OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 23

June 19, 2006
Daniel E. Shearouse, Clerk
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Brett Bursey and Mining Association of South Carolina, Respondents,

v.

South Carolina Department of Health and Environmental Control, Defendant,

and South Carolina Electric and Gas Company, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
William P. Keesley, Circuit Court Judge

Opinion No. 26166
Heard April 4, 2006 – Filed June 19, 2006

AFFIRMED

Elizabeth B. Partlow, of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., and Thomas Grant Eppink, of SCANA Corporation, both of Columbia, for petitioner.

Gregory Jacobs English, of Wyche, Burgess, Freeman & Parham, P.A., of Greenville, for respondent, Mining Association of South Carolina.

Brett Bursey, of Lexington, *pro se* respondent.

Etta R. Williams, of Columbia, for defendant.

JUSTICE MOORE: We granted a writ of certiorari to review the Court of Appeals' decision in Bursey v. South Carolina Dep't of Health and Envtl. Control, 360 S.C. 135, 600 S.E.2d 80 (Ct. App. 2004). We affirm.

PROCEDURAL FACTS

As part of the dam remediation project on Lake Murray, petitioner (SCE&G) planned a back-up dam to be constructed by using materials that could be excavated on-site. During this planning process, SCE&G contacted the Department of Health and Environmental Control (DHEC) to inquire into whether it would be necessary to obtain a mine operating permit. DHEC responded by informing SCE&G that no permit would be needed, as the material SCE&G planned on excavating would be used on-site rather than being sold or transported to another location and, thus, did not fall within the definition of "mining." In response to DHEC's determination, nearby resident, Brett Bursey, and the Mining Association of South Carolina (Association) individually filed appeals with the Mining Council (Council).[1] The Mining Council then agreed to conduct a hearing to review DHEC's decision not to require a mine operating permit. Following the hearing, the Mining Council found SCE&G was required to obtain a permit for the

[1]The Mining Council is established in the office of the Governor and acts as an advisory body to the Governor in considering issues relating to mining. In addition, the eleven-member Council adjudicates disputes arising from permitting determinations made by DHEC. S.C. Code Ann. §§ 48-21-20 and 48-20-190 (Supp. 2005).

proposed actions. The circuit court and Court of Appeals affirmed. *See* Bursey, *supra*.

ISSUES

I. Should the decision of the Mining Council be vacated for lack of subject matter jurisdiction?

II. Did the Court of Appeals err by applying an inappropriate standard of review?

III. Did the Court of Appeals err by applying a substantial evidence standard of review to a legal determination by the Mining Council?

IV. Did the Court of Appeals err by finding respondents' appeals to the Mining Council were timely?

DISCUSSION

I. Subject matter jurisdiction

SCE&G argues the Council did not have subject matter jurisdiction to entertain respondents' appeals because appeals to the Council can be taken only from the approval or denial of an application for an operating permit and cannot be taken from a decision not to require a permit. SCE&G claims that such an appeal should be taken directly to the Administrative Law Court (ALC).

The South Carolina Mining Act, in S.C. Code Ann. § 48-20-30 (Supp. 2005), states that DHEC is responsible for administering the provisions and requirements of the Mining Act, which includes the process and issuance of mining permits. Section 48-20-30 further states that DHEC "has ultimate authority, subject to the appeal provisions of this chapter regulating and controlling such activity." (Emphasis added).

South Carolina Code Ann. § 48-20-60 (Supp. 2005), provides that an appeal from a DHEC decision regarding an operating permit may be taken to the Council "as provided by Section 48-20-190." Section 48-20-190 provides, in pertinent part:

> An applicant for a certificate of exploration or operating permit or a person who is aggrieved and is directly affected by the permit may appeal to the council from a decision or determination of the department issuing, refusing, modifying, suspending, revoking, or terminating a certificate of exploration or operating permit or reclamation plan, or imposing a term or condition on the certificate, permit, or reclamation plan.

(Emphasis added). This section further requires the Council to issue a written decision setting forth its findings of fact and conclusions, and authorizes the Council to direct DHEC to take any action necessary to effectuate the Council's decision.

Section 48-20-60 states that an appeal from a DHEC decision regarding an operating permit may be taken to the Council as provided by § 48-20-190. This section indicates that any appeal involving a decision goes to the Council, including a decision not to require a permit.

A technical reading of § 48-20-190, however, indicates that respondents' appeals should not go to the Council. DHEC's decision did not issue a permit or refuse to issue a permit. Instead, DHEC's decision was a decision that SCE&G's project did not require a permit. We conclude, however, that such a technical reading is strained and is not a practical interpretation of § 48-20-190 that is consonant with the purpose and policy of the appeal provisions of the Mining Act. *See* TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998) (statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers).

Further, we find the legislature's intent would not be effectuated by requiring that an appeal from a DHEC decision not to require a permit be taken to the ALC, as opposed to the Council, which the legislature has deemed the appropriate specialized entity for addressing appeals regarding DHEC's interpretation of the Mining Act. *See* Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998) (cardinal rule of statutory construction is to ascertain and effectuate legislative intent whenever possible).

Accordingly, the Mining Council had subject matter jurisdiction to hear respondents' appeals.

II. Appropriate standard of review

In reviewing the Council's decision that DHEC should have required SCE&G to obtain a permit, the circuit court applied the substantial evidence standard located in the Administrative Procedures Act (APA), which states that a reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(6)(e) (2005). The Court of Appeals affirmed the circuit court, finding the APA required reviewing courts to apply the substantial evidence standard applicable to appeals from decisions of an administrative agency.

SCE&G argues the APA is not applicable to the instant appeal and that the standard of review located in Title 18, Chapter 7, of the South Carolina Code should have been applied by the lower courts. In support, SCE&G cites S.C. Code Ann. § 48-20-200 (Supp. 2005), which states:

> An appeal to the courts may be taken from any decision of the council, or its designated committee or the hearing panel, in the manner provided by Chapter 7 of Title 18 [S.C. Code Ann. §§ 18-7-10 to -300 (1985 & Supp. 2005)].

SCE&G claims this reference means appeals from the Council must be reviewed using the *de novo* standard of review set forth in S.C. Code Ann. § 18-7-170 (1985).[2]

The APA purports to provide uniform procedures before State Boards and Commissions and for judicial review after the exhaustion of administrative remedies. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). We have previously used the APA standard of review when reviewing the appeal of a Mining Council decision. In Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 467 S.E.2d 913 (1996), the South Carolina Land Resources Conservation Commission (LRCC)[3] granted a corporation a permit to mine kaolin. The Council upheld LRCC's decision, and the circuit court upheld both determinations. In affirming the Council's determination, we specifically identified and applied the substantial evidence standard of review contained in the APA.

Further, in the analogous case of Lark v. Bi-Lo, Inc., *supra*, we ruled the Workers' Compensation Commission (Commission) was an agency for purposes of the APA and that the standard of review located in the APA, rather than the standard of review previously applied by the courts in workers' compensation cases, applied to appeals from the Commission. The Commission and the Mining Council are similar entities. The Commission has seven members who are appointed by the Governor and hears and determines all contested cases involving workers' compensation. *See* S.C. Code Ann. § 42-3-20 (1985). The Council has eleven members, nine of which are appointed by the Governor. The Council hears contested cases involving mining permit decisions made by DHEC. *See* S.C. Code Ann. §§ 48-21-20 and 48-20-190 (Supp. 2005). In Lark, we held the Commission was an agency for purposes of the APA because it has rule making authority and

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[2]Section 18-7-170 states: ". . . In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all of the parties and for errors of law and fact."

[3]Previously, permits were granted or denied by LRCC. Due to government restructuring, the Mining Act is now administered by DHEC.

hears and decides contested matters. The APA defines "agency" as "each state board, commission, department or officer . . . authorized by law to make rules or to determine contested cases." S.C. Code Ann. § 1-23-310(1) (2005). The Council, like the Commission, falls within this agency definition because it determines contested cases.

We find the courts on appeal should defer to the findings of the Council in these matters given the Council has special expertise on mining that the appellate courts do not possess. Based on the authority of Waters and Lark, we find the APA standard of review applies to appeals from Mining Council decisions. *Cf.* S.C. Reg. 89-290(H) (Supp. 2005) (all Council hearings shall be conducted in accordance with the APA).

III. Application of appropriate standard of review

SCE&G argues the Court of Appeals erroneously applied the substantial evidence standard to a legal determination, that is whether the project fell within an exception to the permitting requirements, rather than examining this determination for an error of law. *See* S.C. Code Ann. § 1-23-380(A)(6)(d) (2005) (court may reverse or modify decision if substantial rights of appellant have been prejudiced because administrative findings, inferences, conclusions or decisions are affected by other error of law).

The Mining Act, which requires a permit for all mining activities, defines "mining" as:

> (a) the breaking of the surface soil to facilitate or accomplish the extraction or removal of ores or mineral solids for sale or processing or consumption in the regular operation of a business;
>
> (b) removal of overburden lying above natural deposits of ore or mineral solids and removal of the mineral deposits exposed, or by removal of ores or mineral solids from deposits lying exposed in their natural state.

> . . . Mining does not include excavation or grading when conducted solely in aid of on-site farming or of on-site construction. . . .

S.C. Code Ann. § 48-20-40(1) (Supp. 2005) (emphasis added).

SCE&G's activities on the project included blasting, dewatering, crushing, and stockpiling rock, as well as converting the rock into concrete. All activities were to be performed on SCE&G's property.

In reviewing DHEC's determination that SCE&G's activities did not require a permit, the Council concluded SCE&G's activities constituted mining, did not fit within the on-site construction exception, and that a permit was required. Both the circuit court and the Court of Appeals affirmed, finding substantial evidence existed in the record to support the Council's decision that SCE&G's project required a permit.

SCE&G argues the lower courts erred by applying the substantial evidence standard of review to the determination of whether the project went beyond the scope of the exception for on-site construction. They argue deference is not required to the Council's decision because an interpretation of the requirements of the Mining Act, such as the definition of "excavation," is solely a matter of law.

The question of whether SCE&G's activities on the project meet the exception to the permitting requirements carved out by the statute is a mixed question of fact and law. There is a question of law in determining the meaning of the term "excavation" in the exception. *See* Charleston County Parks & Rec. Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995) (determination of legislative intent is a matter of law); Thompson v. Ford Motor Co., 200 S.C. 393, 21 S.E.2d 34 (1942) (the interpretation of the meaning of a statutory term is not a finding of fact). There is also a question of fact in determining whether SCE&G's activities in association with the project exceed the scope of the definition of "excavation" in the exception.

Both the circuit court and the Court of Appeals addressed the definition of excavation, while the Council did not. The Council simply found that SCE&G's activities involved more than excavation. The circuit court found that excavating encompasses: (1) forming a cavity or hole in; (2) forming by hollowing out; (3) digging out and removing; and (4) exposing to view by or as if by digging away a covering. The Court of Appeals stated that, while "excavation" was not defined in the statute, the parties had submitted that the literal definition is akin to that of "digging." Using the APA's "affected by an error of law" standard of review, we find the lower courts did not err in their definition of "excavation."

On the issue of whether SCE&G's activity is excavation, the appropriate standard of review, as used by the lower courts, is the substantial evidence standard of review.

The Council found SCE&G's proposed activities of blasting to create an approximately 60-acre quarry pit, dewatering the quarry pit, producing aggregate from the quarry pit, processing aggregate from the quarry pit using primary and secondary and possibly tertiary crushers and conveyors, stockpiling the crushed aggregate, and further processing the aggregate to create concrete to construct a dam necessitated that SCE&G be required to obtain a mining permit. The Council found these activities involved more than "excavation and grading" as contemplated by the exception to the permitting requirements. Both the circuit court and the Court of Appeals found there was substantial evidence to support the Council's finding that SCE&G's project went beyond excavation solely in aid of on-site construction and amounts to mining subject to regulation under the Mining Act.

At the hearing before the Council, Craig Kennedy, the assistant director in the Mining and Solid Waste Management Division of DHEC, testified. He stated the type of projects normally covered by the exception for excavation for on-site construction are for projects where a developer is bringing a site down to a certain grade to allow for construction of a structure, *e.g.* building a Wal-Mart parking lot, and where a person borrows material from one part

of their property to be used on another part of their property. He stated the exception had been used in two cases similar to the instant case and that he interprets the statutory exception to apply anytime the project is solely in aid of on-site construction. Kennedy testified that, without a mining permit, SCE&G will not be required to have a reclamation plan for the land once the project is complete.

James Daniel, the vice-president of Vulcan Materials Company, testified SCE&G's activities exceed excavating and grading because the project is being operated like a quarry by engaging in blasting, dewatering, crushing rock, and processing the rock into concrete.

A portion of the Technical Specifications of SCE&G's project was introduced at the hearing. The document covered the aggregate production of turning the rock into concrete. The specifications mention the excavation of overburden, blasting, aggregate crushing and handling, dewatering, and creation of concrete that will occur on SCE&G's property. The specifications reference the large amounts of equipment that will be involved in the project, such as trucks, conveyors, bins, silos, bulldozers, crushers, a water storage tank, and a plant for mixing the concrete.

From a review of the record, the Council's decision finding SCE&G's activities constituted mining and did not fall within the statutory exception to the requirement of a mining permit is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Accordingly, the Court of Appeals did not err by finding there was substantial evidence to support the Council's decision. *Cf.* Dunton v. S.C. Bd. of Exam'rs in Optometry, 291 S.C. 221, 353 S.E.2d 132 (1987) (construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons).

IV. Timeliness of appeals

SCE&G argues respondents, Bursey and the Mining Association (Association), failed to file their appeals to the Council in a timely manner.

Pursuant to the Mining Act,

> . . . The person taking the appeal within thirty days after the department's decision shall give written notice to the council through its secretary that he desires to appeal and filing a copy of the notice with the department at the same time.

S.C. Code Ann. § 48-20-190 (Supp. 2005). While this language seems to require that a notice of appeal be filed within thirty days of the actual decision, the Act's regulations state that the time for giving a notice of appeal does not actually begin to run until the date of notice of the DHEC decision. *See* 26 S.C. Code Ann. Reg. 89-290(B) (Supp. 2005) ("The person taking the appeal shall within thirty days after notification of the Department's decision, give written notice to the Mining Council through its secretary that he desires to take an appeal, at the same time filing a copy of the notice with the Department.") (emphasis added).

DHEC notified SCE&G of its decision that no permit was required by letter dated June 5, 2001. On appeal to the Council, SCE&G argued Bursey and the Association's appeals, filed October 17 and October 19, respectively, were untimely because they were filed outside of the thirty-day time period for filing appeals to the Council. Craig Kennedy, of DHEC, testified at the Council hearing that he informed Bursey of DHEC's decision in a telephone conversation before August 31, 2001. Kennedy also testified that he informed the director of the Association of the decision on September 10, and provided a copy of DHEC's written determination to an Association member on September 27, 2001. Kennedy admitted that September 27 was the first time anyone with the Association was provided with a written explanation of the factual and legal basis of DHEC's determination.

Kennedy testified that, as of September 24, the decision not to require a permit was "pretty final," but that he could have been overruled by his supervisor at DHEC. He stated, however, that whether to require the permit was his decision to make.

The director of the Association testified he was not aware of the DHEC decision not to require a permit until he received a copy of the written determination on September 27, 2001.

