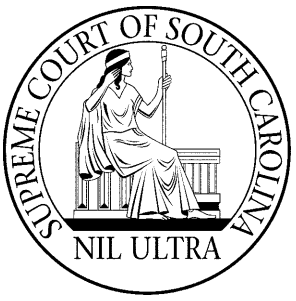

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 24

June 18, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The City of Rock Hill, Appellant,

v.

Cynthia A. Suchenski, Respondent.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 26345
Heard January 4, 2007 – Filed June 18, 2007

AFFIRMED

Harry P. Collins, of Rock Hill, for Appellant.

Thomas F. McDow, of Rock Hill, for Respondent.

ACTING JUSTICE MANNING: This is an appeal from the Rock Hill municipal court. Cynthia Suchenski (respondent) was found guilty of driving with an unlawful alcohol concentration (DUAC), and the circuit court reversed her conviction based on the City of Rock Hill's (City's) failure to comply with S.C. Code Ann. § 56-5-2953 (2006), which requires the arresting officer to provide videotaping of the incident site. We affirm.

FACTS

Respondent was arrested for driving under the influence (DUI) and was later charged with DUAC. At the incident site, the arresting officer did not videotape the entire arrest as required by § 56-5-2953 because the officer's camera ran out of tape. The videotaping began upon activation of the officer's blue lights and recorded two field sobriety tests and the Miranda warnings, but the tape stopped before the officer administered a third field sobriety test and before respondent was arrested.

At trial, respondent moved to dismiss the charges due to the officer's failure to provide a complete videotape from the incident site. The officer testified that a tape had never ended during an arrest before and that he turned on his blue lights and assumed the videotape was running as usual. The officer stated he did not know the tape was about to expire. The municipal court denied the motion pursuant to the statute on the grounds of exigent circumstances. The municipal court also cited State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002), and State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991), in support of its denial of respondent's motion to dismiss.

The case was tried before a jury, and respondent was found guilty. Respondent appealed her conviction, and the circuit court reversed, holding that respondent's motion to dismiss should have been granted. The circuit court distinguished Huntley and Mabe, the two cases relied upon by the municipal court in denying respondent's motion to dismiss. However, the circuit court did not address the finding of the municipal court that exigent circumstances excused compliance with the statute and simply held that the City violated the videotaping statute.

ISSUE

Did the circuit court err in reversing respondent's conviction and dismissing the DUAC charge?

ANALYSIS

In criminal appeals from municipal court, the circuit court does not conduct a de novo review. S.C. Code Ann. § 14-25-105 (Supp. 2006); State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004). In criminal cases, the appellate court reviews errors of law only. State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973). Therefore, our scope of review is limited to correcting the circuit court's order for errors of law.

The City first argues that the circuit court erred by determining the City violated S.C. Code Ann. § 56-5-2953. This issue is not preserved.

Section 56-5-2953 commands the arresting officer to videotape the individual during a DUI arrest. Subsection (A) of the statute outlines the requirements for videotaping at the incident site and at the breath test site. Subsection (B) of the statute provides exceptions that excuse compliance with the statute.[1] In this case, both parties agreed that the arresting officer failed to comply with the requirements of subsection (A), but the municipal court denied respondent's motion to dismiss due to an exception in subsection (B).

On appeal to the circuit court, the City reiterated its position that noncompliance was excused pursuant to § 56-5-2953(B). However, the circuit court's order did not address or even mention the exceptions in subsection (B). The circuit court simply concluded, "Here, the legislature has established a procedure that must be followed in the making of a DUI arrest. Here, the procedure was not followed." While the circuit court correctly applied subsection (A) of the statute, it omitted any mention of subsection (B) of § 56-5-2953.

[1] Respondent argues the applicable statutory provision states, "Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape based upon the totality of the circumstances."

The City did not seek a post-judgment ruling from the circuit court on the potential applicability of § 56-5-2953(B). This precludes our review of the applicability of the subsection (B) exceptions, as we may only review the circuit court's order for errors of law. We cannot determine error regarding an issue not addressed by the circuit court. *See* Williams v. Williams, 329 S.C. 569, 579, 496 S.E.2d 23, 29 (Ct. App. 1998), *rev'd on other grounds*, 335 S.C. 386, 517 S.E.2d 689 (1999) ("The circuit court has the authority to hear motions to alter or amend the judgment when it sits in an appellate capacity, and these motions are required in order to preserve issues for further review by the Court of Appeals or the Supreme Court in cases where the circuit court fails to address an issue raised by a party."); United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992) (circuit court sitting on appeal did not address an issue and Wal-Mart made no motion pursuant to Rule 59(e), SCRCP, to have the court rule on the issue; thus the allegation was not preserved for further review by the Court of Appeals).

The City next contends that, per Huntley, a violation of the videotaping statute should not result in dismissal of a charge when there was no showing of prejudice to the defendant. We disagree.

Under § 56-5-2953, a violation of the statute, with no mention of prejudice, may result in dismissal of the charges. The statute provides, "Failure by the arresting officer to produce the videotapes required by this section **is not alone a ground for dismissal** of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 **if** [exceptions apply]…" (emphasis added). Conversely, failure to produce videotapes would be a ground for dismissal if no exceptions apply.

The circuit court found Huntley to be inapposite, and we agree. The statute at issue in Huntley was the implied consent statute which required a simulator test before administration of a breath test. That statute, S.C. Code Ann. § 56-5-2950 (2006), is silent as to the remedy for noncompliance, whereas the statute in this case provides for dismissal of charges when the statute is inexcusably violated.

CONCLUSION

The City failed to seek a ruling in the circuit court in regards to the applicability of the exceptions for noncompliance found in § 56-5-2953(B). Accordingly, that issue is not properly before us. Finally, dismissal of the DUAC charge is an appropriate remedy provided by § 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions.

AFFIRMED.

MOORE, ACJ, WALLER, J., and Acting Justice James W. Johnson, Jr., concur. BURNETT, J., dissenting in a separate opinion.

BURNETT, J.: I respectfully dissent. In my opinion, the issue of whether the circuit erred by determining the City violated S.C. Code Ann. § 56-5-2953 is preserved.

In order to preserve an issue for appellate review, a party must file a motion to alter or amend the judgment when the party raises an issue to the lower court and the court fails to rule upon the issue. *E.g.*, Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000); see also Rules 52(b) and 59(e), SCRCP. However, a motion to alter or amend the judgment under Rule 59(e) was not necessary in this case. Appellant's failure to move to seek a ruling from the lower court on the applicability of S.C. Code Ann. § 56-5-2953(B) (2006) does not violate the long-established preservation requirements.

Both parties argued the applicability of subsections (A) and (B) extensively in their briefs and at the hearing before the lower court. The lower court's determination hinged on whether subsection (B) provided an excuse for the violation of subsection (A). The lower court determined no exception in subsection (B) applied. Although the lower court's order only addressed subsection (A), the fact that subsection (B) did not apply was implicit in the order and, therefore, preserved for review.

A preservation issue did not arise when the lower court implicitly ruled in the negative that no exception applied, as opposed to alternatively ruling in the positive that an exception applied. For preservation purposes, it was unnecessary for the lower court to rule upon an exception when no such exception applied. Hence, despite the fact the entire opinion addressed only subsection (A), Appellant was free to argue on appeal an exception in subsection (B) applied.

Section 56-5-2953(B), states, in pertinent part:

> Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting

> officer submits a sworn affidavit certifying that the videotape equipment at the time of the arrest … was in an inoperable condition, … or in the alternative … it was physically impossible to produce the videotape because the person needed emergency medical treatment, or **exigent circumstances existed**.

(emphasis added). In the instant case, the videotape began upon activation of the officer's blue lights and recorded two field sobriety tests and the Miranda warnings. The tape stopped before the officer administered a third field sobriety test and a "walk and turn" test, and before Respondent was arrested. The officer testified he assumed the videotape was running as usual and did not know the tape had expired prematurely. The municipal court correctly denied Respondent's motion to dismiss based on the "exigent circumstances" exception in subsection (B).

Because it was unnecessary for Appellant to make a motion pursuant to Rule 59(e), the issue of whether subsection (B) applied is preserved for review. Accordingly, I would reverse the lower court and reinstate the decision of the municipal court.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James Earl Reed, Petitioner,

v.

Jon Ozmint, Director, South Carolina Department of Corrections, Respondent.

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

Opinion No. 26346
Heard May 1, 2007 – Filed June 18, 2007

AFFIRMED IN PART; REVERSED IN PART

Teresa L. Norris, of Blume, Weyble & Norris, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, for Respondent.

JUSTICE BURNETT: James Earl Reed (Petitioner), who has been sentenced to die for murder, seeks to waive appellate review of the order denying his application for post-conviction relief (PCR) and to be executed. Although Petitioner is competent, he has not made a knowing and intelligent

waiver of his right to appellate review. Petitioner has also made a motion to relieve counsel and proceed *pro se* which we deny.

FACTUAL/PROCEDURAL BACKGROUND

Petitioner was indicted for two counts of murder of his ex-girlfriend's parents in 1994. In 1996, a jury convicted Petitioner of both counts of murder, and he was sentenced to death. His convictions and death sentence were affirmed on direct appeal.[1] State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998), cert. denied 525 U.S. 1150, 119 S.Ct. 1051, 143 L.Ed.2d 57 (1999).

Petitioner filed an application for PCR, which was denied after an evidentiary hearing. He then filed a Notice of Appeal. However, prior to the filing of a petition for writ of certiorari, Petitioner wrote a letter to Chief Justice Toal professing his innocence, claiming to waive his right to all appeals, and asking that a date for his execution be set. We remanded Petitioner's case to the circuit court for a competency hearing.

A competency hearing was held on February 10, 2006, before Judge A. Victor Rawl. Judge Rawl received testimony from Dr. Donna Schwartz-Watts, Dr. Pratap Narayan, and Petitioner. He also received into evidence a forensic evaluation by the South Carolina Department of Mental Health among other documents. In an order dated March 30, 2006, Judge Rawl found Petitioner competent under the Singleton v. State[2] standard to waive appellate review of the order denying his PCR application. He also determined Petitioner's decision was knowing and voluntary.

Petitioner subsequently wrote a letter to Respondent's counsel stating he had fired his attorney and asking for assistance. We construed the letter to

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[1] We note the issue of Petitioner's competency was raised at trial. The trial court found Petitioner competent to stand trial and this ruling was affirmed on direct appeal. State v. Reed, 332 S.C. 35, 39-42, 503 S.E.2d 747, 749-50 (1998).