Bursey testified he became aware of DHEC's decision not to require a permit at some point in June 2001. He testified he submitted a Freedom of Information request to DHEC on June 29 requesting any written documentation relating to the decision, but did not receive a response from DHEC until September 26, 2001. Bursey testified that when he did receive a response from DHEC, a written explanation for their decision was not included. Bursey explained he did not receive what he felt to be a credible answer regarding the permitting decision until October 15, 2001, when he was informed by the project manager for SCE&G that no permit would be required because the proposed actions were not "mining." Prior to that time, Bursey had concluded that DHEC staff had determined SCE&G did not need a permit. At the time he spoke with Kennedy, Bursey testified he was unable to determine if a decision was final.

The Council concluded that DHEC's final decision was not communicated to Bursey or the Association before September 27, 2001, when DHEC provided an Association member with a written copy of the decision. Finding Bursey and the Association did not have notice of DHEC's decision before September 27, 2001, the Council ruled their appeals of October 17 and October 19 were timely filed within the thirty-day period. The circuit court and Court of Appeals affirmed, finding there was substantial evidence to support the Council's finding that the appeals were timely filed.

SCE&G argues the evidence in the record establishes that both Bursey and the Association knew of DHEC's final determination long before September 27.

The possibility of drawing two inconsistent conclusions from the evidence does not prevent an Administrative Agency's finding from being supported by substantial evidence. Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995). Rather, the appellate court need only find,

considering the record as a whole, evidence that would allow reasonable minds to reach the conclusion that the administrative agency reached. *Id.*

We find there is substantial evidence in the record to support the Council's decision that respondents' appeals were timely filed. While Bursey testified he became aware of DHEC's decision not to require a permit in June 2001, he stated he did not believe this was a final decision made by DHEC, but was a staff decision that could be altered. Kennedy's testimony that, as of September 24, the decision not to require a permit was "pretty final," but was a decision that could have been overruled by his supervisor, supports Bursey's analysis of the situation. As for the Association, while there was conflicting evidence as to what occurred in a telephone conversation between the Association's director and Kennedy on September 10, Kennedy admitted that September 27 was the first time anyone with the Association was provided with a written explanation of DHEC's determination. Further, the director of the Association testified he was unaware of the DHEC decision until he received a copy of the written determination on September 27, 2001. Considering the record as a whole, there is evidence that allows reasonable minds to reach the conclusion that the Council reached. *See* Grant, *supra*.

Accordingly, the Court of Appeals did not err by affirming the Council's decision on the basis there was substantial evidence in the record to support the finding that the appeals were timely filed.

CONCLUSION

We find the Mining Council had subject matter jurisdiction to hear respondents' appeals and that the APA standard of review applies to appeals from Mining Council decisions. Further, we find there was substantial evidence to support the Council's finding that SCE&G's activities constituted mining and did not fall within the statutory exception to the requirement of a mining permit. Finally, we find there was substantial evidence to support the Council's finding that the appeals were timely filed. Therefore, the decision of the Court of Appeals is
AFFIRMED.

TOAL, C.J., and WALLER, J., concur. PLEICONES, J., dissenting in a separate opinion in which BURNETT, J., concurs.

JUSTICE PLEICONES: I respectfully dissent. In my opinion, the circuit court erred in applying the standard of review found in the Administrative Procedures Act (APA)[4] rather than the de novo standard found in S.C. Code Ann. § 18-7-170 (1985). I would therefore vacate both the Court of Appeals' decision and the circuit court's order and remand for reconsideration of SCE & G's appeal.

It is well-settled that a specific statute controls over a more general one, e.g., Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc., 368 S.C. 137, 628 S.E.2d 38 (2006), and that a more recent legislative enactment prevails over an earlier one. E.g., Town of Duncan v. S.C. Budget & Control Bd., 326 S.C. 6, 482 S.E.2d 768 (1997). Here, S.C. Code Ann. § 48-20-200 (Supp. 2005), mandating that appeals from the Mining Council be taken in the manner provided by § 18-7-170, was reenacted after the adoption of the APA, and hence is the more recent statute. Perhaps even more persuasive is the fact that § 48-20-200 is applicable only to Mining Council appeals, and therefore is the more specific statute. Further, the fact that we have applied the APA standard in a previous Mining Council appeal where the parties did not contest the standard of review does not bind us in this case where the matter is properly preserved and presented for our review. E.g., Hutto v. Southern Farm Bureau Life Ins. Co., 259 S.C. 170, 191 S.E.2d 7 (1972) ("It is, of course, settled law that 'a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion"); cf. Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 529 S.E.2d 11 (2000)(fact that Court decided prior appeal on merits is not dispositive whether order is directly appealable where appealability was not raised).

The ordinary rules of statutory construction dictate that the de novo standard be applied. I would therefore vacate the circuit court order and the Court of Appeals' decision and remand the matter to the circuit court for a de novo appellate review.

BURNETT, J., concurs.

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[4] S.C. Code Ann. § 1-23-380(A)(6)(e)(2005).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Helen Marie Douglas, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26167
Heard April 18, 2006 – Filed June 19, 2006

AFFIRMED IN PART; REVERSED IN PART

Attorney General Henry Dargan McMaster,
Chief Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J. Zelenka, and
Solicitor David M. Pascoe, all of Columbia, for Petitioner.

Jack B. Swerling, of Columbia, for Respondent.

JUSTICE BURNETT: Helen Marie Douglas (Respondent) was convicted of the murder and armed robbery of her husband, Rufus "Ronnie"

Douglas (the victim). The Court of Appeals reversed the convictions and remanded the case for a new trial. State v. Douglas, 359 S.C. 187, 597 S.E.2d 1 (Ct. App. 2004). We granted the State's writ of certiorari. We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent and the victim owned two houses in Colleton County. Generally, the victim stayed at their home in the town of Walterboro (town house) and Respondent stayed at their house on Chessee Creek (river house). Before 7 a.m. on November 4, 1997, Respondent discovered the victim's body in a bedroom in the town house. An autopsy revealed the victim had been shot five times in the head, including three fatal shots.

Police investigators testified the town house appeared ransacked, but there were no signs of a forced entry and nothing was broken. The only item missing was the victim's wallet. Investigators found five spent shell casings from a .25-caliber pistol on the victim's bedroom floor.

According to Respondent, she ate dinner and watched a movie with the victim on November 3. The victim stayed at the town house and Respondent stayed at the river house that night. Respondent originally asserted she did not leave the river house until she went to breakfast at 6 a.m. on November 4. She asserted she went to the town house at 6:50 a.m. to go hunting with the victim. Respondent eventually told police the victim had said during dinner on November 3 he wanted to file for divorce. She also admitted to police she was having an affair, but she denied having any marital problems.

Testimony at trial revealed the victim had plans to go to a car auction with his brother in Ravenel the morning of November 4. Family members also testified Respondent generally did not hunt, and when the victim did hunt, he would go with his grandson.

According to Respondent's boyfriend, she came to his house about 3:30 a.m. on November 4 and stayed until 5 a.m. She told him the

victim had brought up divorce during dinner that night and she was worried because her beauty shop was in the back of the town house. Respondent also told her boyfriend that she planned to work in the yard at the river house on November 4.

Respondent told police the victim owned a .357 Magnum revolver and she owned a .22-caliber derringer. Respondent admitted the couple owned a .25-caliber pistol when she was specifically asked by police about the gun. Her sons testified Respondent possessed the couple's .25-caliber pistol, and Respondent told police she had returned the pistol to the victim. Respondent also told police she saw the .25-caliber pistol on the victim's bedside nightstand the Sunday before the murder.

Respondent gave her son, Tony, the keys to the river house after her arrest. Ronald, the couple's other son, made a copy of the keys and made at least three trips to the river house between March and April 1998. During one visit to the river house, Ronald's ex-wife found a bag with .25-caliber bullets and a box with a receipt for a .25-caliber pistol in a bedroom closet. Ronald turned these items over to the police.

In April 1999, homeowners near the river house discovered a garbage bag in the creek behind their house. The bag contained another garbage bag, rocks, and a brick. The second bag contained five surgical gloves, two shirts, and a pair of jeans. One of Respondent's daughters-in-law identified the shirts as belonging to Respondent, the jeans as Respondent's size, and the gloves as similar to those Respondent used at her beauty shop. The only hair sample found on the clothing could not be identified.

Police also discovered a cinder block in a search of the creek. A .25-caliber pistol, the victim's wallet, and socks were found inside the cinder block. The pistol was identified as the murder weapon through forensic testing.

The State presented testimony from Eric Creech and Gary Wayne Walker to support its theory that Respondent murdered her husband. During July 1997, Respondent told Creech, who did carpentry work for her, she had

a rocky relationship with the victim and they hated each other. When Creech asked Respondent why she did not get out of the marriage, Respondent replied she was scared she might lose some benefits or retirement, but she would stay married.

Walker testified he had been an acquaintance of the Douglases since the 1970s. One day in September 1997, he saw Respondent by the mailbox at the river house and stopped to talk. He told Respondent he had a new job as an insurance agent and Respondent asked him about several types of insurance. She then told him she was interested in life insurance on the victim and asked Walker to provide her with quotes. Walker testified he saw Respondent at a later date and mentioned the quotes to her, but he never gave any actual quotes to Respondent.

The State introduced evidence that Respondent was the beneficiary of two life insurance policies on the victim. Respondent was the beneficiary of the victim's federal retirement benefits. After the victim's death, Respondent submitted claims to receive the benefits under the life insurance policies and the victim's retirement account.

The jury found Respondent guilty of murder and armed robbery. The trial judge sentenced Respondent to life imprisonment for the murder charge and thirty years' imprisonment for the armed robbery charge, to be served concurrently.

The Court of Appeals affirmed the trial court's denial of Respondent's motion for directed verdict. The Court of Appeals further found, however, that the trial court abused its discretion by admitting testimony that Respondent inquired about life insurance on the victim about two months before the murder. The Court of Appeals reversed and granted Respondent a new trial. Douglas, 359 S.C. 196-97, 203-06, 597 S.E.2d at 5-6, 9-11.

ISSUES

I. Did the Court of Appeals err in finding the trial court abused its discretion by admitting testimony that Respondent casually inquired about obtaining a life insurance policy on the victim two months before his death?

II. Did the Court of Appeals err in concluding the admission of the testimony was not harmless error?

STANDARD OF REVIEW

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); State v. Frank, 262 S.C. 526, 533, 205 S.E.2d 827, 830 (1974). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); State v. Manning, 329 S.C. 1, 7, 495 S.E.2d 191, 194 (1997).

LAW AND ANALYSIS

I. Admission of Testimony

The State argues the Court of Appeals erred in reversing the trial court's decision to admit testimony from Gary Walker that Respondent inquired about life insurance on the victim approximately two months before the murder. We disagree.

All relevant evidence is admissible. Rule 402, SCRE; State v. Saltz, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001). Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991).

Evidence of insurance is properly admitted when it tends to establish motive. State v. Beckham, 334 S.C. 302, 311, 513 S.E.2d 606, 610 (1999); see also State v. Williams, 321 S.C. 327, 332-33, 468 S.E.2d 626, 629-30 (1996) (evidence that a month before the murder of his wife and son defendant had substantially increased life insurance benefits for them and made himself the beneficiary was some circumstantial evidence of defendant's motive). Generally, evidence of a life insurance policy is properly admitted when there is evidence of the defendant's knowledge of the policy's existence, its validity, or believed validity, and that the defendant will benefit from it. Beckham, 334 S.C. at 311, 513 S.E.2d at 610 (citing State v. Cole, 772 P.2d 531 (Wash. App. 1989)). Our precedent does not necessarily require the existence of a policy, but does require "some showing that the defendant would derive some benefit from the proceeds of the policy" to be admissible. State v. Vermillion, 271 S.C. 99, 100, 245 S.E.2d 128, 129 (1978); see, *e.g.*, State v. Thomas, 159 S.C. 76, 80-81, 156 S.E. 169, 170-71 (1930) (applications for insurance on the life of a boy by his reputed father, which were refused and on which no policies were issued, were held to be admissible as motive in the prosecution of the father for murdering the boy because they tended to show he tried to obtain an even greater amount of insurance on the life of the deceased than that which he actually procured).

At trial, defense counsel objected to Walker's testimony as unfairly prejudicial under Rule 403, SCRE. The trial court overruled the objection and allowed the testimony.

The Court of Appeals concluded the trial court abused its discretion by admitting Walker's testimony. The Court of Appeals discerned the testimony was not admissible because there was no policy from which Respondent could have received a benefit. The Court of Appeals also found Respondent was prejudiced by the inference that she attempted to purchase life insurance on the victim without his knowledge. Douglas, 359 S.C. at 197, 597 S.E.2d at 6.

Respondent's inquiry to Walker about life insurance on the victim had only slight probative value because Respondent never received a

quote on the premiums, applied for, or purchased life insurance on the victim. Without the existence of an application for a life insurance policy or the issuance of a policy, the evidence presented at trial does not show how Respondent would derive some benefit from the policy's proceeds. Respondent's sole inquiry during a casual conversation does not establish motive, planning, or intent.

Moreover, the record reveals Walker did not inform Respondent she would be required to obtain the victim's permission to purchase the life insurance on him. Walker testified generally that one spouse is required to obtain the other spouse's permission to be named as a beneficiary under a life insurance policy on the other spouse's life. The prejudicial effect of this testimony was the inference that Respondent decided not to purchase the life insurance on the victim because she needed the victim's permission. The slight probative value of Walker's testimony did not substantially outweigh the unfair prejudice to Respondent, and the trial court abused its discretion by admitting the testimony.

II. Harmless Error

The State further contends if the trial court improperly admitted Walker's testimony, the Court of Appeals erred in finding the error was not harmless. We agree.

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). In determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict. State v. Mizzell, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002). Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). Thus, an insubstantial error not affecting the result of the trial is harmless where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

The police investigation revealed the town house had not been forcibly entered and Respondent was the only person, other than the victim, with a key to the house. Respondent was the last person to see the victim alive and was the first person to discover he had been murdered. Respondent told police she went to the river house on November 4 because she had plans to go hunting with the victim. Yet, she told her boyfriend she planned to do yard work at the river house that day and did not intend to go into town. Testimony at trial revealed the victim had plans to go to a car auction that morning. Also, the evidence revealed Respondent was not known to hunt, and if the victim hunted, he went with his grandson; not Respondent.

The night of the victim's murder, he told Respondent he wanted a divorce. Respondent told police that after returning from dinner with the victim, she did not leave the river house until the next morning when she left for breakfast. However, Respondent's boyfriend told police she visited him in the early morning hours of November 4. During this visit, Respondent told her boyfriend that the victim wanted a divorce and she was worried about her business if a divorce occurred. Also, Respondent had previously told Creech she hated the victim and she would not divorce him because she did not want to lose her benefits.

Respondent regularly possessed the couple's .25-caliber pistol, and the murder weapon was a .25-caliber pistol. The murder weapon and the victim's wallet were found in the creek behind Respondent's river house. Respondent's clothing was found in the creek near the location of the murder weapon and the victim's wallet. Further, two bullets fired into the victim originated from the same source or same melt of lead as several of the bullets found in the box of ammunition in Respondent's closet. Moreover, the admission of Respondent's inquiry about life insurance was an insubstantial error given that the State sought to establish motive through the proper admission of two life insurance policies and the victim's retirement benefits from which Respondent would benefit. The trial court's erroneous admission of Walker's testimony did not contribute to the verdict obtained and was harmless beyond a reasonable doubt.