[2] 313 S.C. 75, 84, 437 S.E.2d 53, 58 (1993).

be a motion to relieve counsel and we deferred ruling on the motion until we issued this opinion.

ISSUES

I. Did the circuit court err in finding Petitioner is competent to waive appellate review of the denial of his PCR application and in finding his decision is knowing, intelligent, and voluntary?

II. Should this Court grant Petitioner's motion to relieve counsel and proceed *pro se*?

STANDARD OF REVIEW

This Court is charged with the responsibility of issuing a notice authorizing the execution of a person who has been duly convicted in a court of law and sentenced to death. The Court will issue an execution notice after that person either has exhausted all appeals and other avenues of PCR in state and federal courts, or after that person, who is determined by this Court to be mentally competent, knowingly and voluntarily waives such appeals. See In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996); Roberts v. Moore, 332 S.C. 488, 505 S.E.2d 593 (1998); S.C. Code Ann. §§ 16-3-25, 17-25-370 (2003).

When considering a request by a convicted capital defendant to waive the right to appeal or pursue PCR, and to be executed forthwith, we must determine whether the defendant is competent and whether the decision is knowing and voluntary. See Hughes v. State, 367 S.C. 389, 395, 626 S.E.2d 805, 808 (2006) (Court will issue an execution notice if the person, who is determined by the Court to be mentally competent, knowingly and voluntarily waives appeals and PCR); State v. Torrence, 317 S.C. 45, 46, 451 S.E.2d 883, 883 (1994) (Torrence II) (waiver may not be found unless Court first determines defendant is competent and his decision is knowing and voluntary). In making a determination on the competency of a convicted capital defendant to waive his appellate or PCR rights, we are not bound by

the circuit court's findings or rulings, although we recognize the circuit court judge, who saw and heard the witnesses, is in a better position to evaluate their credibility and assign comparative weight to their testimony. Hughes, 367 S.C. at 395, 626 S.E.2d at 808. This matter is similar to one arising in the Court's original jurisdiction because it is this Court which must finally determine whether a particular capital defendant is mentally competent to make a knowing and voluntary waiver of his appellate or PCR rights. *Id.* at 395-96, 626 S.E.2d at 808. In deciding the issue of a capital defendant's competency, we carefully and thoroughly review the defendant's history of mental competency; the existence and present status of mental illness or disease suffered by the defendant, if any, as shown in the record of previous proceedings and in the competency hearing; the testimony and opinions of mental health experts who have examined the defendant; the findings of the circuit court which conducted a competency hearing; the arguments of counsel; and the capital defendant's demeanor and personal responses to the Court's questions at oral argument regarding the waiver of appellate or PCR rights. *Id.* at 396-97, 626 S.E.2d at 808-09.

LAW/ANALYSIS

I. Waiver of Right to Appeal

A. Mental Competency

The standard for determining whether a convicted capital defendant is mentally competent to waive the right to a direct appeal or PCR is set forth in Singleton:

> The first prong is the cognitive prong which can be defined as: whether a convicted defendant can understand the nature of the proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. The second prong is the assistance prong which can be defined as: whether the convicted defendant possesses sufficient capacity or ability to rationally communicate with counsel.

313 S.C. at 84, 437 S.E.2d at 58; accord Torrence II, 317 S.C. at 47, 451 S.E.2d at 884. This standard of competency is the same one required before a convicted defendant may be executed. Torrence II, 317 S.C. at 47, 451 S.E.2d at 884. The failure of either prong is sufficient to warrant a stay of execution and a denial of the convicted defendant's motion to waive his right to appeal or pursue PCR. Singleton, 313 S.C. at 84, 437 S.E.2d at 58.

Dr. Schwartz-Watts, an expert in forensic psychiatry, testified at the competency hearing that Petitioner has traits of paranoia. She opined Petitioner's suspicious attitude toward his attorneys and their motives in representing him was indicative of his paranoia. She also diagnosed Petitioner with schizotypal personality disorder and testified he has borderline intellectual functioning. Dr. Schwartz-Watts testified although Petitioner can lose contact with reality when under stress, he does not currently have any psychotic symptoms and his mental state has not deteriorated from 2001 to 2006.

Dr. Pratap Narayan, the court-appointed expert in forensic psychiatry, also testified at the competency hearing. Dr. Narayan provisionally diagnosed Petitioner with adjustment disorder with mixed disturbance of emotions and conduct. He testified Petitioner does not have a psychotic illness and did not exhibit signs of any major mental illness.

Drs. Schwartz-Watts and Narayan also testified Petitioner met the Singleton standard. They testified Petitioner understands the nature of the current proceedings, what he was tried for, the nature of his punishment, and the reasons for the punishment. They also testified he has the capacity and ability to communicate and assist counsel.

At the competency hearing, Petitioner presented Judge Rawl with a *pro se* motion, captioned "Stand 3 Motion." In this motion, Petitioner requested the court "dismiss the case or kill me." Petitioner testified he understood the hearing before Judge Rawl was to determine his competency, but he intended to fight for his innocence, integrity, and dignity at the hearing. Petitioner further testified he understood the nature of the proceedings, what he was tried for, the reason for the punishment, and the nature of the punishment.

Petitioner admitted he had conflicts with his attorneys, but he did not have a problem communicating with them.

Judge Rawl found Petitioner suffers from a personality disorder, but he is not currently suffering from any psychotic or emotional disturbance. He found Petitioner met both prongs of the Singleton standard and is competent to waive his right to appeal the denial of his PCR application.

We extensively questioned Petitioner during oral arguments to ascertain whether he met the Singleton criteria. Although Petitioner has a personality disorder and may, at times, have paranoid thoughts and eccentric thinking, these conditions do not affect his capacity or ability to satisfy either the cognitive or assistance prong of the Singleton standard. Based on our own colloquy with Petitioner and the overwhelming evidence in the record before us, we find Petitioner is competent to waive his right to appeal the order denying his PCR application.

B. Knowing, Intelligent, and Voluntary

A capital defendant, who is competent, may waive his right to appeal if the decision to do so is knowing, intelligent, and voluntary. Torrence II, 317 S.C. at 46, 451 S.E.2d at 883; see also Whitmore v. Arkansas, 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990); Gilmore v. Utah, 429 U.S. 1012, 97 S.Ct. 436, 50 L.Ed.2d 632 (1976).

At the competency hearing, Dr. Schwartz-Watts testified Petitioner wants to waive any further proceedings and proceed to execution because "he does not see any other legal avenues" in which to prove his innocence. Therefore, he would rather die with his own personal belief that he is innocent instead of staying on death row where he believes people will presume him guilty. Dr. Narayan also testified Petitioner "would much rather be executed at this point with maintaining his dignity and his integrity . . . and his innocence." He opined Petitioner's desire to waive further legal proceedings was not based on a psychotic premise. Petitioner testified he brought the waiver so that he could leave death row with his innocence and integrity.

Judge Rawl determined Petitioner wanted to waive his right to appeal because Petitioner believes he will be unsuccessful in the appellate process and although he maintains his innocence, Petitioner would prefer to end the legal process and maintain his dignity. Judge Rawl concluded Petitioner's waiver was knowing and voluntary.

We thoroughly questioned Petitioner during oral arguments about his trial, the PCR process, and the appeals process. We also questioned him about the consequences of his request to terminate any appeals from the denial of his PCR application. Petitioner alleged he wanted to waive his right to appeal, but he also requested the Court review his *pro se* brief and either dismiss the case if the Court found him innocent or set a date for execution if the Court found him guilty. Specifically, Petitioner asked the Court to review substantive claims regarding the quality of representation he received during his trial and PCR proceeding, evidentiary matters which he claims should have been pursued during prior proceedings, and whether he had a right to two standby counsel during his trial.

We find Petitioner conditioned his request to waive his right to appellate review on our determination of his innocence or guilt based on the merits of the case.[3] Unlike other capital defendants who have confirmed their guilt and waived their right to appeal, Petitioner's conditional request is not an unequivocal waiver of the right to appeal. Compare State v. Passaro, 350 S.C. 499, 507-08, 567 S.E.2d 862, 867 (2002) (capital defendant reaffirmed his request to waive his right to appeal); State v. Torrence, 322 S.C. 475, 477-79, 473 S.E.2d 703, 705-06 (1996) (capital defendant remained steadfast in

[3] For example, the following exchange between Petitioner and Chief Justice Toal demonstrates Petitioner's request is not a waiver of his right to appeal:

> Q. Although the papers we've got up here are papers in which you say, "I want to waive my right to appeal," you really do want us to review, uh, what you say went wrong in your trial?
> A. Yes.

his desire to withdraw his appeal). Accordingly, Petitioner has failed to make a knowing and intelligent waiver of his right to appeal.

II. Motion to Relieve Counsel and Proceed *Pro Se*

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." Faretta v. California, 422 U.S. 806, 807, 95 S.Ct. 2525, 2527, 45 L.Ed.2d 562, 566 (1975). This right may be waived, and the waiver must be knowing, voluntary, and intelligent. *Id.* at 835, 95 S.Ct. at 2541, 45 L.E.2d at 581; State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999).[4]

"A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466 (1938). A defendant makes an intelligent waiver when he "knows what he is doing and his choice is made with eyes open." Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L.Ed. 268, 275 (1942).

We questioned Petitioner at length about his decision to waive his right to counsel. Petitioner stated he was not satisfied with counsel's representation of him because, according to Petitioner, she presumed he was guilty and was "against the evidence that proves his innocence." Petitioner appeared upset that his counsel would not "fight for his innocence" in accordance with his wishes. We also questioned Petitioner whether he fully

[4] We note a criminal defendant's right to self-representation under the United States Constitution is not absolute. See Martinez v. Court of Appeal of California, Fourth Appellate Dist., 528 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) (finding there is no federal constitutional right to self-representation on direct appeal from a criminal conviction).

understood the nature of PCR proceedings and the appellate process following a denial of a PCR application. Petitioner asked the Court to allow him to waive his right to appeal and he stated he did not want us to review the questions raised in his PCR application. Yet, he also asked us to review the merits of his case, and he raised substantive claims regarding his trial which he desired the Court to address. Although Petitioner is competent to waive this right, we find troubling the fact that Petitioner clearly does not understand the procedural posture of his case. For this reason, we deny Petitioner's motion to relieve counsel at this stage of the proceeding.

CONCLUSION

We affirm the circuit court's finding that Petitioner is competent to waive his right to appellate review of the order denying his PCR application, and we reverse the circuit court's ruling that Petitioner made a knowing and intelligent waiver of that right.[5] Further, we deny Petitioner's motion to relieve counsel. Based on the foregoing, the matter involving the order denying Petitioner's PCR application should no longer be held in abeyance and the appeal shall proceed as set forth in Rule 227, SCACR.

AFFIRMED IN PART AND REVERSED IN PART.

TOAL, C.J., MOORE, PLEICONES, JJ., and Acting Justice J. Michael Baxley, concur.

[5] We need not address Petitioner's remaining issue. See Hughes, 367 S.C. at 409, 626 S.E.2d at 815 (appellate court need not address remaining issues when resolution of prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Rocque Hernandez-Zuniga, Appellant,

v.

Andrew Tickle and South Carolina Uninsured Employers Fund, Respondents.

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

Opinion No. 4253
Submitted June 1, 2007 – Filed June 14, 2007

AFFIRMED

Tiffany R. Spann-Wilder, of North Charleston, for Appellant.

Terri Morrill Lynch, of Charleston, for Respondents.

ANDERSON, J.: The Appellate Panel of the South Carolina Workers' Compensation Commission ("SCWCC") found Andrew Tickle ("Tickle") did

not regularly employ four or more employees. Accordingly, the Appellate Panel did not have jurisdiction to award benefits to Hernandez-Zuniga ("Claimant"). The circuit court affirmed the Decision and Order of the Appellate Panel. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

Claimant sustained his injury on May 10, 2003 when he fell from a ladder while painting for his employer, Tickle. He sought temporary disability benefits and medical treatment under the South Carolina Workers' Compensation Act (Act). Tickle claimed he was not subject to the Act because he regularly employed less than four workers.

At the time of his hearing, Claimant was a twenty-one year old Honduran with a sixth grade education who had been in the United States four years working as a painter. He began working for Tickle some time in the spring of 2003. Claimant worked eight hours a day and some weekends, earning ten dollars per hour. Tickle paid him directly, once a week, in cash. After commencing work for Tickle, Claimant worked regularly for approximately one month, until the day he fell. Claimant believed he would have continued employment with Tickle had he not been injured.

Claimant undertook three projects for Tickle—one project painting beach chairs and two house-painting projects. Two people, Claimant and Alle Hernandez (Alle),[2] worked on the beach chairs project. Claimant, Alle, and Victor Valdez (Victor) began painting the first house owned by the

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

[2] This witness is referred to in the Briefs on Appeal as Alle Hernandez. However, at the hearing the witness said his name was Alle Hernandez Alverez. For the sake of clarity we will refer to him as "Alle." Additionally, Appellant's Brief refers to Rene' Alverez, as the worker who finished up after Claimant was injured. However, Tickle declared the worker's name was Rene' Everest. Assuming this is the same individual, we will refer to him as "Rene."

Garretts. Claimant and Alle subsequently went to the Hewitt[3] home while Victor purportedly continued work on the Garrett house. Franklin Hernandez-Zuniga (Franklin) allegedly joined Claimant and Alle at the Hewitt home, the site where Claimant fell. Claimant believed Franklin began work the day before the accident and quit shortly after Claimant was injured. Victor moved to the Hewitt project after Claimant's accident.

Tickle left his previous employer, the Finish Company, in 2003 and started his own business as a painting contractor. He claimed he initially arranged with Claimant and the other workers to supply all the paint for the Garrett house, get a draw each week, and divide the proceeds with them, in cash, without tax deductions. Ultimately he paid them weekly wages at an hourly rate. Tickle explained he hired the workers "project by project" because he had not yet established his company. Claimant and his co-workers provided their own brushes and caulk guns. Tickle acknowledged he agreed to pay them a flat fee of $1000 to paint the Hewitt house. Claimant did not complete the Hewitt project because of his injury, so Tickle paid him hourly for work completed.

Tickle asseverated there were never more than three people working for him in April or May 2003. He thought someone helped finish up after Claimant fell but denied knowing anyone named Franklin working on the projects. Beth Garrett, owner of the first house Tickle's crew painted, maintained she never observed more than three people working on her home.

Tickle obtained a business license on June 26, 2003 and established Tickle Tools in July 2003. He declared he conducted no official business as Tickle Tools before July 21, 2003.

[3] The second painting job is confusingly referred to as the Hewitt house in some parts of the record and as the Pitts house in other parts. For clarity we refer to the second house as the Hewitt house.

The hearing commissioner found:

> The evidence established that upon the jobs where the Claimant worked there were only two (2) individuals on the first and three (3) on the second. The only evidence of employment of four (4) employees, which is conflicting, was for a day or two. Therefore, the Claimant did not meet his burden of proving the Employer "regularly" employed four or more employees.

Accordingly, the hearing commissioner ruled Claimant was not entitled to benefits under the Workers' Compensation Act because Tickle did not regularly employ four (4) or more employees as required by section 42-1-150 of the South Carolina Code of Laws (Supp. 2006). Consequently, the South Carolina Workers' Compensation Commission lacked jurisdiction to address the claim. The Appellate Panel affirmed the hearing commissioner's ruling and adopted his Decision and Order in its entirety. The circuit court affirmed.

ISSUE

Did the Claimant demonstrate by a preponderance of the evidence that Tickle regularly employed four or more employees and was subject to the South Carolina Workers' Compensation Act?

STANDARD OF REVIEW

Judicial review of a Workers' Compensation decision is governed by the substantial evidence rule of the Administrative Procedures Act. Baxter v. Martin Bros., Inc., 368 S.C. 510, 513, 630 S.E.2d 42, 43 (2006); Shealy v. Aiken County, 341 S.C. 448, 454, 535 S.E.2d 438, 442 (2000). However, if the factual issue before the Commission involves a jurisdictional question, this court's review is governed by the preponderance of evidence standard. Nelson v. Yellow Cab Co., 343 S.C. 102, 108, 538 S.E.2d 276, 279 (Ct. App. 2000) aff'd 349 S.C. 589, 564 S.E.2d 110 (2002); Kirksey v. Assurance Tire

Co., 314 S.C. 43, 45, 443 S.E.2d 803, 804 (1994); Vines v. Champion Bldg. Prods., 315 S.C. 13, 16, 431 S.E.2d, 585, 586 (1993); Porter v. Labor Depot, Op. No. 4212 (S.C. Ct. App. filed Mar. 5, 2007) (Shearouse Adv. Sh. No. 9 at 52); Cooke v. Palmetto Health Alliance, 367 S.C. 167, 173, 624 S.E.2d 439, 441 (Ct. App. 2005); Edens v. Bellini, 359 S.C. 433, 440, 597 S.E.2d 863, 867 (Ct. App. 2004); Simons v. Longbranch Farms, Inc., 345 S.C. 277, 280, 547 S.E.2d 500, 502 (Ct. App. 2001); Lake v. Reeder Constr. Co., 330 S.C. 242, 248, 498 S.E.2d 650, 654 (Ct. App. 1998). Consequently, our review is not bound by the Commission's findings of fact on which jurisdiction is based. Canady v. Charleston County Sch. Dist., 265 S.C. 21, 25, 216 S.E.2d 755, 757 (1975) A reviewing court has both the power and duty to review the entire record, find jurisdictional facts without regard to conclusions of the Commission on the issue, and decide the jurisdictional question in accord with the preponderance of evidence. Id ; see also Kirksey, 314 S.C. at 45, 443 S.E.2d at 804 (holding this court can find facts in accordance with the preponderance of evidence when determining a jurisdictional question in a Workers' Compensation case); Sanders v. Litchfield Country Club, 297 S.C. 339, 342, 377 S.E.2d 111, 113 (Ct. App. 1989) (deciding where a jurisdictional issue is raised, this court must review record and make its own determination whether the preponderance of evidence supports the Commission's factual findings bearing on that issue).

Workers' compensation statutes are construed liberally in favor of coverage, and South Carolina's policy is to resolve jurisdictional doubts in favor of the inclusion of employees within workers' compensation coverage. Nelson v. Yellow Cab Co., 343 S.C. 102, 109, 538 S.E.2d 276, 279 (Ct. App. 2000) aff'd 349 S.C. 589, 564 S.E.2d 110 (2002) (citing Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992); O'Briant v. Daniel Constr. Co., 279 S.C. 254, 305 S.E.2d 241 (1983); Horton v. Baruch, 217 S.C. 48, 59 S.E.2d 545 (1950); Spivey v. D.G. Constr. Co., 321 S.C. 19, 467 S.E.2d 117 (Ct. App. 1996); McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 313 S.E.2d 38 (Ct. App. 1984)).

> In determining such jurisdictional questions, it must be kept in mind that the basic purpose of the Workmen's Compensation Act is the inclusion of

> employers and employees within its coverage and not their exclusion, and doubts of jurisdiction will be resolved in favor of inclusion rather than exclusion. However, a construction should not be adopted that does violence to the specific provisions of the Act.

White v. J. T. Strahan Co., 244 S.C. 120, 135 S.E.2d 720, 723 (1964)

While the appellate court may take its own view of the preponderance of evidence on the existence of an employer-employee relationship, the final determination of witness credibility is usually reserved to the Appellate Panel. See Dawkins v. Jordan, 341 S.C. 434, 441, 534 S.E.2d 700, 704 (2000) (citing Ford v. Allied Chem. Corp., 252 S.C. 561, 167 S.E.2d 564 (1969)).

LAW/ANALYSIS

Claimant contends the circuit court erred in finding Tickle was not an employer subject to the Workers' Compensation Act because he did not have four or more persons regularly employed. Specifically, Claimant maintains that four workers were Tickle's regular employees, and three individuals were his statutory employees. We disagree.

"The issue of whether an employer regularly employs the requisite number of employees to be subject to the Workers' Compensation Act is jurisdictional." Harding v. Plumley, 329 S.C. 580, 584, 496 S.E.2d 29, 31 (Ct. App. 1998). The question of subject matter jurisdiction is a question of law. Gray v. Club Group, Ltd., 339 S.C. 173, 183, 528 S.E.2d 435, 440 (Ct. App. 2000); Roper Hosp. v. Clemons, 326 S.C. 534, 536, 484 S.E.2d 598, 599 (Ct. App. 1997)). On appeal from the Workers' Compensation Commission, this court may reverse where the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(A)(5) (Act No. 387, 2006 S.C. Acts 387, eff. July 1, 2006); Stephen v. Avins Constr. Co., 324 S.C. 334, 337, 478 S.E.2d 74, 76 (Ct. App. 1996).