CONCLUSION

We affirm the Court of Appeals' finding that the trial court abused its discretion by admitting Walker's testimony, but we reverse the Court of Appeals' finding that this was reversible error. The error was harmless and we uphold Respondent's convictions.

AFFIRMED IN PART; REVERSED IN PART.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Calvin L. Jeter and Quantilla B. Jeter, Respondents,

v.

South Carolina Department of Transportation, Petitioner,

v.

Phyllis P. Brown, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Fairfield County
Kenneth G. Goode, Circuit Court Judge
Larry R. Patterson, Circuit Court Judge

Opinion No. 26168
Heard March 9, 2006 – Filed June 19, 2006

AFFIRMED IN PART; REVERSED IN PART

Andrew F. Lindemann, of Davidson, Morrison and Lindemann, P.A., of Columbia; and Charles V. Verner, of Harley and Verner, L.L.P, of Newberry, for Petitioner.

Albert V. Smith, of Spartanburg, for Respondents Calvin L. Jeter and Quantilla Jeter.

Daryl G. Hawkins, of Columbia; and Howard Hammer, of Hammer and Hammer, of Columbia, for Respondent Phyllis P. Brown.

ACTING JUSTICE COUCH: This Court granted South Carolina Department of Transportation's (SCDOT) writ of certiorari to review the Court of Appeals' rulings on subject matter jurisdiction and venue in Jeter v. S.C. Dep't of Transp., 358 S.C. 528, 595 S.E.2d 827 (Ct. App. 2004). We affirm in part and reverse in part.

FACTUAL/PROCEDURAL BACKGROUND

On July 12, 1997, Calvin Jeter was operating a motorcycle on Secondary Road 37, also known as Herbert Road, in Union County, and Phyllis Brown was driving a vehicle in the opposite direction. SCDOT had recently resurfaced part of Herbert Road. After entering upon a resurfaced portion of the road, Brown saw a deer on the roadside and applied the brakes. She lost control of her vehicle and collided with Jeter's motorcycle. Brown claimed excessive, loose gravel on the road caused her to lose control of the vehicle.

Jeter and his wife, Quantilla, each filed complaints in the Union County Court of Common Pleas against SCDOT under the South Carolina Tort Claims Act (SCTCA).[1] The Jeters alleged SCDOT had failed to safely maintain the roadway and failed to warn drivers of its dangerous condition.

SCDOT filed third-party complaints against Brown, naming her as a third-party defendant. SCDOT contended Brown was a necessary party to the litigation to permit apportionment of fault under S.C. Code Ann. § 15-

[1] S.C. Code Ann. §§ 15-78-10 through -200 (2005).

78-100(c).[2] Brown filed a counterclaim against SCDOT under the SCTCA for personal injuries she sustained from the accident.

After settling with the Jeters, Brown moved to dismiss the third-party complaints under Rule 12(b)(6), SCRCP. The lower court ruled Brown was a necessary party to the action under Rule 19, SCRCP, and must remain a party to the action solely for the purposes of satisfying the statutory requirement of S.C. Code Ann. § 15-78-100(c).

Brown then filed an amended answer and counterclaim, alleging venue in Union County was improper and that as a matter of right should be transferred to Fairfield County, her county of residence. Brown subsequently filed a motion to change venue to Fairfield County. The lower court granted Brown's motion, over SCDOT's objection, and transferred venue to Fairfield County. The lower court subsequently denied SCDOT's motion to change venue back to Union County, pursuant to S.C. Code Ann. § 15-78-100(b).

During the trial, the lower court ruled Brown was not negligent as a matter of law and granted a directed verdict for Brown on the issue of her negligence. The lower court also granted Brown's motion for directed verdict on SCDOT's defense of unavoidable accident. The jury returned verdicts in favor of the Jeters and Brown.

SCDOT appealed to the Court of Appeals. The Court of Appeals interpreted S.C. Code Ann. § 15-78-100(b) to establish subject matter jurisdiction in the circuit court of South Carolina and venue in the county where the act or omission occurred. The Court of Appeals found the lower court did not abuse its discretion by transferring venue to Fairfield County under S.C. Code Ann. § 15-7-30 (2005). The Court of Appeals further found

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[2] Section 15-78-100(c) provides:

> In all actions brought pursuant to this chapter when an alleged tortfeasor is named as party defendant in addition to the governmental entity, the trier of fact must return a special verdict specifying the proportion of monetary liability of each defendant against whom liability is determined.

the lower court erred in directing a verdict for Brown on the issue of her negligence because the SCTCA requires the jury to apportion fault among all potential tortfeasors. Accordingly, the Court of Appeals reversed and remanded the case. Jeter, 358 S.C. at 532-36, 595 S.E.2d at 829-31.[3]

ISSUES

I. Did the Court of Appeals err in construing S.C. Code Ann. § 15-78-100(b)?

II. Did the Court of Appeals err in finding the lower court did not abuse its discretion by transferring venue to Fairfield County under S.C. Code Ann. § 15-7-30?

STANDARD OF REVIEW

Motions to change the venue of a trial are addressed to the sound discretion of the trial court. Garrett v. Packet Motor Express Co., 263 S.C. 463, 210 S.E.2d 912 (1975). This Court will not disturb the trial judge's decision on appeal unless a manifest abuse of discretion is found resulting in an error of law. Graham v. Beverly, 235 S.C. 222, 110 S.E.2d 923 (1959). Moreover, the error of law must be so opposed to the trial judge's sound discretion as to amount to a deprivation of the legal rights of the party. O'Shields v. Caldwell, 208 S.C. 245, 37 S.E.2d 665 (1946).

LAW/ANALYSIS

[3] The Court of Appeals' ruling to reverse the directed verdict for Brown on the issue of her negligence and its decision to not reach the issue of whether the trial court should have charged the defense of unavoidable accident have not been appealed. Because these rulings have gone unchallenged, they are the law of the case. See Clark v. S.C. Dep't of Pub. Safety, 362 S.C. 377, 608 S.E.2d 573 (2005) (an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal).

I. Construction of S.C. Code Ann. § 15-78-100(b)

SCDOT argues the Court of Appeals erred in finding § 15-78-100(b) is not a statutory provision solely setting forth subject matter jurisdiction. SCDOT argues this statutory provision provides that only the circuit court in the county where the act or omission occurred has subject matter jurisdiction over an action brought pursuant to the SCTCA. Accordingly, the only court having subject matter jurisdiction over this particular case is the Union County Court of Common Pleas. We disagree.

The issue of interpretation of a statute is a question of law for the court. Charleston County Parks & Rec. Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995) (holding the determination of legislative intent is a matter of law). This Court is free to decide questions of law with no particular deference to the lower court. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

The Court of Appeals held § 15-78-100(b) addressed subject matter jurisdiction to the extent that such jurisdiction was conferred in the circuit court. The Court of Appeals further held the statutory provision established venue in the county in which the act or omission occurred. Jeter, 358 S.C. at 532-33, 595 S.E.2d at 829-30.

Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. Venue is the place or geographical location of trial. The propriety of either is independent of the other. Dove v. Gold Kist, Inc., 314 S.C. 235, 236, 442 S.E.2d 598, 600 (1994); State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

The South Carolina Constitution in Article V, § 11, states, "The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided

by law."[4] Section 15-78-100(b) states, "Jurisdiction for any action brought under this chapter is in the circuit court and brought in the county in which the act or omission occurred."

In Dove, Dove appealed a worker's compensation claim to the circuit court, which dismissed his appeal for lack of subject matter jurisdiction. On appeal, the Court construed S.C. Code Ann. § 42-17-60 (Supp. 1993), which provided in relevant part: "[E]ither party . . . may appeal from the decision of the commission to the court of common pleas of the county in which the alleged accident happened, or in which the employer resides or has his principal office." Dove, 314 S.C. at 238, 442 S.E.2d at 600. The Court discerned, "There is but one Circuit Court in South Carolina, with uniform subject matter jurisdiction '*throughout the State.*'" Id. (citing State ex rel. Riley v. Martin, 274 S.C. 106, 111, 262 S.E.2d 404, 406 (1980); S.C. Const. art. V, § 1) (emphasis in original). Then, the Court construed the statutory provision as granting subject matter jurisdiction to the court of common pleas throughout the state and as designating venue in the county in which the alleged accident happened or in which the employer resides or has his principal office. Id. at 239, 442 S.E.2d at 600.

In Harrison v. S.C. Tax Comm'n, 261 S.C. 302, 199 S.E.2d 763 (1973), *overruled on other grounds by* McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985), *superseded by statute*, the Court considered whether S.C. Code § 10-2605 (1962),[5] was intended to confer subject matter jurisdiction or was a venue provision. Former section 10-2605 provided in pertinent part: "The *circuit courts of this State are hereby vested with jurisdiction* to hear and determine all questions, actions and controversies, . . . affecting boards, commissions and agencies of this State, and officials of the

[4] See also S.C. Const. art. V, § 1 ("The judicial power shall be vested in a unified judicial system, which shall include a Supreme Court, a Court of Appeals, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law.").

[5] Currently codified at § 15-77-50 (2005). See also Whetstone v. S.C. Dep't of Hwys. & Pub. Transp., 272 S.C. 324, 252 S.E.2d 35 (1979) (concluding § 15-77-50 established venue).

State in their official capacities *[i]n the circuit where such question, action or controversy shall arise*." Harrison, 261 S.C. at 305, 199 S.E.2d at 764 (emphasis in original). The Court found because the South Carolina Constitution granted subject matter jurisdiction to the court of common pleas in all civil cases, "the [statute] could not have been intended to confer jurisdiction on it of this class of actions in the strict sense of that term. The intent of the legislature must have been to fix the venue of such actions 'in the circuit where such question, action or controversy shall arise. . . .' " Id. at 306, 199 S.E.2d at 764.

Section 15-78-100(b) is similar to § 42-17-60 and former § 10-2605 in that the statutory provision references subject matter jurisdiction and venue in one sentence. Because there is but one circuit court in South Carolina, with uniform subject matter jurisdiction throughout the state, § 15-78-100(b) establishes subject matter jurisdiction for actions arising under the SCTCA in the circuit court throughout the state. See Dove, 314 S.C. at 238, 442 S.E.2d at 600; Riley, 274 S.C. at 111, 262 S.E.2d at 406. Section 15-78-100(b) also establishes venue "in the county in which the act or omission occurred." See also Ellis by Ellis v. Oliver, 307 S.C. 365, 367, 415 S.E.2d 400, 401 (1992) ("Under the SCTCA, venue is proper where the act or omission occurred.").

II. Transfer of venue pursuant to S.C. Code Ann. § 15-7-30

SCDOT argues if § 15-78-100(b) establishes venue in the county in which the act or omission occurred, then the Court of Appeals erred in affirming the lower court's transfer of venue under § 15-7-30 when the original venue was proper under § 15-78-100(b). We agree.[6]

[6] Regardless of any preservation problems we address this issue in the interest of judicial economy. The first time this case was tried, it ended in a mistrial. This appeal involves the second trial, and based on the unappealed rulings of the Court of Appeals, this case will be tried for a third time. See S. Bell Tel. & Tel. Co. v. Hamm, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) (deciding an issue on appeal in the interest of judicial economy).

Upon Brown's motion, the lower court transferred venue to Fairfield County as a matter of right, citing S.C. Code Ann. § 15-7-30;[7] McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996); and Ellis, 307 S.C. at 365, 415 S.E.2d at 400.[8]

The Court of Appeals found that § 15-78-100(b) did not prevent the lower court from considering Brown's motion to transfer venue pursuant to § 15-7-30. The Court of Appeals further found the lower court did not

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[7] Section 15-7-30 then provided:

> In all other cases the action shall be tried in the county in which the defendant resides at the time of the commencement of the action. If there be more than one defendant then the action may be tried in any county in which one or more of the defendants to such action resides at the time of the commencement of the action. If none of the parties shall reside in the State the action may be tried in any county which the plaintiff shall designate in his complaint. This section is subject however to the power of the court to change the place of trial in certain cases as provided by law.

"In all other cases" has been interpreted to mean §§ 15-7-10 and -20. See Carroll v. Guess, 302 S.C. 175, 177, 394 S.E.2d 707, 708 (1990); Royster Co. v. E. Distrib., Inc., 301 S.C. 18, 20, 389 S.E.2d 863, 864 (1990). The 2005 amendments to § 15-7-30 are not applicable to this case. See § 15-7-30 (Supp. 2005) (applicable to causes of action arising on or after July 1, 2005).

[8] Although the parties argue otherwise, Ellis is not applicable to the current case. The issue in Ellis was whether three defendants were considered multiple defendants for the purpose of determining venue when three separate actions were consolidated under Rule 42, SCRCP. In this case, the issue is whether venue may be transferred under § 15-7-30 when the plaintiffs instituted their actions in a proper venue under § 15-78-100(b).

abuse its discretion by transferring venue to Brown's county of residence. Jeter, 358 S.C. at 533, 595 S.E.2d at 829-30.

The defendant has a substantial right to be tried in the county of his residence pursuant to S.C. Code Ann. § 15-7-30 (2005). Thus, in a case involving only one defendant or multiple defendants who reside in a single county, the venue choice generally is controlled by the residence of the defendant. Carroll, 302 S.C. at 177, 394 S.E.2d at 708. However, where there are multiple defendants residing in different counties, the plaintiff may properly bring the action in the county where any one of the defendants resides at the time of the commencement of the action. In such a case, the plaintiff ordinarily has the right of election as to the county in which an action will be brought. Mack v. Nationwide Mut. Ins. Co., 245 S.C. 619, 623-24, 142 S.E.2d 50, 53 (1965); Rankin Lumber Co. v. Graveley, 112 S.C. 128, 99 S.E. 349 (1919).

"Where an action is properly commenced in any one of two or more venues and is properly brought in one of such venues, it is removable to the other proper venue only if there exists some statutory ground for removal other than the bringing of suit in the wrong venue." 92A C.J.S. *Venue* § 157 (2000); see also 77 Am.Jur.2d *Venue* § 67 (1997); Slattery v. Iowa Dist. Ct. for Johnson County, 442 N.W.2d 82 (Iowa 1989); Kahn v. Gill Hills Co., 610 So.2d 1374 (Fla. App. 1992). "The general rule is that where an action is properly instituted in a county other than that of the defendant's residence, a defendant has no right to request a change of venue to the county of his or her residence on the ground that the action was not brought in a proper county, even if the action could also have been commenced in the county where the defendant resides." 92A C.J.S. *Venue* § 163; see also Tribolet v. Fowler, 266 P.2d 1088 (Ariz. 1954).

We find the reasoning of the Court of Appeals erroneous. The Jeters properly instituted their actions against SCDOT by filing their actions in the Union County Court of Common Pleas pursuant to § 15-78-100(b). Because the actions were properly instituted, Brown, as a defendant, had no right to request a change of venue to the county of her residence based on an

allegation that the actions were brought in an improper venue.[9] Thus, the lower court abused its discretion by transferring venue to Brown's county of residence pursuant to § 15-7-30.

CONCLUSION

We affirm the Court of Appeals' finding that § 15-78-100(b) establishes subject matter jurisdiction in the circuit court of South Carolina and venue in the county where the act or omission occurred. We find the lower court abused its discretion by transferring venue under § 15-7-30 and reverse that part of the Court of Appeals' decision. Further, we find it unnecessary to address SCDOT's remaining arguments and issue on appeal related to venue. See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issues is dispositive).

AFFIRMED IN PART; REVERSED IN PART.