Pellucidly, the appellate court's standard of review in cases involving jurisdictional questions is not a substantial evidence standard. Our precedent lucidly establishes that an appellate court reviews jurisdictional issues by making its own findings of fact without regard to the findings and conclusions of the Appellate Panel. Harding, 329 S.C at 584, 496 S.E.2d at 31 (citing Kirksey, 314 S.C. at 45, 443 S.E.2d at 804). Furthermore, the appellate court evaluates the record and resolves the issue by determining whether the preponderance of evidence supports inclusion under the Act. Id. The appellant bears the burden of showing that the circuit court's decision is against the preponderance of evidence. Gray, 339 S.C. at 182, 528 S.E.2d at 440 (citing Lake v. Reeder Constr. Co., 330 S.C. 242, 498 S.E.2d 650 (Ct. App. 1998)); Chavis v. Watkins, 256 S.C. 30, 180 S.E.2d 648 (1971); Crim v. Decorator's Supply, 291 S.C. 193, 352 S.E.2d 520 (Ct. App. 1987).

I. Four or More Persons Regularly Employed

Claimant urges that section 42-1-360(2) does not apply in the instant case, because the greater weight of the evidence indicates Tickle had four regularly employed workers during the relevant time period.

The South Carolina Workers' Compensation Act does not mandate coverage for all employees. Section 42-1-360 specifies that the Act excludes

> (1) Casual employees, as defined in § 42-1-130, and Federal employees in this State;
>
> (2) Any person who has regularly employed in service less than four employees in the same business within the State or who had a total annual payroll during the previous calendar year of less than three thousand dollars regardless of the number of persons employed during that period;
>
> (3) Textile Hall Corporation, an eleemosynary corporation whose principal object is the organizing and production of the Southern Textile Exposition;

> (4) State and county fair associations; unless any such employer voluntarily elects to be bound by this Title, as provided by § 42-1-380.
>
> (5) Agricultural employees; unless the agricultural employer voluntarily elects to be bound by this Title, as provided by § 42-1-380.

S.C. Code Ann. § 42-1-360 (Supp. 2006); see also Nolan v. National Sales Co., Inc., 294 S.C. 371, 372, 364 S.E.2d 752, 753 (1988) (holding an employer must have at least four employees in the state to be subject to provisions of South Carolinas Workers' Compensation Act).

Addressing the minimum number requirement in exemption provisions like section 42-1-306(2), Professor Larson inculcates:

> The controlling number of employees is determined in light of the employer's established mode or plan in the operation of its business. If it regularly employs the requisite number, the employer remains covered although the number employed falls temporarily below the minimum. Ordinarily only such employees as would themselves be subject to the act are included in the count. Details of interpretation should be controlled by the underlying purpose of the exemption, which is to avoid administrative inconvenience to very small employers.
>
> The most common problem under the usual wording of statutes conferring this type of exemption is the question of whether the employer "regularly" employs more than the minimum number. Since the practical effect of the numerical boundary is normally to determine whether compensation insurance is compulsory, an employer cannot be allowed to

> oscillate between coverage and exemption as its labor force exceeds or falls below the minimum from day to day. Therefore, if an employer has once regularly employed enough men to come under the act, it remains there even when the number employed temporarily falls below the minimum. The term "regularly employed" has been construed to embrace regularly-employed part-time as well as full-time workers. In all these cases, the fact that the number working at the exact time of injury was below the minimum is of course immaterial. . . .
>
> The question whether a particular employee should be disregarded for numerical-minimum purposes is very similar to the question whether he or she is a casual employee. It has been said that the two concepts are the same, and observation which, if true, would somewhat simplify the classification problem. As in the casual employment definition, both duration and regularity of recurrence are important factors. Thus, if the minimum number is exceeded on only eight of the one hundred and four days preceding the accident, the employer is not regularly employing the minimum. But if the number exceeds the minimum on seventeen out of twenty-seven days in the course of a construction job, the employer is covered. . . . It is the established mode or plan of operation of the business that is decisive.

4 Larson, Workers' Compensation §§ 74.01-02 (internal quotations and citations omitted).

A. "Regularly Employed"

In Harding v. Plumley, we applied section 42-1-360 (2) to a set of facts similar to those in the instant case. 329 S.C. at 584, 496 S.E.2d at 31.

Plumley owned a construction company and hired Harding as a general laborer. Id. at 582, 496 S.E.2d at 30. Harding was injured on his first and only day on the job. Id. The hearing commissioner found the relevant time period for determining the number of regularly employed workers ran from two months before through two months after the accident, which corresponded to the period of construction. Id. at 584, 496 S.E.2d at 31. We concluded Plumley had "at the most, two regularly employed laborers" who worked during the relevant time period and were paid on an almost weekly basis. Id. at 586, 496 S.E.2d at 33. Two other laborers worked on occasion and received only one or two paychecks. Id. Assuming Harding's one day on the job amounted to regular employment, a fourth employee was still needed to meet jurisdictional requirements under section 42-1-360. Id. at 587, 496 S.E.2d at 33.

Turning to the case sub judice, we focus on the definition of "regularly employed." As noted in Harding, section 42-1-360 does not define the term "regularly employed." 329 S.C. at 584, 496 S.E.2d at 31. When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning. Branch v. City of Myrtle Beach, 340 S.C. 405, 409-10, 532 S.E.2d 289, 292 (2000); Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 363 S.C. 612, 622, 611 S.E.2d 297, 302 (Ct. App. 2005); University of Southern California v. Moran, 365 S.C. 270, 276, 617 S.E.2d 135, 138 (Ct. App. 2005); see also Santee Cooper Resort v. South Carolina Pub. Serv. Comm'n, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989) ("Words used in a statute should be taken in their ordinary and popular significance unless there is something in the statute requiring a different interpretation."). "The terms must be construed in context and their meaning determined by looking at the other terms used in the statute." Hinton v. S.C. Dep't of Prob., Parole and Pardon Servs., 357 S.C. 327, 332-33, 592 S.E.2d 335, 338 (Ct. App. 2004).

Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. Whitner v. State, 328 S.C. 1, 16, 492 S.E.2d 777, 779 (1997); see also State v. Gordon, 356 S.C. 143, 152, 588 S.E.2d 105, 110 (2003) ("[T]he court should not consider the

particular clause being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law."); Stephen v. Avins Const. Co., 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct. App. 1996) (finding statutory provisions should be given reasonable and practical construction consistent with purpose and policy of entire act).

Dictionaries can be helpful tools during the initial stages of legal research for the purpose of defining statutory terms. Heilker v. Zoning Bd. of Appeals for City of Beaufort, 346 S.C. 401, 409, 552 S.E.2d 42, 46 (Ct. App. 2001). The term "regularly" means "[a]t fixed and certain intervals, regular in point of time. In accordance with some consistent or periodical rule or practice." Black's Law Dictionary, 1286 (6th ed. 1990). "Regular" is defined as "usual, customary, normal or general." Id. at 1285.

In the context of construing the statute, the term "regular" is often juxtaposed with the term "casual." 4 Larson, Workers'Compensation §§ 74.01-02 ("It has been said that the two concepts are the same . . . in the casual employment definition, both duration and regularity of recurrence are important factors."). Where employment cannot be characterized as permanent or periodically regular, but occurs by chance, or with the intention and understanding on the part of both employer and employee that it shall not be continuous, it is casual. Smith v. Coastal Tire and Auto Service 263 S.C. 77, 81, 207 S.E.2d 810, 812 (1974). "Employment is casual when not permanent or periodically regular but occasional or by chance and not in the usual course of the employers trade or business." Singleton v. J. P. Stevens & Co., Inc., 533 F. Supp. 887, 892 (D.C.S.C. 1982) aff'd Singleton v. J.P. Stevens & Co., Inc., 726 F.2d 1011 (4th Cir. (1984); see also S.C. Code Ann. § 42-1-130 (Supp. 2006) (excluding "a person whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer" from the definition of employee under the Act).

Because South Carolina workers' compensation law is fashioned after North Carolina's statute, our courts often rely on North Carolina precedent for guidance in interpreting the South Carolina Workers' Compensation Act. Nelson v. Yellow Cab Co., 343 S.C. 102, 117-118, 538 S.E.2d 276, 284 (Ct. App. 2000) aff'd 349 S.C. 589, 564 S.E.2d 110 (2002) (citing Spoone v.

Newsome Chevrolet-Buick, 309 S.C. 432, 424 S.E.2d 489 (1992); Stephen v. Avins Constr. Co., 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct. App. 1996) (decisions of North Carolina courts interpreting that state's Workers' Compensation statute are entitled to weight when South Carolina courts interpret South Carolina Workers' Compensation law).

North Carolina courts have interpreted "regularly employed" as "employment of the same number of persons throughout the period with some constancy." Grouse v. DRB Baseball Management, Inc., 465 S.E.2d 568, 570 (N.C. Ct. App. 1996) (citing Patterson v. L.M. Parker Co., 162 S.E.2d 571, 575 (1968)). The court explained the purpose of the Act would not be accomplished "by making it applicable to an employer who may have had, in the total number of persons entering and leaving his service during the period, more than the minimum number required by the Act." Patterson, 162 S.E.2d at 575.

B. Relevant Time Period

A priori, we must identify the relevant time period for determining whether a minimum number of persons were employed throughout the period with some constancy. This task is particularly difficult for employment in which workers come and go due to the nature and type of work they perform.

As Professor Larson edifies, the employer's established mode or plan of operation dictates, to a large extent, the relevant time period, and both duration and regularity of occurrence are important factors. In Harding, the time roughly corresponding to the duration of the construction project constituted the relevant period. Harding v. Plumley, 329 S.C. 580, 584, 496 S.E.2d 29, 31 (Ct. App. 1998). Because only two employees worked with any constancy for the duration of that period, the employer was not required to provide Workers' Compensation coverage. Id. at 587, 496 S.E.2d at 31.

In Patterson, the North Carolina Supreme Court looked at the number employed six weeks prior to the claimant's injury and determined it was less than the jurisdictional minimum. Patterson v. L.M. Parker Co., 162 S.E.2d 571, 574 (1968). The court concluded the minimum number was not

employed with sufficient constancy or regularity during that time to bring the employer under the provisions of the Act. Id.

In Durham v. McLamb, an employer hired four carpenters to work on a construction project in December, 1979. 296 S.E.2d 3, 5 (N.C. Ct. App. 1982). The claimant was injured on December 20, 1979. Id. at 4. All the workers were discharged in January 1980 because the employer could no longer pay them. Id. at 5. The employer argued he was exempt from the Act because during the week claimant was injured, only three workers were on the job. Id. at 7. The court reasoned "the number of workers on the job site on the date of the injury, standing alone, is not determinative of the issue. If the defendant had four or more "regularly employed" employees, the fact that he fell below the minimum requirement on the actual date of injury would not preclude coverage." Id. The four employees were deemed full-time and "regularly employed" until their discharge in early January, 1980. Id. "[A]lthough they worked irregular days and hours, their employment extended over a period of some four weeks, during which they worked, not by chance or for a particular occasion, but according to a definite employment at hourly wages which were paid at the end of each week worked." Id.

The North Carolina Court of Appeals revisited this issue in Grouse v. DRB Baseball Management, Inc., 465 S.E.2d 568, 570 (N.C. Ct. App. 1996). The court found evidence DRB employed "with some constancy" at least four people during the year the claimant was injured, even though only three regularly employed workers were present on the day of the injury. Id. at 571.

In the case at bar, Tickle left the Finish Company and engaged in itinerant projects to earn income while he was developing his business plan. His mode of operation was "project to project." He claimed he initially attempted to form a partnership with the workers. Nevertheless, he paid the workers hourly wages, and that arrangement persisted throughout the period.

Once Claimant commenced work in the spring of 2003, he worked continuously until the day of his accident, a period of approximately four to six weeks. Work on Tickle's projects subsided after Claimant was injured

and resumed after Tickle obtained a business license and workers' compensation insurance.

We determine the relevant time period for ascertaining whether Tickle regularly employed four or more employees with some constancy began when Claimant started working for Tickle on the beach chairs project. The period terminated shortly after Claimant's injury, when Tickle ceased operating until he officially opened his business.

During the relevant period, the workers undertook three projects. Two people worked on the first project painting beach chairs. Three people worked on each of the two houses. Allegedly, a fourth employee continued to finish up work on the Garrett house while the others moved on to the next project. Claimant and Alle worked every weekday and some weekends after Tickle hired them; they expected their employment to continue.

Tickle disavowed any employment relationship with the workers, professing instead to have formed a business partnership with them. The record provides little to substantiate Tickle's assertion. Alternatively, Tickle admitted he hired the workers on a project-by-project basis, because he was just starting up his painting business.

We conclude Claimant and Alle were Tickle's employees and not business partners. In addition, they were "regularly employed" workers during the relevant period. On the other hand, the greater weight of evidence indicates Franklin was not regularly employed by Tickle. Testimony about the duration of his employment was conflicting and inconclusive. Tickle disclaimed any knowledge that Franklin worked on any of the projects, though he was aware another individual might have worked on the Hewitt project. Moreover, Beth Garrett never observed more than three workers painting her house. Even if Victor worked for Tickle at the same time, but in another location, Claimant still fails to demonstrate Tickle regularly employed at least four workers with some constancy during the relevant period.

II. Statutory Employees

Claimant argues that three individuals were Tickle's statutory employees under section 42-1-400 and should be counted to meet the jurisdictional requirement of four or more regular employees. We disagree.

The question of whether a worker is a statutory employee is jurisdictional and is therefore a question of law for the court. Riden v. Kemet Electronics Corp., 313 S.C. 261, 263, 437 S.E.2d 156, 157 (Ct. App. 1993) (citing Bigham v. Nassau Recycle Corp., 285 S.C. 200, 328 S.E.2d 663 (Ct. App. 1985).

Section 42-1-400 defines an owner's obligation to provide workers' compensation coverage for the workmen of his subcontractor:

> When any person, in this section and §§ 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code Ann. § 42-1-400 (Supp. 2006).

In Ost v. Integrated Prod., Inc.[4], the supreme court first addressed whether statutory employees of a subcontractor may be counted toward the

[4] The court distinguished Nolan v. National Sales, 294 S.C. 371, 364 S.E.2d 752 (1988) in its analysis in Ost. In Nolan, the claimant, a National Sales employee, attempted to amalgamate Integrated's pilots as National's statutory

number of employees required to bring the general contractor within the Act. 296 S.C. 241, 371 S.E.2d 796 (1988). Integrated was a Georgia corporation employing three pilots who regularly flew into South Carolina in the course and scope of their employment. Id. at 243, 371 S.E.2d at 797. Integrated contracted with National Sales Company, a Georgia corporation, to provide personnel to sell Integrated's yarn products in South Carolina. Id. Neither the pilots nor the sales personnel were residents of South Carolina, but all traveled into South Carolina regularly in the course of their employment. Id. (emphasis added).

Ost, a pilot for Integrated, was killed in an airplane crash near Greenville, South Carolina. Id. at 242-43, 371 S.E.2d at 797. The circuit court upheld a Workers' Compensation award of death benefits and Integrated appealed, arguing it had less than four employees working in South Carolina and was exempt from the Act under S.C. Code section 42-1-360(2). Id. at 242, 371 S.E.2d at 797. Ost asserted the employees of National Sales, Integrated's subcontractor, were statutory employees and should be counted for purposes of meeting the jurisdictional requirement. Id.

The court analyzed three South Carolina cases interpreting section 42-1-400 "to determine whether employees of a secondary employer constitute statutory employees of the principal employer." Ost, 296 S.C. at 244, 371 S.E.2d at 798.

> In the leading case, Marchbanks v. Duke Power Company, 190 S.C. 336, 2 S.E.2d 825 (1939), this Court held that when a person performs work which is part of the trade or business of the principal, the employees of the person will be considered statutory

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employees in order to meet the South Carolina Workers' Compensation Act's jurisdictional requirement. The Court of Appeals held Nolan's assertion was not preserved and without merit. The supreme court affirmed and suggested its agreement with the Court of Appeals that National Sales, as the subcontractor of Integrated, could not count Integrated's employees to meet the jurisdictional requirement.

employees of the principal. We concluded that a person who was injured while painting the power company's pole was engaged in the 'trade, business or occupation' of the power company because the activity was an important part of the power company's trade or business.

Likewise, in Boseman v. Pacific Mills, 193 S.C. 479, 8 S.E.2d 878 (1940), we held that when an activity performed by the employees of a subcontractor is necessary, or essential to, or an integral part of, the operation of the principal employer's business, the employees of the subcontractor constitute the statutory employees of the principal employer. There, an employee of the subcontractor, who was painting a water tank at a mill, was killed when the tank caught fire and exploded. Our court reasoned that the water tank, which provided essential protection to the mill against fires, was an integral part of the trade or business of the mill as to subject it to liability for the death of Boseman.

This court espoused another test to determine whether an employee of a subcontractor was a statutory employee in Bridges v. Wyandotte Worsted Company, 243 S.C. 1, 132 S.E.2d 18 (1963). In Bridges, the defendant contracted with an electric company, plaintiff's employer, to repair or replace the transmission line owned by the defendant and located on his property. The lines had been replaced on a previous occasion, and customarily maintained by a qualified crew regularly employed by the defendant. We concluded that the repair or replacement of the transmission lines was a part of the work ordinarily and customarily performed by the employees of the defendant in the prosecution of the

> defendant's business. Finding the repair of the transmission lines was a part of the defendant's trade or business, we held that the defendant was liable for the subcontractor's employees' injuries.

Id. at 245, 371 S.E.2d at 798-99.

Thus, a three-part test emerged to ascertain whether employees of a subcontractor are statutory employees of the general contractor. Id. at 246-47, 371 S.E.2d at 799. "This statutory requirement has been construed to include activities that: (1) are an important part of the trade or business of the employer, (2) are a necessary, essential, and integral part of the business of the employer, or (3) have been previously performed by employees of the employer." Glass v. Dow Chemical Co., 325 S.C. 198, 201, 482 S.E.2d 49, 50-51 (1997) (citing S.C. Code Ann. § 42-1-400 (1976)); Woodard v. Westvaco Corp., 315 S.C. 329, 337, 433 S.E.2d 890, 894 (Ct. App. 1993), vacated on other grounds, 319 S.C. 240, 460 S.E.2d 392 (1995)). "Only one of these tests must be met in order for a subcontractor's employees to be considered the statutory employees of the owner." Glass, 325 S.C. at 201, 482 S.E.2d at 51 (citing Woodard, 315 S.C. at 337, 433 S.E.2d at 894). "Since no easily applied formula can be laid down for determining whether work in a particular case meets these tests, each case must be decided on its own facts." Id. (citing Ost, 296 S.C. at 244, 371 S.E.2d at 798); see also Olmstead v. Shakespeare, 354 S.C. 421, 581 S.E.2d 483 (2003); Meyer v. Piggly Wiggly No. 24, Inc., 331 S.C. 261, 500 S.E.2d 190 (Ct. App. 1998).

The Ost court concluded National Sales' employees were statutory employees of Integrated and held those employees may be included to satisfy the four person jurisdictional requirement of Section 42-1-360(2). Ost, 296 S.C. at 247, 371 S.E.2d at 799. In reaching this conclusion the court considered the underlying purpose of the Act:

> It was evidently realized by the General Assembly that it would not be fair to relieve the owner of compensation to employees doing work which was part of his trade or business by permitting such owner

> to sublet or subcontract some part of said work. Doubtless in many instances such contractor would be financially irresponsible, or the number of employees under him would be so small, as in this case, that such contractor would not be required under the Act to carry compensation insurance. It was therefore, provided under the first paragraph that where such work in which the employee was engaged was a part of the owner's trade or business, the owner would be responsible in compensation to all employees doing such work, whether employees of an independent contractor or not.

Id. at 247, 371 S.E.2d at 800.