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

[9] This opinion does not preclude the parties from bringing a subsequent motion pursuant to § 15-7-100 to change venue based on the convenience of witnesses and the promotion of justice. Such a motion would be left to the discretion of the lower court. Chestnut v. Reid, 299 S.C. 305, 307, 384 S.E.2d 713, 714 (1989).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Edward M. Seabrook, Jr., and
Folly North Partners, LLC, Respondents,

v.

Vernon Knox, Gered Lennon, Wallace Benson, and Allen Boyd, in their official capacities as members of the City Council of the City of Folly Beach, and Harvey Wittschen, Ernest Horres, Victoria Messina, and John Ball, in their official capacities as members of the Zoning Board of Adjustment of the City of Folly Beach, and Tom Hall, in his official capacity as the Building/Zoning Official of the City of Folly Beach, and
The City of Folly Beach, Defendants,

of whom The City of Folly Beach is Appellant.

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

Opinion No. 26169
Heard January 18, 2006 – Filed June 19, 2006

REVERSED

Christopher L. Murphy and James A. Stuckey, Jr., both of Stuckey Law Offices, of Charleston, for Appellant.

William B. Regan and Frances I. Cantwell, both of Reagan and Cantwell, of Charleston, for Respondents.

CHIEF JUSTICE TOAL: The trial court held that the City of Folly Beach (City) denied the due process and equal protection rights of Edward M. Seabrook and Folly North Partners (collectively Respondents) as guaranteed by the United States Constitution. This case was certified from the court of appeals pursuant to Rule 204(b), SCACR. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

This suit is based on the conduct of the City of Folly Beach, the Folly Beach City Council (City Council), and Folly Beach's local zoning authorities concerning a parcel of property owned by Seabrook. In 1996, Seabrook sold Folly North Partners (Folly North) an option to buy an undeveloped tract of land on the east end of Folly Island. The option was contingent on the property being zoned for residential use because Folly North hoped to develop the property into oceanfront lots.

Immediately, problems arose regarding the property's zoning. Because the Seabrook property was located at the east end of the island, it bordered only a former United States Coast Guard Base and the water. Most likely, the property's location led to the current confusion and dispute, since it appears most people mistakenly believed the Coast Guard owned the entire east end of the island. The zoning problems immediately arose because the official map accompanying the last zoning ordinance, passed in 1993,

stopped at the beginning of the Coast Guard Base and illustrated that all land beyond the base's boundary was zoned N-1 (nature conservancy).

This ambiguity came to light when L. Russell Bennett, the principal owner of Folly North, began discussing his plans to develop a residential subdivision on the property. Bennett testified he "reserved his rights" as to the then existing zoning, and took the matter to the City Council.

Bennett first appeared before the City Council in May of 1996, at which time he presented an ordinance to rezone the Seabrook property from N-1 to R-1 (residential). The City Council passed the rezoning ordinance on first reading, but on the second reading, the ordinance failed. Later, the City held a citywide referendum, pursuant to S.C. Code Ann. § 5-17-10 (2004), to rezone the Seabrook property from N-1 to R-1. The referendum failed as well.

In November of 1996, Bennett submitted a preliminary plat for subdivision of the Seabrook property to the city building official, Tom Hall. By letter, Hall refused to accept the plat because the Seabrook property was zoned N-1. Bennett appealed to the zoning board, arguing the Seabrook property was never zoned N-1 because it did not appear on the 1993 zoning map. The zoning board upheld the building official's determination. Bennett appealed the zoning board's decision to circuit court.

The circuit court reversed the zoning board's decision. The circuit court based this decision on a 1979 zoning map showing the Seabrook property as zoned R-2 (moderate density residential district). The circuit court concluded that because the 1993 ordinance map did not "show, delineate, describe or otherwise reference" the Seabrook property, and because neither the planning commission nor the City Council could demonstrate they intended to rezone the property in 1993, the Seabrook property retained its residential zoning classification and was never rezoned

to N-1. After the trial court's decision, Bennett resubmitted his plat application which was eventually approved.[1]

Respondents filed the instant action in the court of common pleas. Respondents alleged depravations of procedural and substantive due process, a violation of equal protection, gross negligence, and a temporary taking. Prior to trial, all defendants except the City were dismissed, and all causes of action except due process and equal protection were abandoned. Specifically, Respondents alleged: (1) that the City deprived Respondents of their "vested interest" in having their plat approved by improperly developing an "official policy" that the Seabrook property should be zoned N-1, and (2) that Respondents were members of a class of owners of property zoned R-1, but were arbitrarily treated different from all other members of the class.

The trial court found the City violated Respondents' rights to due process and equal protection. The trial court found the City Council usurped the building official's authority to enforce the zoning ordinance by adopting an "official policy" that the Seabrook property was zoned N-1. The trial court found this was a deprivation of due process because it obstructed the building official's ability to offer an unbiased opinion as to the property's zoning and deprived Respondents of the right to have their subdivision plat processed. As to equal protection, the trial court found Respondents' rights were violated when the City Council zoned Respondents' property without following the legislative process.

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

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[1]Although their plat was approved, Respondents never actually developed the Seabrook property. In fact, after executing its option and purchasing the property for $500,000.00, Folly North sold the property to the Charleston County Parks and Recreation Commission for $3,956,524.01. Folly North also obtained a $2,200,000.00 tax credit to defer tax on the capital gains realized by the sale.

Did the City deny Respondents' rights to due process and equal protection as guaranteed by the United States Constitution?

LAW/ANALYSIS

In an action at law, on appeal of a case tried without a jury, the trial judge's factual findings will not be disturbed on appeal unless they are not reasonably supported by the evidence. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 774 (1976).

I. Due Process

In its decision finding a due process violation, the trial court made no distinction between substantive and procedural due process. Because the City divides its argument between substantive due process and procedural due process, we address the issues in a similar manner.

A. Procedural Due Process

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976). In this case, Respondents allege they possessed a vested property interest in having their plat application approved and in the immediate use of their property for development of a subdivision. We dismiss this claim as moot.

A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court. *Mathis v. S. C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). If there is no actual controversy, this Court will not decide moot or academic questions. *Id.* (citing *Jones v. Dillon-Marion Human Res. Dev. Comm'n.*, 277 S.C. 533, 535, 291 S.E.2d 195, 196 (1982)).

Two factors compel our finding Respondents' procedural due process claim is moot. First, this is not an appropriate case to award money damages under the guise of a procedural due process violation. A violation of a plaintiff's procedural due process rights is typically remedied by either injunctive relief or a court order instructing that the plaintiff be afforded the process he was denied. In this case, since Respondents seek relief in the form of money damages, ruling on a procedural due process claim would have no practical effect whatsoever.

Second, because the Seabrook property was rezoned and because Respondents' plat was approved, Respondents have already received the appropriate procedural relief. Respondents claim the City Council developed an "official policy" that the Seabrook property would be zoned N-1, thereby depriving Respondents of the process set out in the City's ordinances for determining zoning disputes. As a result, Respondents' claim they were prevented from having their subdivision plat approved. We disagree.

Respondents' position is best stated as claiming not that they were deprived of the process set by the law, but that the process set out in the law was tainted by City Council's "official position." The claim that the process was "tainted" is more akin to a substantive due process claim because at no time were Respondents prevented from going through the dispute resolution procedure. In fact, it was in the final stage of this procedure, appeal in the circuit court, that Respondents won their desired result. Since Respondents' plat was approved, thereby purging any continuing "taint" in the process, any judgment on the issue of procedural due process would be a speculative and academic exercise. For this reason, we reverse the trial court and find Respondents' procedural due process claim is moot.

B. Substantive Due Process

Substantive due process protects a person from being deprived of life, liberty, or property for arbitrary reasons. *Worsley Companies, Inc. v. Town of Mount Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000). To establish a substantive due process claim, a plaintiff must show he possessed a constitutionally protected property interest that was deprived by state action

so far beyond the limits of legitimate governmental action, no process could cure the deficiency. *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1998).

The trial court found the City's actions were an unprecedented and arbitrary interference with the process of resolving zoning disputes and Respondents' right to have their subdivision plat processed. We find Respondents' substantive due process claim is barred by a previously executed waiver.

After the original trial court determined the Seabrook property was zoned for residential use, Bennett asked the zoning official to approve his plat. After some delay in assembling the proper documents,[2] the plat was approved, but with several "conditions." Specifically, the plat approval contained three limitations and contingencies regarding erosion on the coastline of the property. Respondents sued the City in an attempt to have these conditions removed, and Respondents were granted summary judgment. The City appealed.

While the case was pending in this Court, the parties settled the lawsuit. The release executed in the settlement discharged the City from:

> any and all known or unknown injuries, damages, loss of services, loss of profits, loss of income, expenses, compensation, rights, *suits of whatever kind and nature…on account of, arising out of or in any way growing out of, **the subdivision of the tract of property*** on the north end of Folly Beach commonly referred to as "The Seabrook Tract," . . . .

(emphasis added).

[2] This delay was initially attributable to a dispute about whether the City was in possession of a valid plat application and whether Respondents needed to re-submit the plat application. Once this issue was resolved, concern on the City Council about conditioning the plat's approval on the satisfaction of several measures aimed at erosion control delayed the process further.

In the instant lawsuit, Respondents' complaint alleges they had a "vested property interest" in having their plat approved and "to the immediate use of their property for the development of a nine (9) lot residential subdivision." Because Respondents' due process claims are based upon the City's refusal to immediately approve Respondents' plat for subdivision, the previously signed release is directly implicated.

In ruling the earlier release did not apply, the trial court incorrectly reasoned that the release applied only to the case at that time pending in this Court. The language of the release clearly indicates it applies more broadly. Specifically, the release applies to all claims "on account of, arising out of or in any way growing out of, the subdivision of the tract of property." The release does provide that these circumstances are "more fully delineated" in the case at that time pending before this Court; however, the trial court improperly distinguished the instant case by stating "[t]he case now before the court is not based on the actions of City officials in refusing to *subdivide* the Seabrook Tract, rather, it is based on the actions of City officials in adopting and implementing a policy establishing zoning outside the process set by law." (emphasis in original).

This purported distinction ignores the plain language of Respondents' complaint. The complaint expressly rests the due process claims on the obstruction of Respondents' right to subdivide the Seabrook tract. For these reasons, we reverse the trial court and find Respondents' substantive due process claim is waived.

II. Equal Protection

To establish an equal protection violation, plaintiffs must demonstrate they were intentionally and purposely subjected to treatment different from others similarly situated. *Sylvia Dev. Corp.*, 48 F.3d at 818. The trial court found the City treated Respondents differently from similarly situated property owners and that the City imposed a zoning designation on Respondents' property outside the legislative process. We dismiss this claim as moot.

A case becomes moot when the parties no longer possess a cognizable interest in the outcome. *Powell v. McCormack*, 395 U.S. 486, 496 (1969). The record indicates that the Seabrook property was rezoned after a slight delay in the process, and that Respondents ultimately sold the property for a sum comparable with the value of residential oceanfront property. As Respondents no longer possess any claim to the property, were not delayed significantly in this process, and realized such substantial financial gains, any claim to an equal protection violation is far too tenuous for adjudication.

That we dispose of this case on somewhat technical grounds should not be perceived as a license for a city or municipal authority to use last-minute rezoning to cure violations of a property owner's rights in hopes of seeking shelter in the principles of justiciability. When established zoning statutes and procedures are arbitrarily or unreasonably disregarded, several constitutional claims may arise. In this case, however, any judgment of this Court on equal protection grounds would clearly lack a practical effect.

CONCLUSION

The trial court erred in finding violations of Respondents' due process and equal protection rights. We are extremely mindful of the often contentious nature of zoning and development disputes, and we recognize that, in the appropriate cases, improper actions of local administrative bodies may result in federal due process and equal protection violations.

Ultimately, our conclusion in this case is compelled by two factors: first, the fact that Respondents achieved a beneficial result after proceeding through the very process the law guaranteed; second, the fact that much of this subject matter was waived in the disposition of a previous lawsuit.

For the foregoing reasons, we reverse.

MOORE, and BURNETT, JJ., and Acting Justice Clyde N. Davis, concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Caroline Boyd and The Caroline Collection, Inc., Respondents,

v.

BellSouth Telephone Telegraph Company, Inc., a/k/a BellSouth Telecommunications, Inc., now known as BellSouth, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Bamberg County
J. Martin Harvey, Special Referee

Opinion No. 26170
Heard May 2, 2006 – Filed June 19, 2006

AFFIRMED IN PART; REVERSED IN PART

Richard B. Ness, of Ness, Jett & Tanner, LLC, of Bamberg, for Petitioner.

James D. Mosteller, III, of Barnwell; and Stephen A. Spitz, of Charleston, for Respondents.

JUSTICE BURNETT: Caroline Boyd filed a declaratory judgment action on behalf of herself and her wholly owned corporation, The Caroline Collection, Inc., (collectively referred to as "Boyd") against BellSouth Telephone Telegraph Company, Inc., a/k/a BellSouth Telecommunications, Inc., now known as BellSouth (BellSouth). Boyd sought an easement across BellSouth's property. The special referee granted BellSouth's motion for summary judgment. The Court of Appeals affirmed in part, reversed in part, and remanded. Boyd v. BellSouth Tel. Telegraph Co., 359 S.C. 209, 597 S.E.2d 161 (Ct. App. 2004). We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

In 1923, BellSouth's predecessor, AT&T, completed construction of a three-story building on its property in Denmark, South Carolina. BellSouth's original lot was bordered on the north by Otis Street (formerly Hammond Street), on the west by Carolina Highway (formerly Palmetto Avenue), and on the east by Beech Avenue. At some point during BellSouth's ownership, a driveway was constructed which ran from the rear of the building to Beech Avenue. A gate was erected at the end of the driveway on Beech Avenue.

In 1988, BellSouth severed the lot into two parcels and sold the western parcel with the building to the City of Denmark (Denmark). Denmark's parcel was bordered by Otis Street and Carolina Highway. In 1991, Denmark sold its parcel to John Boyd, who later conveyed the parcel to his wife, Caroline Boyd. Boyd used the building as an antique store.

Denmark and Boyd used BellSouth's gate and driveway to access the rear entrance of the building. After September 11, 2001, BellSouth decided to construct a fence between the two parcels for security reasons. This fence would prohibit Boyd from using BellSouth's existing gate and driveway to access the rear entrance of the building.

Boyd then brought this declaratory judgment action contending she had an easement implied by prior use,[1] implied by necessity, or by equitable estoppel over BellSouth's parcel. The special referee granted BellSouth's motion for summary judgment on all claims.

Boyd appealed. The Court of Appeals affirmed the special referee's grant of summary judgment for BellSouth on the easement by necessity claim and reversed the grant of summary judgment for BellSouth on the claims for an easement implied by prior use and by equitable estoppel. *Id.* at 213-17, 597 S.E.2d at 163-65.

We granted BellSouth's petition for writ of certiorari to review the Court of Appeals' decision concerning the easement implied by prior use and equitable estoppel.

ISSUES

I. Did the Court of Appeals err in reversing the special referee's grant of summary judgment for BellSouth on the easement implied by prior use claim?

II. Did the Court of Appeals err in reversing the special referee's grant of summary judgment for BellSouth on the easement by equitable estoppel claim?

STANDARD OF REVIEW

In reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Under Rule 56, SCRCP, a party is entitled to a judgment as a matter of law if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

[1] Easements implied by prior use are also referred to as easements implied by preexisting use. See 25 Am.Jur.2d Easements and Licenses §§ 22-29 (2004).

show that there is no genuine issue as to any material fact. In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Fleming v. Rose, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002); Conner v. City of Forest Acres, 348 S.C. 454, 462, 560 S.E.2d 606, 610 (2002).