In Harding, Plumley engaged two subcontractors during the relevant time period to perform certain parts of the construction. 329 S.C. at 585, 496 S.E.2d at 32. Harding argued the subcontractors' two workers were statutory employees according to section 42-1-400 of the South Carolina Code of Laws and should be counted in determining whether Plumley was exempt under provision 42-1-360(2). Id. The court considered Ost in addressing the claimant's argument. We noted one of Plumley's subcontractors was paid only once and the other, twice, during the relevant time period. In contrast, the statutory employees in Ost "regularly" traveled into South Carolina as part of their employment. Even assuming Plumley's subcontractors' workers were statutory employees, we held the record did not support a conclusion that Plumley employed the "same number of persons through the period with some constancy." Id. at 587, 496 S.E.2d at 33 (citing Patterson v. L.M. Parker Co., 162 S.E.2d 571, 575 (N.C. 1968).

Here, Claimant asserted that three individuals—Rene, Fernando Lucas, and Claudio Gomez—were statutory employees of Tickle and should be counted toward the jurisdictional minimum. Tickle disclosed that he hired Rene to finish up work after Claimant's accident. He then explained Fernando Lucas was a finisher with whom he subcontracted to "do a couple of patches." Tickle paid Lucas $120.00 on April 10, 2003, $40.00 on May 2,

2003, and $970.00 on July 31, 2003. Tickle issued a $750.00 check to Claudio Gomez on July 25, 2003.[5] The record substantiates that Fernando Lucas performed work that was an important part of Tickle's painting business and a necessary and integral part of Tickle's trade. See Ost, 296 S.C. at 244, 371 S.E.2d at 798. However, without evidence describing the work Rene and Gomez performed, we cannot determine whether they were Tickle's statutory employees under section 42-1-400 and the test in Ost. Even assuming the three were all statutory employees, our reasoning in Harding is equally applicable in addressing whether they should be counted toward the jurisdictional minimum. Like the subcontractors' workers in Harding, the statutory employees here did not work for Tickle in a regular, recurring capacity. Although Tickle may have employed some additional workers or statutory employees, the record fails to support the conclusion that Tickle employed "the same number of persons throughout the period with some constancy." Harding v. Plumley, 329 S.C. at 587, 496 S.E.2d at 33.

CONCLUSION

To promote the purpose of the Workers' Compensation Act, the statute is to be construed liberally for the protection of the injured worker, with jurisdictional doubts generally resolved in favor of inclusion. We are, nevertheless, constrained to interpret the Act as it is written and do not have the power to expand its scope.

The statutory language unequivocally exempts employers who do not regularly employ four or more employees. We adopt the definition of "regularly employed" as employment of the same number of persons with some constancy throughout a relevant time period. We rule the relevant time period should be identified by considering (1) the employer's established mode of operation; (2) whether the employer generally employs the jurisdictional number at any time during his operation, and (3) the period during which employment is definite and recurrent rather than occasional, sporadic, or indefinite.

[5] We are unable to identify from the handwriting on this check the purpose of its issue.

Taking our own view of the preponderance of the evidence, we conclude Tickle regularly employed less than four workers during the identified relevant time period. Tickle was exempt from the South Carolina Workers' Compensation Act when Claimant sustained his injury. The Appellate Panel of the Workers' Compensation Commission did not have jurisdiction to consider his claim.

Accordingly, the decision of the circuit court is

AFFIRMED.

HUFF and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ecclesiastes Production Ministries, Appellant,

v.

Outparcel Associates, LLC, Respondent.

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 4254
Submitted June 1, 2007 – Filed June 14, 2007

REVERSED

S. Allan Hill, of Greenville, for Appellant.

Ralph Gleaton, of Greenville, for Respondent.

ANDERSON, J.: Ecclesiastes Production Ministries ("EPM") appeals the grant of a directed verdict in regard to its third-party claims against Outparcel Associates, LLC ("Outparcel"). The trial judge granted Outparcel's motion based on a settlement agreement between EPM and JDL

Holdings, LLC ("JDL") that he deemed to require Outparcel's release as well. We **REVERSE**.[1]

FACTUAL/PROCEDURAL BACKGROUND

On July 18, 2001, EPM entered into an agreement with Outparcel for the lease of a building ("the Leased Property") in Greenville County. The lease contained a seven-page, handwritten addendum granting EPM the option to purchase the land and the right of first refusal.

On March 31, 2003, without EPM's knowledge, Outparcel entered into a bond for title agreement with JDL for the sale of a larger tract of land that included the Leased Property. JDL later filed suit against EPM to collect rent under the lease agreement between EPM and Outparcel.

EPM answered and brought Outparcel into the suit as a third-party defendant. EPM's pleadings asserted, inter alia, that Outparcel had failed to offer a right of first refusal to EPM before entering into the bond for title agreement with JDL. Additionally, EPM counterclaimed against JDL for fraud and tortious interference with its contractual right of first refusal.

Shortly before trial, on February 2, 2005, EPM and JDL settled their claims and released one another with a document they termed a "Mutual Settlement and Release" ("the Settlement Agreement"). The Settlement Agreement between EPM and JDL was conditioned upon EPM continuing to pursue its claims for damages against Outparcel. Under certain circumstances, EPM was to share an award from Outparcel. The document detailed how any recovered damages were to be divided between EPM and JDL.

EPM's third-party complaint against Outparcel came to trial on February 6, 2005. At the conclusion of EPM's case, Outparcel moved for a

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

directed verdict, arguing the Settlement Agreement had the effect of releasing EPM's claim against Outparcel. The trial court granted the motion.

STANDARD OF REVIEW

In ruling on a motion for a directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. Hurd v. Williamsburg County, 363 S.C. 421, 611 S.E.2d 488 (2005); Hinkle v. Nat'l Cas. Ins. Co., 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003); Huffines Co. v. Lockhart, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2005); Lingard v. Carolina By-Products, 361 S.C. 442, 446, 605 S.E.2d 545, 547 (Ct. App. 2004). The trial court must deny such a motion when the evidence yields more than one inference or its inference is in doubt. Steinke v. South Carolina Dep't of Labor, Licensing & Reg., 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999); Collins Entertainment, Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005); Sims v. Giles, 343 S.C. 708, 714, 541 S.E.2d 857, 860 (Ct. App. 2001). If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created and the motion should be denied. Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003); Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995); Huffines at 187, 617 S.E.2d at 129.

A motion for directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability. Carolina Home Builders, Inc. v. Armstrong Furnace Co., 259 S.C. 346, 358, 191 S.E.2d 774, 779 (1972). "When the evidence yields only one inference, a directed verdict in favor of the moving party is proper." Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 476-77, 514 S.E.2d 126, 130 (1999); accord Sims, at 714, 541 S.E.2d at 860; R & G Constr., Inc. v. Lowcountry Reg'l. Transp. Auth., 343 S.C. 424, 540 S.E.2d 113 (Ct. App. 2000). "The issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror." Small v. Pioneer Machinery, Inc., 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997). However, if the evidence taken as a whole is susceptible of more than one reasonable inference, the case must be submitted to the jury.

Quesinberry v. Rouppasong, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998); Getsinger v. Midlands Orthopaedic Profit Sharing Plan, 327 S.C. 424, 426, 489 S.E.2d 223, 223 (Ct. App. 1997); see also Heyward v. Christmas, 352 S.C. 298, 573 S.E.2d 845 (Ct. App. 2002) (if the evidence is susceptible of more than one reasonable inference, a jury issue is created and the court may not grant a directed verdict).

"When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." Harvey v. Strickland, 350 S.C. 303, 308, 566 S.E.2d 529, 532 (2002); accord Pond Place Partners v. Poole, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct. App. 2002); Boddie-Noell Props., Inc. v. 42 Magnolia P'ship, 344 S.C. 474, 482, 544 S.E.2d 279, 283 (Ct. App. 2000), aff'd as modified by 352 S.C. 437, 574 S.E.2d 726 (2002). "The issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror." Huffines, at 188, 617 S.E.2d at 129-30 (citing Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997)). However, this rule does not authorize the jury to the submission of speculative, theoretical, or hypothetical views. Small v. Pioneer Mach., Inc., 329 S.C. 448, 461, 494 S.E.2d 835, 842 (Ct. App. 1997). Our courts have recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court to determine. Bell v. Bank of Abbeville, 211 S.C. 167, 173, 44 S.E.2d 328, 330 (1947); Small, 329 S.C. at 461, 494 S.E.2d at 841-42. "A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture or speculation." Hanahan, 326 S.C. at 149, 485 S.E.2d at 908; Small, 329 S.C. at 461, 494 S.E.2d at 841-42. This does not mean the trial court should ignore facts unfavorable to the opposing party. Long v. Norris & Assocs., Ltd., 342 S.C. 561, 568, 538 S.E.2d 5, 9 (Ct. App. 2000); Love v. Gamble, 316 S.C. 203, 208, 448 S.E.2d 876, 879 (Ct. App. 1994). In deciding whether to grant or deny a directed verdict motion, the court is concerned only with the existence or nonexistence of evidence. Pond Place Partners, Inc., 351 S.C. at 15, 567 S.E.2d at 888.

An appellate court will reverse only where there is no evidence to support the trial judge's ruling, or where the ruling was controlled by an error of law. Clark v. S.C. Dep't of Public Safety, 362 S.C. 377, 382-83, 608

S.E.2d 573, 576 (2005); Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999); Abu-Shawareb v. S.C. State Univ., 364 S.C. 358, 613 S.E.2d 757 (Ct. App. 2005); Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 418 (Ct. App. 2000). Essentially, this court must resolve whether it would be reasonably conceivable to have a verdict for a party opposing the motion under the facts as liberally construed in the opposing party's favor. Harvey, 350 S.C. at 309, 566 S.E.2d at 532; Hanahan, 326 S.C. at 149, 485 S.E.2d at 908.

LAW/ANALYSIS

EPM argues the trial judge erred in granting Outparcel's motion for a directed verdict on the ground that the mutual release granted by EPM and JDL to one another had the effect of releasing Outparcel as well. EPM avers that viewing the facts in the light most favorable to the nonmoving party, the law of contract construction does not allow for finding that the Settlement Agreement provides for Outparcel's release from EPM's third-party claim. We agree.

A. The Extant Precedent

1. Settlement Agreements

The term "release" has been defined as the "relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced." 76 C.J.S. Release § 2 (1994). A release is an agreement providing that a duty owed to the maker of the release is discharged immediately. Id.; see also Black's Law Dictionary 1315-16 (6th ed. 1990) (a release is the act of giving up a right or claim to the person against whom it could have been enforced). Whether a particular agreement constitutes a release is to be determined from the intent of the parties. Id.

Under the common law, the release of one of multiple joint tortfeasors, unavoidably resulted in the release of all. Bartholomew v. McCartha, 255 S.C. 489, 179 S.E.2d 912 (1971). In response to the obvious quandaries

caused by this rule, South Carolina jurisprudence adopted documents in lieu of a general release: (1) a covenant not to sue; and (2) a covenant not to execute. A covenant not to sue was recognized and approved in Powers v. Temple, 250 S.C. 149, 156 S.E.2d 759 (1967). A covenant not to execute received the imprimatur and approbation of our supreme court in Poston by Poston v. Barnes, 294 S.C. 261, 363 S.E.2d 888 (1987).

In Ackerman v. Travelers Indemnity Co., 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995), this court discussed the genesis of the covenant not to sue:

> At common law, a valid release of one joint tort-feasor was usually a release of all the joint wrongdoers and was a bar to a suit against any of them for the same wrong. At the base of this rule was the theory that there could be but one compensation for the joint wrong. If the injured party was paid by one of the wrongdoers for the injury he had suffered, each wrongdoer being responsible for the whole damage, his cause of action was satisfied in exchange for a release, and he could not proceed against the others. Thus a release of one joint wrongdoer released all. But when the consideration received for the release was not full compensation for the injury, the purpose for the harsh rule did not exist. To allow for this, the covenant not to sue was developed.

Ackerman, 318 S.C. at 146-47, 456 S.E.2d at 413. Technically, in the case of a release, there is an immediate discharge; whereas, in the case of a covenant not to sue, there is merely an agreement not to prosecute a suit. 66 Am. Jur. 2d Release § 2 (1973).

The differences between a covenant not to sue and a covenant not to execute were succinctly explained in Poston:

> Other jurisdictions hold that a Covenant Not To Execute is not a satisfaction or a release and that its

> legal effect is similar to that of a Covenant Not To Sue because it does not operate to release other joint tortfeasors. A Covenant Not To Execute is a promise not to enforce a right of action or execute a judgment when one had such a right at the time of entering into the agreement. A Covenant Not to Sue and a Covenant Not to Execute are so closely akin that a major distinguishing factor is that the latter is normally executed when a settlement occurs after the filing of a lawsuit, while the former is entered into before a lawsuit is filed. In South Carolina when a Covenant Not To Sue has been entered into, usually the covenanting tortfeasor is no longer a party to the litigation.
>
> We are cognizant that litigants are free to devise a settlement agreement in any manner that does not contravene public policy or the law. In fact, this Court encourages such compromise agreements because they avoid costly litigation and delay to an injured party. However, these settlement agreements must be carefully scrutinized in order to determine their efficiency and impact upon the integrity of the judicial process.

Poston, 294 S.C. at 263-64, 363 S.E.2d at 889-90 (citations omitted).

Bartholomew v. McCartha addressed the efficacy of a settlement agreement's release as to the liability of a third-party and manifestly replaced "the ancient common-law rule, that regardless of the intention of the parties, the release of one joint tort-feasor releases all." 255 S.C. 489, 491, 179 S.E.2d 912, 913 (1971) (quoting Mickle v. Blackmond, 252 S.C. 202, 224, 166 S.E.2d 173, 182 (1969)). In Bartholomew the plaintiff was involved in a car crash with two other vehicles. After the victim settled out of court with one of the two tortfeasor defendants, the remaining defendant claimed the other parties' agreement released him from liability as well. Declining to

adopt the traditional common-law rule that the release of one joint tortfeasor discharged all others, the court held:

> Being untrammeled by the ancient rule which, in our view, tends to stifle settlements, defeat the intention of parties and extol technicality, we adopt the view that the release of one tort-feasor does not release others who wrongfully contributed to plaintiff's injuries unless this was the intention of the parties, or unless plaintiff has, in fact, received full compensation amounting to a satisfaction. It, therefore, becomes unnecessary for us to determine whether the instrument involved here is a release rather than a covenant.

Bartholomew at 492, 179 S.E.2d at 914.

Finding no merit to the appellants' contention that the circuit court erred in finding the plaintiff's release of another defendant did not, as a matter of law, operate to exonerate the appellants from liability, in Scott by McClure v. Fruehauf Corp., 302 S.C. 364, 396 S.E.2d 354 (1990), the South Carolina Supreme Court enunciated:

> The release of one tortfeasor does not constitute a release of others who contributed to the plaintiff's injuries unless the parties intended such a release or the plaintiff received full satisfaction. Bartholomew v. McCartha, 255 S.C. 489, 179 S.E.2d 912 (1971). The release here evidences no intent to release others from liability and in fact contemplates further litigation against other tortfeasors to fully compensate [the plaintiff].

Id. at 368, 396 S.E.2d at 356.

In Loyd's Inc. by Richardson Const. Co. of Columbia, S.C., Inc. v. Good, 306 S.C. 450, 412 S.E.2d 441, (Ct. App. 1991), a release was executed

between a subcontractor and pond owner who had suffered siltation damage. The agreement provided full satisfaction of the pond owner's claims, and therefore had the efficacy of releasing the general contractor and upstream property owner from liability as well. This court instructed:

> [B]efore the effective date of the [act creating a right of contribution of joint tortfeasors], the law was clear that the release of one tortfeasor served to release others who wrongfully contributed to the plaintiff's injuries only if the injured party and released party intended that result, or the injured party in fact received full compensation for his injuries amounting to a satisfaction. Following this reasoning, a covenant not to sue or a release which is not effective as a full release of all tortfeasors is a satisfaction "pro tanto" and reduces the amount of damages recoverable against the nonsettling tortfeasors by the amount of the consideration for the release.

Id. at 454, 412 S.E.2d at 444 (internal citations omitted).

After executing a release with other persons involved in their automobile accident, in Bowers v. South Carolina Dept. of Trans., 360 S.C. 149, 600 S.E.2d 543 (Ct. App. 2004), an injured motorist and her parents filed suit against the South Carolina Department of Transportation alleging its negligence in roadway maintenance contributed to the collision. Looking to the language of the release document, the Court of Appeals upheld the circuit court's award of summary judgment. The court based its determination on both prongs of Bartholomew, and concluded that, under the terms of the release, the parties received full compensation and intended that all claims for injuries would be relinquished:

> The terms of the Release do not evince an intent to limit its scope to any specifically identified parties. Rather, the Release is general and all encompassing in its scope. It clearly states that the Appellants released the tort-feasor "and all other

persons, firms or corporations liable, or who might be claimed to be liable." This language is a clear, explicit, and unequivocal indication of the parties' intent that *all* claims arising from the accident-now and in the future-are barred under the terms of the Release. Had Appellants intended a contrary result and desired to limit the operation of the Release to named persons only, the terms of the Release could have been easily tailored to that end. We are constrained by the plain, unambiguous language of the Release to find that Appellants' claims against SCDOT fall within the terms of the Release.

This result is also compelled under the second prong of Bartholomew. The Release clearly and unequivocally contemplates that the respective settlement payments to Appellants constituted a "full compensation amounting to a satisfaction."

Appellants, however, argue that "damages to be awarded for injury and resulting pain and suffering cannot be determined with mathematical precision" and this determination is, therefore, always "an issue of fact." They essentially argue that full compensation is always a function of the jury's discretion, rendering summary judgment unavailable. While we agree that damages, especially non-pecuniary damages, in a personal injury claim are difficult to ascertain in light of the broad discretion accorded the trier of fact, Appellants misconstrue the precise issue before us. The issue is not determining the exact amount (assuming liability) a jury would award. Instead, the issue is "*full compensation amounting to a satisfaction*." Id. at 491, 179 S.E.2d at 913 (emphasis added).

> A "satisfaction" is generally defined as "[t]he discharge of an obligation by paying a party what is due to him" or "[t]he performance of a substituted obligation in return for the discharge of the original obligation." Black's Law Dictionary 1342 (6th ed. 1990). In cases involving a disputed or liquidated claim arising in contract or tort, the parties will reach an "accord" whereby one of the parties agrees to accept as "satisfaction" of the disputed claim some performance or undertaking different from that which he considers himself entitled. See South Carolina Farm Bureau Mut. Ins. Co. v. Kelly, 345 S.C. 232, 239, 547 S.E.2d 871, 875 (Ct. App. 2001) (noting that "[a]n accord and satisfaction occurs when there is (1) an agreement to accept in discharge of an obligation something different from that which the creditor is claiming or is entitled to receive; and (2) payment of the consideration expressed in the new agreement.") (quoting Tremont Constr. Co. v. Dunlap, 310 S.C. 180, 182, 425 S.E.2d 792, 793 (Ct. App. 1992); Mercury Marine Div. v. Costas, 288 S.C. 383, 386, 342 S.E.2d 632, 633 (Ct. App. 1986)). Indeed, parties regularly reach compromise settlements for a variety of reasons, including the vagaries and unpredictability of litigation and the desire for finality. Where, as here, a party accepts "a full and final compromise adjustment and settlement of any and all claims," such amounts to a Bartholomew satisfaction, thereby extending the preclusive effect of the release to nonparties to the instrument.

Bowers v. Dept. of Transp., 360 S.C. 149, 154-55, 600 S.E.2d 543, 545-46 (Ct. App. 2004) (emphasis in original).

2. Contract Interpretation

A release is a contract and contract principles of law should be used to determine what the parties intended. See Bowers v. Dept. of Transp., 360 S.C. 149, 153, 600 S.E.2d 543, 545 (Ct. App. 2004) (stating "The Release is a contract" and applying South Carolina's rules of contract construction); see also Lowery v. Callahan, 210 S.C. 300, 300, 42 S.E.2d 457, 458 (1947) (noting that the "same principles of adequacy of consideration which apply to other contracts, govern as to releases"); Hyman v. Ford Motor Co., 142 F. Supp. 2d 735 (D.S.C. 2001) (applying South Carolina contract law principles to determine validity of a release); 18 S.C. Jur. Release § 2 (2003) ("Because a release is a contract, principles of law applicable to contracts generally are also applicable to releases."); 76 C.J.S. Release § 2 (1994) (stating that a release is contractual in nature).