LAW AND ANALYSIS

I. Easement Implied by Prior Use

BellSouth argues the Court of Appeals erred in reversing the grant of summary judgment on the easement implied by prior use claim because South Carolina does not recognize this type of easement. If early case law recognized the claim, then BellSouth contends it has only been recognized in the context of water drainage easements and has been subsumed by the development of easements by necessity and by prescription. Further, if an easement implied by prior use is currently recognized, then the Court of Appeals erred in finding a genuine issue of material fact existed as to the necessity element.

The special referee recognized a claim for easement implied by prior use, but found Boyd did not produce any evidence BellSouth intended to create an easement at the time of severance. He also found Boyd did not meet the element of necessity. Based on those findings, the special referee granted summary judgment for BellSouth.

The Court of Appeals held an easement implied by prior use exists when: (1) the dominant and servient tracts of land originated from a common owner; (2) the use was in existence at the time the original grantor severed the tracts; and (3) the use was apparent, continuous, and necessary for enjoyment of the dominant tract. Boyd, 359 S.C. at 214, 597 S.E.2d at 164 (citing Crosland v. Rogers, 32 S.C. 130, 133, 10 S.E. 874, 875 (1890) and Slater v. Price, 96 S.C. 245, 255-56, 80 S.E. 372, 374 (1913)). Further, the evidence showed BellSouth was the common owner of both parcels and continuously used the apparent driveway during the time of common

ownership. The Court of Appeals concluded a factual issue existed as to whether the driveway is reasonably necessary for the enjoyment of Boyd's property and remanded the case. Boyd, 359 S.C. at 215-16, 597 S.E.2d at 164-65.

A. Recognition of Claim

While other authorities plainly identify easements by prior use, necessity, and prescription as three types of easements, South Carolina case law has not clearly distinguished between these types of easements. See 25 Am.Jur.2d Easements and Licenses §§ 22, 30, 39 (generally describing easements by prior use, necessity, and prescription). Moreover, although easements by implication have been recognized in South Carolina, an easement implied by prior use has never been explicitly recognized.

The intent of the parties, as shown by all the facts and circumstances under which a conveyance was made, may give rise to an easement by implication. Hamilton v. CCM, Inc., 274 S.C. 152, 158, 263 S.E.2d 378, 381 (1980). Whatever easements are created by implication must be determined as of the time of the severance of the ownership of the tracts involved. Clemson Univ. v. First Provident Corp., 260 S.C. 640, 652, 197 S.E.2d 914, 920 (1973). Easements may be implied by necessity, by prior use, from map or boundary references, or from a general plan. 25 Am.Jur.2d Easements and Licenses §§ 20-22, 30 (describing the different types of implied easements); Restatement (Third) Property: Servitudes §§ 2.11-.15 (2000 & Supp. 2006) (same); see, *e.g.*, Carolina Land Co. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975) (when a grantor lays out a tract of land in streets and lots on a plat and sells those lots by deeds referring to the plat, normally the legal effect is the creation and conveyance of implied easements in the streets to the grantees); McAllister v. Smiley, 301 S.C. 10, 389 S.E.2d 857 (1990) (easement implied where the deed described the tract of land as bounded by a street and the deed referred to the plat on which the street was indicated but the deed did not mention an easement); Brasington v. Williams, 143 S.C. 223, 141 S.E. 375 (1927) (easement implied by necessity where the grantee was without an express easement or right of way to a public highway); see generally Brasington, 143 S.C. at 245, 141 S.E. at 382 ("There

seems to have been nine methods recognized under the common law for the creation of an easement, namely, by grant, estoppel, way of a necessity, implication, dedication, prescription, ancient window doctrine, reservation, or condemnation.") (citing Davis v. Robinson, 127 S.E. 697 (1925)).

The party asserting the right to an easement implied by prior use must establish the following: (1) unity of title; (2) severance of title; (2) the prior use was in existence at the time of unity of title; (3) the prior use was not merely temporary or casual; (4) the prior use was apparent or known to the parties; (5) the prior use was necessary in that there could be no other reasonable mode of enjoying the dominant tenement without the prior use; and (6) the common grantor indicated an intent to continue the prior use after severance of title. See Elliott v. Rhett, 39 S.C.L. (5 Rich.) 405 (1852) ("Apart from all considerations of time, there is implied, upon the severance of a heritage, a grant of all those continuous and apparent easements, which have in fact been used by the owner during the unity, though they have had no legal existence as easements. . . ."); [2] Crosland, 32 S.C. at 133, 10 S.E. at 875 (implicitly recognizing an easement implied by prior use "where there has been a unity of possession and a subsequent sale of a portion of the land over which the easement is claimed, that said easement must have been apparent, continuous, and necessary at the time of said sale, the term 'necessary' meaning that there could be no other reasonable mode of enjoying the dominant tenement without this easement"); [3] see also Merrimon

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[2] This quote exemplifies how the language used to describe easements implied by prior use and by necessity blurred the distinctions between the two types of easements. In Brasington, the plaintiff sought to establish an easement by necessity or by prescription. The Court addressed only those two types of easements, but relied on and quoted Elliott in which the Court had implicitly recognized an easement implied by prior use. Brasington, 143 S.C. at 240, 141 S.E. at 380.

[3] In Crosland, 32 S.C. at 132, 10 S.E. at 874, the Court further explained an implied easement may arise:

v. McCain, 201 S.C. 76, 82, 21 S.E.2d 404, 407 (1942), overruled on other grounds by Jowers v. Hornsby, 292 S.C. 549, 551-52, 357 S.E.2d 710, 711 (1987) (plaintiff sought an easement based on three grounds: (1) the easement was visible, apparent, and appurtenant to the property, (2) the easement was implied by necessity, and (3) easement by prescription).[4]

> when the claimant has been in possession of both the dominant and the alleged servient tenement, and while in this possession he creates the easement, or what would have been an easement had it been over another's land, and he afterwards sells a portion of the land over which the alleged easement runs, reserving the easement either expressly or under circumstances which implied a reservation.

[4] See generally 25 Am.Jur.2d Easements and Licenses § 22 ("[A]n easement implied from prior use is created when the servient and dominant estates were once under common ownership, the rights alleged were exercised prior to the severance of the estate, the use was not merely temporary, the continuation of this use was reasonably necessary to the enjoyment of the parcel, and a contrary intention is neither expressed nor implied."); Restatement (Third) of Property: Servitudes § 2.12 (2000) ("Unless a contrary intent is express or implied, the circumstances that prior to a conveyance severing the ownership of land into two or more parts, a use was made of one part for the benefit of another, implies that [an easement] was created to continue the prior use if, at the time of the severance, the parties had reasonable grounds to expect that the conveyance would not terminate the right to continue the prior use."); 28A C.J.S. Easements § 63 (1996) (Elements of an easement implied by prior use include: (1) unity of ownership and a subsequent severance of ownership, (2) the prior use must be permanent, apparent, and continuous at the time of severance, and (3) the use must be necessary after severance of title to benefit the dominant estate.); 3 Tiffany Real Property Easements § 781 (Supp. 2006) ("The requirements of an easement by [prior use] are: (1) title shall have been separated between two tracts, one dominant and one servient; (2) before the separation took place, the use which gave rise to the easement shall have been so long continued and so obvious or manifest as to show that it was meant to be

The party asserting the right of an easement by necessity must demonstrate: (1) unity of title, (2) severance of title, and (3) necessity. Kennedy v. Bedenbaugh, 352 S.C. 56, 60, 572 S.E.2d 452, 454 (2002).

To establish a prescriptive easement, the party asserting the right must show: (1) continued use for 20 years, (2) the identity of the thing enjoyed, and (3) use which is either adverse or under a claim of right. Horry County v. Laychur, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993); Shia v. Pendergrass, 222 S.C. 342, 351, 72 S.E.2d 699, 703 (1952). When the claimant has established that the use was open, notorious, continuous, and

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permanent; and (3) the easement shall be necessary to the beneficial enjoyment of the land granted or retained."); Davis v. Peacock, 991 P.2d 362, 367 (Idaho 1999) ("[T]he party asserting the easement must prove three elements: (1) unity of title or ownership and a subsequent separation by grant of the dominant estate; (2) apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate."); Brown v. Haley, 355 S.E.2d 563, 569 (Va. 1987) ("When a landowner conveys a portion of his land, he impliedly conveys an easement for any use that is continuous, apparent, reasonably necessary for the enjoyment of the property conveyed, and in existence at the time of the conveyance."); Knott v. Washington Hous. Auth., 318 S.E.2d 861, 863 (N.C. Ct. App. 1984) ("An easement implied from prior use is generally established by proof: (1) that there was common ownership of the dominant and servient parcels and a transfer which separates that ownership; (2) that, before the transfer, the owner used part of the tract for the benefit of the other part, and that this use was apparent, continuous and permanent; and (3) that the claimed easement is 'necessary' to the use and enjoyment of the claimant's land."); Rinderer v. Keeven, 412 N.E.2d 1015, 1025 (Ill. App. Ct. 1980) ("For an easement to arise by implication three conditions must be satisfied: (1) the dominant and servient estates must have been owned by a common grantor prior to severance of title; (2) the use prior to severance of title must have been apparent, obvious, continuous and manifestly permanent; (3) the easement must be essential to the beneficial enjoyment of the dominant estate.").

uninterrupted, the use will be presumed to have been adverse. Poole v. Edwards, 197 S.C. 280, 283, 15 S.E.2d 349, 350 (1941).

A prescriptive easement is not implied by law but is established by the conduct of the dominant tenement owner; however, easements by prior use and by necessity are implied by law. Clemson Univ., 260 S.C. at 652, 197 S.E.2d at 919; 12 S.C. Jur. Easements § 10; 25 Am.Jur.2d Easements and Licenses §§ 22, 30. An easement by necessity does not require a preexisting use during unity of title; whereas an easement by prior use does impose this requirement. 25 Am.Jur.2d Easements and Licenses § 32; 28A C.J.S. Easements § 92. An easement implied by prior use will not be extinguished if the easement is no longer necessary, but an easement by necessity will be extinguished once the necessity ends. 25 Am.Jur.2d Easements and Licenses §§ 29, 35.

Easements by prescription, implied by prior use, and implied by necessity have different elements and are applicable to different factual scenarios; thus, an easement implied by prior use has not been subsumed by other types of easements. Regardless of whether an easement implied by prior use was originally recognized in a water drainage situation, this does not prevent its application in other circumstances.

B. Summary Judgment

If an easement implied by prior use is recognized, BellSouth contends the Court of Appeals erred in finding a genuine issue of material fact existed as to the necessity element of easement implied by prior use because the court simultaneously found Boyd did not meet the necessity element of easement by necessity.

The necessity required for easement by necessity must be actual, real, and reasonable as distinguished from convenient, but need not be absolute and irresistible. Jowers, 292 S.C. at 550-51, 357 S.E.2d at 711 (citing Steele v. Williams, 204 S.C. 124, 28 S.E.2d 644 (1944); Merrimon, 201 S.C. at 76, 21 S.E.2d at 404; Lawton v. Rivers, 13 S.C.L. (2 McCord) 445 (1823)). The necessity element of easement by necessity must exist at

the time of the severance and the party claiming the right to an easement must not create the necessity when it would not otherwise exist. Clemson Univ., 260 S.C. at 652, 197 S.E.2d at 920; see also 28A C.J.S. Easements § 96 (necessity required for easement by necessity must exist at the time of the severance and at the time of the exercise of the easement).

For an easement implied by prior use, necessity means "there could be no other reasonable mode of enjoying the dominant tenement without this easement. . . ." Crosland, 32 S.C. at 133, 10 S.E. at 875; see also 25 Am.Jur.2d Easements and Licenses § 29 (necessity for easement implied by prior use generally means reasonable necessity which will contribute to enjoyment of the dominant estate); 28A C.J.S. Easements § 72 (implied grant of easement by prior use requires a reasonable degree of necessity for the enjoyment of the dominant estate; it need not be absolute but must be more than mere convenience). The necessity element of easement implied by prior use must be determined at the time of the severance. 25 Am.Jur.2d Easements and Licenses § 29; 28A C.J.S. Easements § 69; see, *e.g.*, Norken Corp. v. McGahan, 823 P.2d 622 (Alaska 1991) (remanding case for determination of whether necessity element for easement implied by prior use met at the time of severance).

While the necessity elements for the two types of easements obviously are similar, the need required for an easement by prior use may be less than required for an easement by necessity. See Russakoff v. Scruggs, 400 S.E.2d 529, 533 (Va. 1991) (easement implied by prior use "requires a showing of need which, by definition, may be less than that required for establishing an easement by necessity, but must be something more than simple convenience"); Granite Props. Ltd. v. Manns, 487 N.E.2d 1230 (Ill. App. Ct. 1986) (a greater degree of necessity may be required for easement by necessity than for easement by prior use); 28A C.J.S. Easements § 92 (same). This lesser showing of necessity may stem in part from an often unspoken realization on the part of the fact finder that a prior use indicates a need for a particular easement. See Michael V. Hernandez, Restating Implied, Prescriptive, and Statutory Easements, 40 Real Prop. Prob. & Tr. J. 75 (2005) ("The easement implied by prior use is based on the maxim . . . whatever is necessary and related is appended. . . .").

Viewed in the light most favorable to Boyd, the evidence indicates BellSouth at one time commonly owned the two parcels at issue and used the driveway to access the rear entrance of the building. Upon severance of the two parcels, Boyd's parcel, then owned by Denmark, was bounded on two sides by public streets. The evidence indicates there are two entrances to Boyd's building. During the past 50 years, the rear entrance and loading docks have been generally accessible from Beech Avenue by using BellSouth's driveway and have been used to deliver large items to the basement of the building. There is evidence the front entrance does not provide access to the basement for the delivery of large items because the stairways and hallways are too narrow. The evidence also indicates an alternate driveway to the building would be infeasible, impractical, and very costly. Thus, there is a genuine issue of material fact that without this particular easement, there could be no other reasonable mode of enjoying the dominant tenement at the time of severance. Crosland, 32 S.C. at 133, 10 S.E. at 875.

II. Easement by Equitable Estoppel

BellSouth argues the Court of Appeals erred by reversing the grant of summary judgment on the claim for easement by estoppel because Boyd failed to establish the elements of equitable estoppel. We agree.

The essential elements of equitable estoppel as related to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially. S. Dev. Land and Golf Co. v. S.C. Pub. Serv. Auth., 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993); see, *e.g.*, O'Cain v. O'Cain, 322 S.C. 551, 473 S.E.2d 460 (Ct. App. 1996)

(landowner was equitably estopped from denying adjoining landowner use of driveway).

"A properly recorded title normally precludes an equitable estoppel against assertion of that title due to the requirement that the party raising the estoppel be ignorant of the true state of title or reasonable means of discovering it." Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) (internal citation omitted). "One with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been misled." S. Dev. Land and Golf Co., 311 S.C. at 34, 426 S.E.2d at 751.

The special referee determined Boyd did not establish that she and her predecessors lacked knowledge because the chain of title revealed there was no such easement. Therefore, the special referee concluded Boyd and her predecessors could not have been misled by any representations BellSouth made regarding the use of the driveway and granted summary judgment for BellSouth.

Viewing the evidence in a light most favorable to Boyd, the Court of Appeals found the evidence indicated when Boyd's husband made the decision to purchase the property, he relied on a representation by BellSouth that he would have access to the driveway. The Court of Appeals also found Boyd's husband was acting as a joint venturer with her in the antique store during the negotiations and purchase, and concluded summary judgment was improperly granted. Boyd, 359 S.C. at 216, 597 S.E.2d at 165.

Viewing the evidence in the light most favorable to Boyd, Boyd assumed she would always have access to the rear of the building via BellSouth's driveway. The fact that there was not an easement allowing Boyd to cross BellSouth's property was a matter of public record, which Boyd and her predecessors in title had knowledge of or at least the means to obtain the knowledge. Carolina Land Co., 265 S.C. at 107, 217 S.E.2d at 20 ("Law imputes to purchaser who proposes to acquire title to real estate notice of recitals contained in any properly recorded instrument in writing which forms link in chain of title to property proposed to be acquired."). Boyd

failed to show the elements of estoppel and summary judgment was properly granted to BellSouth on this claim.

CONCLUSION

We affirm the Court of Appeals' reversal of the grant of summary judgment on the easement implied by prior use and remand for further proceedings consistent with this opinion. We reverse the Court of Appeals' reversal of the grant of summary judgment on the easement by equitable estoppel.

AFFIRMED IN PART; REVERSED IN PART.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Robert F. McClinton,
Defendant; and Frye Brothers
Bonding and Frontier Insurance
Co., Surety for the Defendant,

Of Whom Frye Brothers
Bonding is Appellant.

Appeal From Lexington County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 26171
Heard May 24, 2006 – Filed June 19, 2006

REVERSED

Robert T. Williams, Sr. of Williams, Hendrix, Steigner & Brink, P.A., of Lexington, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Norman Mark Rapoport, all of the South Carolina Office of the Attorney

General, of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

JUSTICE BURNETT: This appeal raises the novel issue of whether the three-year statute of limitations for contract actions applies to the State's action for the forfeiture of a bail bond in a criminal case.

FACTUAL AND PROCEDURAL BACKGROUND

Frye Brothers Bonding (Appellant) signed as surety for a $10,000 bond on behalf of Robert McClinton in February 1997. McClinton subsequently failed to appear in court as ordered and as required by his bond. A bench warrant for McClinton's arrest was issued in February 1998.

The State filed a rule to show cause in August 2005 for a hearing on whether the bond should be forfeited or estreated by Appellant due to McClinton's failure to appear in court 7½ years earlier. The circuit court subsequently found that the conditions of the bond had been violated and ordered the bond be forfeited and paid to the Lexington County Treasurer, with the proceeds to be distributed among state and local agencies as provided by statute. We certified this case for review from the Court of Appeals pursuant to Rule 204(b), SCACR, to consider the following issue:

> Does the three-year statute of limitations for contract actions apply to the State's action for forfeiture of a bail bond in a criminal case?

STANDARD OF REVIEW

In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C. Code Ann. § 14-3-320 and -330 (1976 & Supp. 2005), and S.C. Code Ann § 14-8-200 (Supp. 2005)); Osprey, Inc. v. Cabana Ltd. Partnership, 340 S.C. 367, 372, 532

S.E.2d 269, 272 (2000) (same); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (same).

An appellate court reviews the circuit court's ruling on the forfeiture or remission of a bail bond for abuse of discretion. State v. Holloway, 262 S.C. 552, 555, 206 S.E.2d 822, 823 (1974). An abuse of discretion occurs when the circuit court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the circuit court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious. Fontaine v. Peitz, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987); S.E.C. v. TheStreet.Com, 273 F.3d 222, 229 n.6 (2d Cir. 2001).

LAW AND ANALYSIS

Appellant contends the circuit court erred in ruling that the three-year statute of limitations for contract actions[1] does not apply in a bond forfeiture action in a criminal case. Appellant asserts this Court has held that the State's right to estreatment or forfeiture of a bond arises from contract, which logically implicates the statute of limitations for contract actions. The State's right to move for forfeiture of the bond accrued upon issuance of the bench warrant in February 1998 after McClinton failed to appear in court. Thus, the State's bond forfeiture action brought 7½ years later is untimely and barred by the statute of limitations.

The State contends Appellant is estopped from denying liability on the bond because both Appellant and McClinton derived a benefit from it – Appellant by presumably intending to profit from the transaction and McClinton by remaining free before trial. The State agrees its right to move for forfeiture of the bond accrued upon the issuance of a bench warrant for the defendant's arrest, but contends no statute of limitations applies to such actions.

[1] S.C. Code Ann. § 15-3-530(1) (2005).

We have held that the State's right to estreatment or forfeiture of a bail bond issued in a criminal case arises from the contract, *i.e.*, the bail bond form signed by the parties. The parties to such a contract typically include the defendant; the person or company which acts as surety for the bond, if any; and the state and local government entities identified on the bond form. We routinely have applied contract principles to resolve various issues arising in bond forfeiture cases. See State v. Cochran, 358 S.C. 24, 27, 594 S.E.2d 844, 845 (2004) ("[t]he State's right to estreatment is governed by contract" and a "surety" is "one who, with the defendant, is liable for the amount of the bail bond upon forfeiture of bail"); State v. Boatwright, 310 S.C. 281, 283-84, 423 S.E.2d 139, 140-41 (1992) ("it is the contract that provides the basis for the State's right to bond estreatment"; in upholding partial estreatment of bond, Court applied the contract principle of impossibility of performance where defendant was extradited to another state, preventing surety from performing his obligation under the contract to deliver defendant to court); State v. McIntyre, 307 S.C. 363, 415 S.E.2d 399 (1992) ("State's right to bond estreatment arises from contract"; Court applied the Statute of Frauds to negate circuit court's oral amendment of contract of which surety asserted it had no notice); State v. White, 284 S.C. 69, 325 S.E.2d 64 (1985) ("State's right to estreatment of a bond arises from contract"; Court held the magistrate erred in disposing of charge originally covered by bond and then continuing the bond to cover a second charge without the consent of the surety); State v. Bailey, 248 S.C. 438, 446, 151 S.E.2d 87, 91 (1966) ("the right of the State to estreatment of an appearance recognizance arises from contract and is, therefore, subject to the doctrine of estoppel"); State v. Simring, 230 S.C. 49, 94 S.E.2d 9 (1956) (same); S.C. Code Ann. § 17-15-160 (2003) (identifying parties to bail bond contract); accord U.S. v. Figuerola, 58 F.3d 502, 503 (9th Cir. 1995) ("A bail bond is a contract between the government, the defendant, and his sureties, and is governed by general contract principles."); U.S. v. Martinez, 613 F.2d 473, 476 (3d Cir. 1980) (same).

Statutes governing matters related to bail bonds, including the qualifications and licensing of bail bondsmen and their runners, the issuance of bonds, and the forfeiture or remission of bonds are found in Titles 17 and 38. S.C. Code Ann. §§ 17-15-10 to -260 (2003 & Supp. 2005) and §§ 38-53-10 to -340 (2002 & Supp. 2005). The forfeiture of a bond after a defendant fails to appear in court as ordered is specifically addressed in two statutes. In order to avoid forfeiture of the bond, the surety must bring the defendant to authorities or place a hold on the defendant's release from incarceration or commitment at another facility within thirty days of issuance of a bench warrant for the defendant's arrest. S.C. Code Ann. § 38-53-70 (Supp. 2005). When the conditions of a bond have been violated, the State shall immediately move for forfeiture of the bond by notifying the parties and seeking a hearing on a rule to show cause on why the bond should not be forfeited. S.C. Code Ann. § 17-15-170 (2003).

The parties have not cited, and we have not found, any statute of limitations in the various provisions contained in Titles 17 or 38. The only South Carolina case which broaches the issue is State v. Cornell, 70 S.C. 409, 50 S.E. 22 (1905). In that case, the Court reaffirmed its previous holding that a surety is bound on a bail bond even though the defendant did not sign the bond form. The surety further argued that the State was statutorily required to move for forfeiture of the bond "without delay," and the State's four-year delay should bar its forfeiture action as untimely.

The Court rejected the surety's argument, finding the language requiring prompt action was merely directory and insufficient to nullify the surety's liability. The Court further reasoned "[t]his is not an action upon a statute for a forfeiture or penalty on the [S]tate, so as to make applicable the two and three years' limitations on such an action . . . . [N]or has there been any such unreasonable delay in instituting these proceedings as would warrant the court in denying the relief sought because of laches." Cornell, 70 S.C. at 413, 50 S.E. at 23. The Court did not discuss the statute of limitations for contract actions, which in 1905 was essentially identical to the present

statute except that it contained a six-year limitation period. Code of Civil Procedure § 112 (Vol. 2 1902).[2]

The Legislature has provided in Title 15, which contains statutes of limitation governing various causes of action, that "[c]ivil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued, except when, in special cases, a different limitation is imposed by statute." S.C. Code Ann. § 15-3-20(A) (2005). A three-year statute of limitations applies to "an action upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520." S.C. Code Ann. § 15-3-530(1) (2005).[3]

A statute of limitations generally begins to run on the date a cause of action accrues, and a breach of contract action usually accrues at the time a contract is breached or broken. Richland-Lexington Airport Dist. v. American Airlines, Inc., 306 F. Supp. 2d 548, 566 (D.S.C. 2002); Livingston v. Sims, 197 S.C. 458, 462, 15 S.E.2d 770, 772 (1941), overruled on other grounds by Santee Portland Cement Co. v. Daniel Intl. Corp., 299 S.C. 269, 384 S.E.2d 693 (1989) (discovery rule applies in contract actions), overruled on other grounds by Atlas Food Systems & Servs., Inc. v. Crane Natl. Vendors Div. of Unidynamics Corp., 319 S.C. 556, 462 S.E.2d 858 (1995).

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[2] Section 112 of the 1902 Code provided that the following shall be commenced "[w]ithin six years: 1. An action upon a contract, obligation or liability, express or implied, excepting those provided for in Section 111."

As noted by the Cornell Court, the 1902 Code addressed causes of action based upon a statute for a penalty or forfeiture to the State or another party, and provided for a two- or three-year statute of limitations. Code of Civil Procedure §§ 113-114 (Vol. 2 1902)

[3] Section 15-3-520 establishes a twenty-year statute of limitations for a bond or other written contract secured by a mortgage of real property, or for certain sealed, written instruments. This section does not apply in the present case.

In United States v. Toro, 981 F.2d 1045 (9th Cir. 1992), the court applied the federal six-year statute of limitations for contract actions to bar the government's action for forfeiture of a bail bond as untimely. The Ninth Circuit explained that courts apply general principles of contract construction when interpreting bail bonds. The government's motion for forfeiture of the bond was an action for money damages and, more specifically, an action for liquidated damages. The Ninth Circuit rejected the government's argument that the district court should have moved, sua sponte, to declare the bond forfeited upon the defendant's failure to appear in court. The six-year statute of limitations on a claim against a surety begins to run when the contract is breached, *i.e.*, when a defendant breaches a bail bond condition. *Id.* at 1047-49; accord State v. American Bankers Ins. Co., 782 P.2d 1316, 1317-18 (Nev. 1989) (where bail bond forfeiture provisions did not contain a statute of limitations, court applied general six-year statute of limitations for contract actions to bond forfeiture action, rather than two-year period for actions upon a statute for penalty or forfeiture); People v. Woodall, 271 N.W.2d 298 (Mich. App. 1978) (surety bond in criminal case is contract between government and principal and surety, and six-year statute of limitations for contract actions applies).[4]

[4] Some states have established specific statutes of limitation for forfeiture of a bail bond. See International Fidelity Ins. Co. v. City of New York, 263 F. Supp. 2d 619 (E.D.N.Y. 2003) (discussing New York statute which requires filing of bail bond forfeiture order within 120 days of date of forfeiture, a prerequisite to recovery from surety); Allegheny Cas. Co. v. Roche Surety, Inc., 885 So.2d 1016 (Fla. App. 5 Dist. 2004) (discussing statute which provides that criminal bonds expire three years after they have been posted); State v. Polk, 688 So.2d 191, 193 (La. App. 4 Cir. 1997) (discussing statute which requires state to complete bail bond forfeiture process within sixty days of defendant's non-appearance; otherwise, surety is released from its obligation).

We find persuasive the reasoning in Toro and similar cases, and conclude it is appropriate to apply the three-year statute of limitations for contracts to bail bond forfeiture actions. The Legislature has not provided a specific statute of limitations in the bail bond statutes; however, nothing in those statutes indicates an intent to prohibit a reasonable deadline for the State to act. In fact, the language of Sections 38-53-70 and 17-15-170 indicates the Legislature anticipated the State would move expeditiously for forfeiture of bond when necessary. The Court did not definitively resolve this issue in Cornell and our conclusion is consistent with prior authority stating that bail bonds generally are governed by contract principles.

We further conclude that the statute of limitations on the forfeiture of a bail bond begins to run thirty days after the issuance of a bench warrant for a defendant's failure to appear, pursuant to the process established in Section 38-53-70. We rely on the more specific process set forth in Section 38-53-70, and less on the general directive in Section 17-15-170 that the State move "immediately" for forfeiture of the bond upon noncompliance with its condition, because this language in the latter statute is merely directory. See Cornell, 70 S.C. at 413, 50 S.E. at 23. Moreover, we note a solicitor will retain significant control over the three-year clock because the solicitor will choose the date the clock begins to run by calling a case for disposition and seeking the issuance of a bench warrant due to a defendant's failure to appear.

In addition, the imposition of a reasonable deadline on the State in this setting is appropriate because, first, a three-year period provides ample time for the State to seek forfeiture of a bond if it desires to do so. Second, statutes of limitations "are designed to promote justice by forcing parties to pursue a case in a timely manner. Parties should act before memories dim, evidence grows stale or becomes nonexistent, or other people act in reliance on what they believe is a settled state of public [or private] affairs." State ex rel. Condon v. City of Columbia, 339 S.C. 8, 19, 528 S.E.2d 408, 413-14 (2000). Furthermore, "[t]here is universal acceptance of the logic of Statutes of Limitations that litigation must be brought within a reasonable time in order that evidence be reasonably available and there be some end to litigation. Not only do such statutes apply to suits against the State but also

to suits brought by the State." Webb v. Greenwood County, 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956); accord Santee Portland Cement Co., 299 S.C. at 271, 384 S.E.2d at 694 (one policy underlying statute of limitations is to protect defendant from false or fraudulent claims that might be difficult to disprove if brought after relevant evidence or witnesses are no longer available).

CONCLUSION

We reverse the circuit court and hold that the three-year statute of limitations for contract actions applies to actions by the State for the forfeiture of a bail bond in a criminal case. The statute begins to run thirty days after issuance of a bench warrant for a defendant's failure to appear, pursuant to the process established in Section 38-53-70. Accordingly, the State's forfeiture action in this instance, brought 7½ years after the issuance of a bench warrant for defendant's arrest for failure to appear in court as ordered, is barred by the statute of limitations.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Charles Pagan, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26172
Heard April 5, 2006 – Filed June 19, 2006

AFFIRMED AS MODIFIED

Deputy Chief Attorney Joseph L. Savitz, III, of South Carolina Office of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters; and Acting Solicitor W. Barney Giese, all of Columbia, for Respondent.

JUSTICE BURNETT: Charles Pagan (Petitioner) was convicted of the murder of Gloria Cummings (the victim), and was sentenced to life imprisonment. We granted Petitioner's petition for writ of certiorari to review the Court of Appeals' decision. State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004). We affirm as modified.

FACTUAL AND PROCEDURAL BACKGROUND

The victim's body was discovered in a vacant lot in Florence County about 8 a.m. on December 11, 1997. A police officer testified the victim's head had been severely beaten and her pants were down around her ankles. Dr. Edward Proctor, a forensic pathologist, performed an autopsy on the victim's body and opined the cause of death was massive blunt force injury to the head.

An investigation revealed semen found on the victim's pants and body belonged to Stephen Blathers, who lived near the vacant lot where the victim's body was discovered. When confronted with the results of the investigation, Blathers admitted having sex with the victim on the night of the murder. He further testified he heard screaming outside his house about 2 a.m. that night and he saw a shadow run across the yard. Blathers thought the shadow was the same man he had previously seen with the victim on the night of the murder, and he later identified Petitioner as that man.

Jessie Jones, who also lived near the vacant lot, testified that about 2 a.m. on December 11, he heard people hitting a sign outside his house, and he told the people to leave. He then observed a man and a woman hitting each other with sticks, and thought they were arguing over money. Jones did not think the man arguing with the woman was Blathers because Blathers is five feet tall and the man he saw was six feet tall.

On December 11 and 13, 1997, Monique Ellerbee Cooks called Crime Stoppers and reported she went to a club with the victim on the night of the murder. Cooks reported the victim left the club with a man, gave a detailed description of the man, and said she did not see them again. Cooks

subsequently met with a forensic artist who drew a composite sketch of the man she saw with the victim. Cooks was also shown a photographic lineup with Petitioner in it; however, she did not identify anyone.

At trial, Cooks testified she was with the victim on the night of the murder. Cooks went to White Sands, a bar, while the victim stayed outside to talk to a man. When Cooks left the bar, she decided to follow the victim and the man because they were leaving together. Cooks testified she thought the victim and the man were arguing over money and drugs. At some point during the walk, the victim and the man began hitting each other with sticks. Cooks testified the victim and the man moved toward a vacant lot when Jones yelled for the people to stop hitting a sign. The man continued hitting the victim and began dragging her. Cooks testified she offered to pay the man, but he did not want her money. The man then told the victim if she did not pay him, he would beat the money out of her. When the victim ran away, the man pursued her, caught her, then began to pull off her clothes, and beat her on the head with a board.

Cooks identified Petitioner in court as the man she saw beat the victim to death. Cooks testified she did not originally report that she had witnessed the murder and she did not initially identify Petitioner in the photographic lineup because she was scared.

Petitioner's defense was alibi and he argued the evidence did not point to him as the murderer. He testified his wife dropped him off at White Sands on the evening of December 10, 1997. He left White Sands between 10 and 10:30 p.m. and went to the Pub, where he talked to Leroy Jones and Darren Burgess. After about an hour, he called his wife to pick him up and approximately thirty minutes later she arrived at the Pub. Jones, Burgess, and Petitioner's wife corroborated Petitioner's testimony regarding when he arrived and departed the Pub. His wife also testified Petitioner was at home for the rest of the night.

Petitioner was arrested by the United States Marshals in New Jersey on February 20, 1998, and extradited to South Carolina. He was subsequently released on bond.

Tamika Lambert testified on February 16, 1999, she was walking down a street in Florence when a man named "Derrick" picked her up in a vehicle. She testified a police officer attempted to pull them over and Derrick sped away eventually wrecking the car. Derrick then ran from the scene, but Lambert was detained by the police. Later that night, Lambert ran into Derrick and he apologized to her. He told her he ran from the police because he did not have a driver's license and "they accused him of killing this girl - - Well, this girl named Monique." She further testified he told her "that he was on . . . a $100,000 bond because they had - - This girl - - They accused him of killing some girl. And it was all because of some girl named Monica."[1] After the incident, Lambert picked Petitioner out of a photographic lineup as "Derrick."

Defense counsel objected to Lambert's testimony. The trial judge allowed the testimony as evidence of identity under Rule 404(b), SCRE. The trial judge also gave the following limiting instruction: the testimony "related to the issue of identification of [Petitioner.] You can't infer that he was charged with or know about a failure to stop for blue light charge, that he's necessarily guilty of murder. There's no connection."

Lavenia Helton testified to a prior altercation between the victim and Petitioner during 1997. Helton testified the victim was leaving Helton's apartment one day with a bag of crack cocaine. Petitioner demanded the victim give him the bag of crack cocaine. When the victim complied, Petitioner told her she would die.

At trial, Petitioner denied knowing the victim. He also denied ever seeing Lambert, Cooks, and Helton until they testified at trial. Petitioner further denied being involved in the February 16, 1999, failure to stop for a blue light incident.

[1] During Lambert's testimony, there appeared to be some confusion over whether the name was Monica or Monique.

The jury found Petitioner guilty of murder, and the Court of Appeals affirmed the conviction.

ISSUE

Did the Court of Appeals err in affirming the trial judge's admission of testimony that, while Petitioner was out on bond for the current murder charge, he failed to stop for a blue light and later explained to a passenger in the vehicle that he had fled from the police because he was accused of killing the victim?

STANDARD OF REVIEW

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

LAW AND ANALYSIS

A. Evidence of Flight

Petitioner argues the Court of Appeals erred in affirming the admission of Lambert's testimony because the testimony did not relate to flight from the charged crime.[2] We agree.

Flight from prosecution is admissible as guilt. State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (evidence of flight

[2] Petitioner relies on McFadden v. State, 342 S.C. 637, 539 S.E.2d 391 (2000). McFadden is not applicable to the current case because it involves the rule that, in a trial *in absentia*, the jury cannot consider the defendant's absence at trial as evidence of defendant's guilt.

admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension). The critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities. State v. Beckham, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999). It is sufficient that circumstances justify an inference that the defendant's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose. Flight or evasion of arrest is a circumstance to go to the jury. *Id.* (citation omitted).

Flight evidence is relevant when there is a nexus between the flight and the offense charged. See State v. Robinson, 360 S.C. 187, 195, 600 S.E.2d 100, 104 (Ct. App. 2004) (citing United States v. Beahm, 664 F.2d 414, 419-20 (4th Cir. 1981) (evidence of flight inadmissible where a defendant flees "after 'commencement of an investigation' unrelated to the crime charged, or of which the defendant was unaware"); United States v. Foutz, 540 F.2d 733, 740 (4th Cir. 1976) (evidence of flight should be excluded where defendant flees while being investigated for another crime), *cert. denied* Nov. 2, 2005.

The Court of Appeals found Lambert's testimony was admissible as evidence of flight. The Court of Appeals discerned the testimony was admissible to prove Petitioner was attempting to violate his bond provisions for the pending murder charge and he could identify the State's key witness. Pagan, 357 S.C. at 141, 591 S.E.2d at 651.

The flight evidence is not relevant in this case because there is no nexus between the flight and the current offense of murder. The evidence does not create an inference that Petitioner's alleged failure to stop for a blue light was motivated by his belief that the police officer was seeking him for his pending murder charge. Robinson, 360 S.C. at 195, 600 S.E.2d at 104 ("Evidence of flight should be excluded when the flight is clearly linked to a separate offense for which the defendant is not on trial."). Lambert's testimony was not admissible as evidence of flight or guilty knowledge.

B. Corroboration Evidence

Petitioner argues the Court of Appeals erred in affirming the admission of Lambert's testimony based on corroboration evidence because the testimony did not corroborate Cooks' testimony. He argues even if the testimony was corroborative, it should have been excluded because the probative value did not substantially outweigh the unfair prejudice to him. We agree.

All relevant evidence is admissible. Rule 402, SCRE; State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991).

"Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness. Evidence is admissible to corroborate the testimony of a previous witness, and whether it in fact corroborates the witness' testimony is a question for the jury." State v. Stroman, 281 S.C. 508, 510, 316 S.E.2d 395, 397 (1984) (internal citations omitted).

The Court of Appeals found Lambert's testimony admissible as corroboration evidence of Cooks' testimony. The Court of Appeals asserted Lambert corroborated that Cooks was an eyewitness to the crime; Cooks was scared Petitioner would harm her; and Petitioner knew Cooks' identity prior to trial. Pagan, 357 S.C. at 142, 591 S.E.2d at 651-52.

Lambert's testimony was irrelevant to any issue presented at trial. Her testimony did not establish that Cooks was an eyewitness to the crime or that Petitioner had threatened Cooks. The testimony simply revealed that Petitioner knew he had been charged with the victim's murder and he knew

the name of a witness. The Court of Appeals erred in affirming the admission of Lambert's testimony as corroboration evidence.

C. Identity under Rule 404(b), SCRE

Petitioner argues the Court of Appeals erred in affirming the admission of Lambert's testimony based on Rule 404(b), SCRE, because the testimony did not identify Petitioner as the victim's murderer. We agree.

Evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. State v. Beck, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000). Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001).

The trial court and the Court of Appeals found Lambert's testimony admissible under Rule 404(b), SCRE, as evidence of identity. The Court of Appeals asserted the "testimony was logically relevant as evidence of [Petitioner's] identity because it connected the murder with [Petitioner's] flight from the police one year later." Pagan, 357 S.C. at 144, 591 S.E.2d at 652.

The trial court erred in admitting the bad act evidence because the bad act did not logically relate to the murder. Petitioner's alleged statement to Lambert was that he fled because a female, named Monique or Monica, had accused him of murdering someone and he was out on bond for that murder charge. The failure to stop and the following explanation in no way identifies Petitioner as the person who murdered the victim. This evidence merely illustrates that Petitioner, who had already been charged

with the victim's murder and released on bond for that charge, knew he had been accused of murder and knew the name of a witness in the case. Compare Braxton, 343 S.C. at 634, 541 S.E.2d at 836 (testimony that witness knew appellant possessed a nine millimeter pistol was relevant because it tended to identify appellant as the possessor of the murder weapon, a nine millimeter pistol); State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001) (prior murder was admissible to establish appellant's identity in the prosecution of the current murder where the same weapon was used in both murders).

D. Harmless Error

Petitioner argues the Court of Appeals erred in finding any error in the admission of Lambert's testimony was harmless error. We disagree.

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). Thus, an insubstantial error not affecting the result of the trial is harmless where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

Although the trial judge erroneously admitted testimony that Petitioner failed to stop for a blue light in 1999, the error did not contribute to the guilty verdict. The 1999 failure to stop was not similar to the current murder charge and the danger of prejudice was not enhanced. Compare State v. Brooks, 341 S.C. 57, 62-63, 533 S.E.2d 325, 328 (2000) (when the prior bad acts are similar to the one for which the appellant is being tried, the danger of prejudice is enhanced); State v. Gore, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) (same). Also, the erroneous admission of bad act evidence had minimal impact when numerous other bad acts, including prior convictions for failure to stop and conspiracy to traffic crack cocaine, were properly admitted. See State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) (finding harmless error when trial judge erred in admitting prior bad

act evidence where the testimony was minimal). Furthermore, the trial judge instructed the jury that they could not find Petitioner guilty of murder because Petitioner was charged with failure to stop.

Moreover, other competent evidence established Petitioner's guilt beyond a reasonable doubt. Helton testified to a prior altercation between Petitioner and the victim in which Petitioner told the victim she would die. Blathers testified he saw Petitioner with the victim on the night of the murder and he later saw Petitioner running away from someone screaming. Cooks gave an eyewitness account of the murder by testifying she witnessed Petitioner beat the victim to death with a board.

CONCLUSION

The Court of Appeals erred in affirming the trial court's admission of Lambert's testimony as evidence of flight, corroboration, and identity. We conclude the error is harmless and affirm Petitioner's conviction.

AFFIRMED AS MODIFIED.

TOAL, C.J., and WALLER, J., concur. MOORE, J., dissenting in a separate opinion in which PLEICONES, J., concurs.

JUSTICE MOORE: I respectfully dissent. I agree with the majority's conclusion that the trial judge erred in allowing Lambert's testimony; however, in my opinion, this error cannot be harmless. Identity was a critical issue in this case. Petitioner's failure to stop for a blue light in 1999 was irrelevant to his identity as the murderer. The fact that the trial judge specifically instructed the jury it could consider this evidence for identification purposes made the erroneous admission of this evidence even more prejudicial. I would reverse and remand for a new trial.

PLEICONES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cynthia K. Grant, Appellant,

v.

Mount Vernon Mills, Inc., Respondent.

Appeal From Greenville County
John C. Few, Circuit Court Judge

Opinion No. 4122
Heard May 11, 2006 – Filed June 12, 2006

AFFIRMED

Candy Kern-Fuller, of Piedmont, for Appellant.

Thomas A. Bright, of Greenville, for Respondent.

KITTREDGE, J.: This is a breach of contract action based on an employee handbook. The employee, Cynthia K. Grant, appeals from the circuit court's grant of summary judgment in favor of Mount Vernon Mills, Inc. We affirm and hold that the termination provisions in the employee handbook did not apply to Grant (as a salaried employee), and that in any

event, the termination policy provisions of the handbook are permissive in nature and did not alter the at-will relationship.

I.

We apply the same standard as the circuit court when reviewing the grant of a summary judgment motion: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). To determine whether any material fact exists, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party. South Carolina Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001).

Once the party moving for summary judgment meets the initial burden of showing the absence of a genuine issue as to any material fact, the nonmoving party may not simply rest on the mere allegations contained in the pleadings. Peterson v. W. Am. Ins. Co., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999). "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

II.

In 1996, Grant began her salaried employment with Mount Vernon as a Pension Benefits Manager. Grant's duties included processing monthly pensions payroll, conducting interviews with plan participants, and reviewing termination packages for terminated employees. Grant received a copy of the employee handbook.

The employee handbook contains numerous policies, including Employment Policy and Practice, Union Policy, Relocation Policy, Jury

Duty, Terminations, Employment of Family Relatives, and so forth. Each policy in the manual has—at the top of the page—the term "**COVERAGE**." The policies apply to a variety of employee classifications. Some policies apply to "ALL EMPLOYEES"; some policies apply to "SALARIED EMPLOYEES"; some apply to "SALARIED EMPLOYEES – EXEMPT AND NONEXEMPT"; some apply to "HOURLY EMPLOYEES"; some apply to "HOURLY NONEXEMPT EMPLOYEES"; and one policy applies to "FIRST LINE SUPERVISORS." As noted, Grant was a salaried employee.

At issue here is the handbook's termination policy that provides "**COVERAGE**" for "HOURLY NONEXEMPT EMPLOYEES" and states in relevant part:

> I. **Policy**
>
> It is the policy of the Company to attempt to be fair and just in all dealings with employees. For purposes of this policy, a termination is the result of any action initiated by the employee or the Company whereby the service record of the employee is broken.
>
> . . . .
>
> B. **Discipline**
>
> 1. **Notice of Warnings**
>
> a) Warnings are normally given as a result of an employee's unsatisfactory conduct or performance. The purpose of the warning is to serve notice to the employee that a continuation of the practice may result in discharge and to advise the employee that a change in conduct or performance must be made.

b) Warnings should be administered by the employee's immediate supervisor and should be straight forward and sincere. The supervisor should assume the responsibility and attitude of being helpful.

. . . .

2. Discharge

a) The three warnings and final improper conduct or performance will result in discharge if all four take place in a twelve consecutive month period.

. . . .

d) Immediate discharge

. . . .

4) Offenses - It is not the Company's intent to list in detail everything that an employee should or should not do under all circumstances. The following offenses are only examples of the types of conduct which could result in immediate discharge:

. . . .

d) Creating discord or lack of harmony; . . . .

(emphasis added).

On September 13, 2000, Grant met with three of her supervisors, Kent Harris, Ned Cochrane, and Gary Williams. Grant was terminated, effective immediately. The supervisors told Grant the reasons for her termination, and those reasons relate to their perception of Grant's poor work performance and

her creating discord and lack of harmony in the workplace. Harris informed Grant she was terminated for her performance problems and lack of effort to work in a team environment within the corporate setting. Further, he stated she consistently displayed a poor attitude as evidenced by various emails she sent. In one of those emails Grant complained about being asked to perform employee interviews. She concluded by asking, "So do we just get the crappy work dumped on us?" In addition to Grant's supervisors' belief of her negative attitude towards employees and her work, Harris stated Grant performed her job poorly.

Grant filed suit in the circuit court alleging race and sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as well as state claims for breach of contract, breach of contract accompanied by fraudulent act, and breach of the covenant of good faith and fair dealing.

Mount Vernon removed the action to federal district court and filed a motion for summary judgment on all claims. The federal district court granted Mount Vernon summary judgment as to the federal claims and remanded the various contract claims to state court.

On remand to state court, Mount Vernon moved for summary judgment. Mount Vernon alleged the various contract claims were premised on the existence of an employment contract, and no contract existed as a matter of law because Grant was employed at-will. Mount Vernon maintained the employee handbook policy plainly stated the termination policy only applied to hourly nonexempt employees, and Grant was a salaried employee. Mount Vernon contended that because the termination policy did not apply to Grant, her at-will status was not altered. Accordingly, Mount Vernon claimed Grant's breach of contract claims failed as a matter of law.

Grant countered that during her employment she reviewed various salaried employee files that contained written warnings prior to termination. Grant also submitted various affidavits from salaried employees who stated they received written warnings prior to termination. Further, Grant submitted affidavits from two managers who stated they gave written warnings to

salaried employees prior to termination. Grant's position was and remains that if other salaried employees received warnings, so should she.

Grant additionally relied on Mount Vernon's failure to insert a conspicuous disclaimer in the handbook to express its desire to maintain the at-will employment relationship.[1] Therefore, Grant contended that a question of fact existed as to whether the handbook created a binding contract, meaning Grant could only be fired for cause.

The circuit court granted Mount Vernon summary judgment. The circuit court reasoned the termination policy stated that coverage was for hourly nonexempt employees and because Grant was a salaried employee no ambiguity existed as to the fact she fell outside the scope of the policy. Therefore, the circuit court found the employee handbook did not create a contract of employment that modified Grant's at-will status. Moreover, the circuit court rejected Grant's reliance on Mount Vernon's decision to give warnings to other at-will employees and not her. This appeal followed.

III.

Grant maintains the circuit court erred in concluding Mount Vernon's employee handbook, as a matter of law, did not alter Grant's status as an at-will employee. We disagree.

South Carolina has long recognized the doctrine of employment at-will. Conner v. City of Forest Acres, 363 S.C. 460, 471, 611 S.E.2d 905, 910-11 (2005) (Conner II); Shealy v. Fowler, 182 S.C. 81, 87, 188 S.E. 499, 502 (1936) ("[a] contract for permanent employment, so long as it is satisfactorily performed, which is not supported by any consideration other than the obligation of service to be performed on the one hand and wages to be paid

[1] The title page of the handbook (entitled "Employee Policies and Procedures On-Line Guide") states that the "on-line policy guide is not intended to bind the Company or any employee to a specific period of employment." This language was neither bold nor capitalized.

on the other, is terminable at the pleasure of either party."). This doctrine allows either party to terminate the employment "for any reason or no reason" without being subject to a claim for breach of contract, subject to narrow exceptions and prohibitions against illegal discrimination which are not present here. Horton v. Darby Elec. Co., Inc., 360 S.C. 58, 67, 599 S.E.2d 456, 460 (2004); see also Conner II, 363 S.C. at 471, 611 S.E.2d at 910. The at-will employment doctrine is essentially an economic incentive that provides critically needed flexibility in the marketplace. Prescott v. Farmers Tel. Co-op., Inc., 335 S.C. 330, 334-35, 516 S.E.2d 923, 925 (1999).

When the at-will status of an employee is altered by the terms of an employee handbook, however, a contract may arise allowing for a cause of action for wrongful discharge. Small v. Springs Indus., Inc., 292 S.C. 481, 484, 357 S.E.2d 452, 454 (1987).

When the evidence conflicts or is capable of more than one inference, the issue of whether an employee handbook constitutes a contract should be submitted to the jury; however, "'a court should intervene to resolve the handbook issue as a matter of law . . . if the handbook statements and the disclaimer, taken together, establish beyond any doubt tha[t] an enforceable promise either does or does not exist.'" Hessenthaler v. Tri-County Sister Help, Inc., 365 S.C. 101, 108, 616 S.E.2d 694, 697 (2005) (quoting Stephen F. Befort, Employee Handbooks and the Legal Effect of Disclaimers, 13 Indus. Rel. L.J. 326, 375-76 (1991-92)).

The typical handbook employment case may be resolved by making three determinations. A handbook forms an employment contract when: (1) the handbook provision(s) and procedure(s) in question apply to the employee, (2) the handbook sets out procedures binding on the employer, and (3) the handbook does not contain a conspicuous and appropriate disclaimer. See Conner II, 363 S.C. at 472, 611 S.E.2d at 911; see also Williams v. Riedman, 339 S.C. 251, 259-60, 529 S.E.2d 28, 32 (Ct. App. 2000) (citing Miller v. Schmid Labs., Inc., 307 S.C. 140, 414 S.E.2d 126 (1992)).

In determining whether the handbook sets out procedures that bind an employer, we must first determine—because of the procedural posture of this

case—whether the employee is covered by the policy provision in question. If the employee is not covered, then the handbook would not form the basis of an employment contract.

Assuming an employee is covered by the relevant provision in the handbook, we next determine whether the handbook sets out binding procedures on the employer. In this regard, in the absence of a conspicuous and appropriate disclaimer, if the language in the handbook sets out mandatory, progressive discipline procedures, those procedures alter the at-will employment relationship. When an employer discharges a covered employee without adhering to the mandatory procedures, the employee may maintain an action for wrongful discharge against the employer. See Hessenthaler, 365 S.C. at 108-09, 616 S.E.2d at 697-98 (citing Conner v. City of Forest Acres, 348 S.C. 454, 463-64, 560 S.E.2d 606, 610-11 (2002) (Conner I)).

Mandatory discipline procedures "typically provide that an employee may be fired only after certain steps are taken. When definite and mandatory, these procedures impose a limitation on the employer's right to terminate an employee at any time, for any reason." Hessenthaler, 365 S.C. at 109, 616 S.E.2d at 698. Permissive language in an employee handbook, on the other hand, does not alter an employee's at-will status. See Horton 360 S.C. at 67-68, 599 S.E.2d at 461 (affirming summary judgment for employer when handbook provided discipline procedures that contained permissive language).

A. Mount Vernon's employee handbook termination policy does not apply to Grant, a salaried employee.

Grant contends a jury question exists as to whether the employee handbook's termination policy applies to her. We disagree.

The employee handbook's termination policy unambiguously states that it applies to hourly nonexempt employees. Grant was a salaried, not an hourly, employee. According to Grant, she was a "salaried non-exempt employee." App. Br. at 10. Grant focuses exclusively on the exempt versus

nonexempt issue.[2] We need not reach the issue of whether Grant was exempt or nonexempt, for she was indisputably not an hourly employee. Because Grant was not an *hourly* nonexempt employee, the termination policy in the handbook did not apply to her.

Grant additionally argues that because the termination provision provides that the company policy is to be "fair and just in all dealings with employees," the termination provision applies to all employees, including salaried and hourly employees. The phrase "employees" in the body of the provision may not be properly read to broaden the coverage beyond that clearly set forth in the heading of the policy. This general policy statement—to be "fair and just"—does not somehow expand the class of Mount Vernon employees to whom this provision applies. This provision, by unmistakable language, is limited to hourly nonexempt employees.

Beyond this, the law does not sanction the leap advocated by Grant. For a general policy statement to be enforceable as a contract, the statement "must be definitive in nature, promising specific treatment in specific situations." Hessenthaler, 365 S.C. at 110, 616 S.E.2d at 698 (finding that because nondiscrimination provision was not specific and did not make any promises regarding disciplinary procedure or termination decisions, the handbook did not contain promises enforceable as a contract). The policy statement of Mount Vernon to be "fair and just" does not create an expectation that employment is guaranteed or that a particular process must be complied with before an employee is terminated. Consequently, the policy statement does not create a contract or otherwise alter Grant's at-will status.

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[2] The parties have not developed the status of Grant as exempt or nonexempt as significant to a resolution of this appeal. From our review of the record, it appears this issue may have been relevant in the adjudication of Grant's previously dismissed federal claims. For example, Grant submitted an affidavit in opposition to the summary judgment motion filed in federal court, in which Grant's expert opined that, for purposes of exemption from the overtime requirements of the Fair Labor Standards Act, Grant was "not an 'exempt' employee" with Mount Vernon.

Grant seeks to avoid the coverage limitation in the termination policy by claiming that her termination is governed by the "ATTENDANCE" policy, which applies to "ALL EMPLOYEES." This argument finds insufficient traction in the record. Grant recalled in her deposition testimony that the reason given at the September 13, 2000, meeting for her termination was that she was "not a team player." The balance of the record is consistent with Grant's recollection of the September 13 meeting in which she was terminated for her poor attitude and "not working as part of a team." Grant points to the September 13 memorandum of Gary Williams which contains, among many other things, a reference to Grant's propensity for arriving late for work and leaving early as "one contributing factor to the overall problem – an example of how her attitude has affected her performance [at Mount Vernon]."

We agree with the assessment of the circuit court that the language of the attendance policy would create an issue of fact if the evidence could reasonably support the conclusion that Grant was terminated for attendance reasons. The evidence (in a light most favorable to Grant) establishes, however, that Grant's alleged attendance related issues were only an adjunct in the decision to terminate her. As former Chief Justice Littlejohn observed, we are not "required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine." Main v. Corley, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984).

B. An employee handbook couched in permissive language does not alter the at-will employment relationship.

Although Grant may not avail herself of the termination policy due to her status as a salaried employee, we address Grant's contention that a handbook (whether couched in mandatory or permissive language) always alters the at-will relationship of the employer and employee absent a conspicuous disclaimer to the contrary. In support of her argument, Grant cites to the supreme court's statement in Conner I "that if an employer wishes to issue written policies, but intends to continue at-will employment [and not

be bound by the polices], the employer must insert a conspicuous disclaimer into the handbook." Conner I, 348 S.C. at 463, 560 S.E.2d at 611.

Grant, however, overlooks that the analysis in Conner I is based upon mandatory language that binds the employer. See Connor I, 348 S.C. at 464, 560 S.E.2d at 611. The supreme court observed in Conner I that "[i]t is patently unjust to allow an employer to couch a handbook, bulletin, or other similar material in mandatory terms and then allow him to ignore these very policies." Conner I, 348 S.C. at 463, 560 S.E.2d at 610 (quoting Small v. Springs Indus., Inc., 292 S.C. at 485, 357 S.E.2d at 455).

In the present case, because nothing in the employee handbook outlined progressive disciplinary procedures in mandatory terms, the presumption that the employment was at-will was not rebutted and no disclaimer was needed. Accordingly, we hold the handbook did not contain promises enforceable in contract.

Even assuming Grant may avail herself of Mount Vernon's termination policy, her contract claims must nevertheless fail. The permissive nature of the termination policy compels this result. Nothing in the employee handbook required Mount Vernon to give warnings to an employee before termination. The handbook provides: "Warnings are *normally* given as a result of an employee's unsatisfactory conduct or performance." (emphasis added). Moreover, the handbook states that if a warning is given then "[w]arnings should be administered by the employee's immediate supervisor and should be straight forward and sincere." Therefore, a plain reading of the handbook shows that a supervisor may give a warning, but is not required to do so. If a warning is given, then the handbook provides procedures on how the warning should be administered.[3]

[3] This serves as an additional sustaining ground. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("[A] respondent . . . may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.").

C. Grant's status as an at-will employee is not altered by Mount Vernon's election to give a warning to other salaried employees.

Grant's final argument is premised on the notion that an employer may not treat at-will employees differently. Grant points to evidence of other salaried employees receiving warnings. If other presumably at-will employees received warnings instead of dismissal, then Grant contends she is *legally* entitled to the same consideration. Although the law prohibits illegal discrimination, Grant makes no such claim to us. The record provides little in terms of the at-will salaried employees who were given warnings. We do not know the tenure of these employees, Mount Vernon's perception of the value of these employees, and the nature of the alleged misconduct of these employees. We decline to speculate that the circumstances of these examples of salaried employees receiving warnings mirror Grant's situation.

We agree with the circuit court that Grant's reference to other salaried employees receiving warnings does not create a question of fact. Absent a claim of illegal discrimination, an employee's status as an at-will employee is not altered by an employer's decision to give a warning to other at-will employees.

The rule could not be otherwise without wreaking havoc on the at-will employment doctrine. Employers routinely give warnings to at-will employees when no warning is legally required. But those at-will employees who are summarily fired and do not receive warnings may not (absent illegal discrimination) bootstrap an employer's unrelated judgment in another employee's situation to alter the at-will relationship and create a contract of employment. From the employer's perspective, that is the essence of the at-will employment relationship.

Say, for example, an employer has two at-will employees who have committed the same infraction and assume the absence of illegal discrimination. Employee A has worked for employer for ten years, and employer perceives employee A as a long time valued employee. Employer elects to give employee A a warning. Assume employee B has worked for employer for one year and employer perceives employee B as only a

marginally adequate employee. Employer elects to fire employee B. Does employer's decision to give employee A a warning alter employee B's at-will status, entitling employee B to a warning? The answer is "no." The result would be the same if we reversed the hypothetical. Though illogical, the at-will employment doctrine would allow the employer to fire employee A and merely warn employee B. Absent a contract of employment or other legally cognizable claim, courts have no business interfering with employers' decisions to warn or fire at-will employees.

We additionally conclude that Mount Vernon's perception that it had cause for terminating Grant does not alter the at-will relationship. Employers will almost always believe there is "good cause" for terminating an employee, including an at-will employee. The fact that an employer claims it takes no disciplinary action without a good reason does not mean the employer can only act in the presence of a good reason. This court reached a similar result in Davis v. Orangeburg-Calhoun Law Enforcement Com'n, 344 S.C. 240, 542 S.E.2d 755 (Ct. App. 2001). Davis claimed an employment contract was created when his employer told him "he could 'only be terminated for cause.'" Id. at 249, 542 S.E.2d at 760. We held such a statement "insufficient by itself to provide a factual issue as to alteration of Davis's at-will employment status." Id. (citing with approval Montgomery County Hosp. Dist. v. Brown, 965 S.W.2d 501, 502 (Tex. 1998) (statements that an employee will be discharged only for "good reason" or "good cause" do not form a binding contract "when there is no agreement on what those terms encompass. Without such agreement the employee cannot reasonably expect to limit the employer's right to terminate him.")).

IV.

We find Mount Vernon's termination policy did not apply to Grant as a salaried employee, and for the reasons discussed above, we hold that an at-will employment relationship existed between Grant and Mount Vernon. We join the circuit court in concluding that Mount Vernon was entitled to summary judgment.

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.