"In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties." Southern Atl. Fin. Servs., Inc. v. Middleton, 349 S.C. 77, 80-81, 562 S.E.2d 482, 484-85 (Ct. App. 2002); accord D.A. Davis Constr. Co., Inc. v. Palmetto Props., Inc., 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984); Williams v. Teran, Inc., 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976); RentCo., a Div. of Fruehauf Corp. v. Tamway Corp., 283 S.C. 265, 267, 321 S.E.2d 199, 201 (Ct. App. 1984). "Contracts should be liberally construed so as to give them effect and carry out the intention of the parties." Mishoe v. Gen. Motors Acceptance Corp., 234 S.C. 182, 188, 107 S.E.2d 45, 47 (1958).

The parties' intention must, in the first instance, be derived from the language of the contract. Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003); C.A.N. Enters., Inc. v. S.C. Health & Human Services Fin. Comm'n., 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) ("In construing terms in contracts, this Court must first look at the language of the contract to determine the intentions of the parties."); Jacobs v. Service Merch. Co., 297 S.C. 123, 375 S.E.2d 1 (Ct. App. 1988). To discover the intention of a contract, the court must first look to its language—if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect. Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973). "Parties are

governed by their outward expressions and the court is not at liberty to consider their secret intentions." Blakeley v. Rabon, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976); Ellie, Inc. v. Miccichi, 358 S.C. 78, 93-94, 594 S.E.2d 485, 493-94 (Ct. App. 2004); accord Kable v. Simmons, 217 S.C. 161, 166, 60 S.E.2d 79, 81 (1950).

The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof. Thomas-McCain, Inc. v. Siter, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977); see also Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000) ("The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the whole scope and effect of the language used."). "Documents will be interpreted so as to give effect to all of their provisions, if practical." Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997) (citing 17A Am. Jur. 2d Contracts § 385 (1991)). In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered. Klutts Resort Realty, Inc., 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977); Bruce v. Blalock, 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1962); Mattox v. Cassady, 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct. App. 1986).

In Brady v. Brady, 222 S.C. 242, 72 S.E.2d 193 (1952) the South Carolina Supreme Court asseverated:

> It is fundamental that in the construction of the language of a [contract], it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning.
>
> Agreements should be liberally construed so as to give them effect and carry out the intention of the parties. In arriving at the intention of the parties to a lease, the subject matter, the surrounding circumstances, the situation of the parties, and the object in view and intended to be accomplished by

> the parties at the time, are to be regarded, and the lease construed as a whole. Different provisions dealing with the same subject matter are to be read together.

Id. at 246-47, 72 S.E.2d at 195.

If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and its language determines the instrument's force and effect. Jordan v. Security Group, Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993); Blakeley at 72, 221 S.E.2d at 769. "Where an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." Ellie at 93, 594 S.E.2d at 493 (quoting Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001)). However, where an agreement is ambiguous, the court should seek to determine the parties' intent. Smith-Cooper v. Cooper, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct. App. 2001); Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 390, 503 S.E.2d 184, 187 (Ct. App. 1998).

"A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear." Ellie at 94, 594 S.E.2d at 493; accord Bruce at 160, 127 S.E.2d at 441; Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997). "[A]n ambiguous contract is one capable of being understood in more senses than one, an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning." Carolina Ceramics, Inc. v. Carolina Pipeline Co., 251 S.C. 151, 155-56, 161 S.E.2d 179, 181 (1968) (citation omitted)

"Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage." Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) (quoting 17A C.J.S. Contracts § 324)

The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994); Jordan v. Security Group, Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993).

Whether a contract's language is ambiguous is a question of law. South Carolina Dep't of Natural Resources v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299 (2001); Southern Atl. Fin. Servs., Inc. v. Middleton, 349 S.C. 77, 80-81, 562 S.E.2d 482, 484-85 (Ct. App. 2002), aff'd as modified, 356 S.C. 444, 590 S.E.2d 27 (2003). Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. Id.; see also Charles v. B & B Theatres, Inc., 234 S.C. 15, 18, 106 S.E.2d 455, 456 (1959) ("[W]hen the written contract is ambiguous in its terms, ... parol and other extrinsic evidence will be admitted to determine the intent of the parties.") (citation omitted). The determination of the parties' intent is then a question of fact for the jury to determine. South Carolina Dep't of Natural Resources, 345 S.C. at 623, 550 S.E.2d at 303.

B. The Case Sub Judice

In granting Outparcel's motion for a directed verdict, the trial judge stated:

> I'm going to grant the motion for a directed verdict based on this mutual settlement and release that I marked as a Court's Exhibit. And just reading that there is no question that this lease and any causes of action that arise out of it, have been transferred to Mr. Ashy and his company, JDL Holdings. That while I don't condone the actions of Mr. Gleaton's client, they are in privity, in privity with Mr. Ashy and his company with respect to this agreement. And that all causes of action then existing or now existing at the time of the release arising hereafter, related to

> the events set forth in the lawsuit which could have been asserted in the lawsuit or related to the business relationship among the parties were fully settled. So I'm granting the directed verdict.

Although the judge was somewhat enigmatical, it appears he based the directed verdict award on Outparcel's contention that the Settlement Agreement between EPM to JDL had the effect of releasing Outparcel from EPM's claim for breach of their contractual right of first refusal. This argument centered upon the following provision in the Settlement Agreement:

> 3. Release by Danny Yopp d/b/a Ecclesiastes Ministries. Danny Yopp d/b/a Ecclesiastes Ministries and its members, officers, directors, employees, heirs, successors and assigns, hereby release and forever discharge JDL Holdings, LLC, and any shareholders, officers, directors, employees, agents, servants, successors, and assigns, and any parent, subsidiary or affiliate thereof, and any other persons, firms, or corporations who are or may be liable, now or in the future, from any and all claims, demands, actions, or causes in action, whether in law or in equity, whether *ex contractu* or *ex delicto*, for damages of any kind, including compensation, loss of profits or income, expenses, consequential damages, punitive damages, costs, attorney's fees, expert witness fees, or any other damages, whether known or unknown, presently existing or which may arise in the future, arising out of, in connection with, or in any way related to the events set forth in the Lawsuit, or any other event, failures or breaches which are asserted or which could have been asserted in the Lawsuit.

Following South Carolina's rules of contract construction, the quoted language of the Settlement Agreement cannot possibly bear the meaning placed upon it by Outparcel and the circuit court. Executed only days before

the trial between EPM and JDL was scheduled to begin, the first sentence of the Settlement/Release states: "This Mutual Release is . . . by and between JDL Holdings, LLC, Plaintiff and Danny Yopp d/b/a Ecclesiastes Productions Ministries." Palpably, the Settlement Agreement was exclusively between EPM and JDL. Outparcel is not, and was not invited to be, a party to the Settlement Agreement. Despite Outparcel's urging to the contrary, the release of "any other persons, firms, or corporations who are or may be liable, now or in the future, from any and all claims, demands, actions, or causes in action" can only reasonably be interpreted to include those persons and entities involved in the claims directly between EPM and JDL.

EPM and JDL mutually settled and released the other from what the Settlement Agreement captioned as, "the Lawsuit." While the meaning of the term "the Lawsuit" may refer to the entirety of the litigation, pellucidly EPM and JDL did not intend to include any claims against Outparcel in what was being settled, as the agreement discusses the continued pursuit of claims against Outparcel by both EPM and JDL. Unlike the general release in Bowers, the Settlement Agreement here clearly evinces an intent to limit its scope to the claims asserted by EPM and JDL against one another.

The Settlement Agreement is predicated upon the continuation of EPM's claims against Outparcel for fraud and contractual breach of the right of first refusal. The fifth paragraph of the Settlement Agreement reads:

> 5. Payment by Danny Yopp d/b/a Ecclesiastes Ministries: In consideration of the aforementioned covenants and promises Danny Yopp d/b/a **Ecclesiastes Ministries, agrees to pay JDL Holdings, LLC the following:**
>
> A. One Hundred Thousand ($100,000.00) Dollars as settlement of JDL's claims for past due rents, attorney's fees, etc.
>
> i. **Payment of the aforementioned $100,000.00 shall be due and payable if, and only if, Danny**

Yopp and/or Ecclesiastes Ministries are successful in obtaining a judgment against Outparcel Associates, LLC on the Cross Claims filed in said Lawsuit for an amount in excess of $200,000.00 and is successful in collecting on the judgment as provided herein. **Danny Yopp agrees to vigorously pursue recovery of all of its damages as demanded in its complaint against Outparcel.** In the event Danny Yopp and/or Ecclesiastes Ministries are successful in obtaining a judgment against Outparcel Associates, LLC on the Cross Claims filed in said Lawsuit for an amount less than $200,000.00, no amount will be due JDL Holdings, LLC or Peter Ashy. If Danny Yopp is awarded a judgment in excess of two hundred thousand dollars ($200,000), the first one hundred thousand ($100,000) dollars received toward satisfaction of the judgment Danny Yopp may obtain against Outparcel will be free and clear of any claim by JDL Holdings, LLC or Peter Ashy. Any amounts received to satisfy the judgment in excess of $100,000 dollars will be divided 20% in favor of JDL Holdings and 80% in favor of Danny Yopp up to a maximum of $100,000 dollars (less attorney fees as provided herein) being paid to JDL Holdings to satisfy the terms of this settlement agreement. The actual amounts due and payable will be directly contingent upon the judgment obtained by Danny Yopp, if any, and those monies received to satisfy said judgment, if any. The parties further agree their respective attorneys will execute an additional addendum to this agreement following the outcome of the February 9th trial, in which the attorney's [sic] will set forth in detail the actual judgment amounts and the ratio's [sic] and/or percentage each parties [sic] will be entitled to any collected monies. In the event Danny Yopp engages the services of an attorney to pursue collection of any

> judgment amount awarded, any reasonable contingency fees and costs charged by the attorney will be applied to any amounts received before applying the distribution percentages shown above. Payment will be due within fifteen (15) days of Danny Yopp and/or Ecclesiastes Production Ministries receiving cash or other funds as satisfaction of the judgment it anticipates obtaining on claims filed in this Lawsuit.
>
> . . . .
>
> iv. The parties also recognize that **JDL Holdings, LLC is in the process of filing a claim against Outparcel Associates, LLC** and Solomon Bekele for breach of contract, conversion and other related claims. The parties agree that any judgment obtained by JDL Holdings, LLC against Outparcel in the subsequent suit will be subordinate to the first one hundred thousand dollars of the escrowed funds generated by the sale of the disputed property and being held by North Georgia Title, Inc., the Qualified Intermediary, or any real estate purchased with those funds, which may be available to satisfy both judgments. This provision in no manner limits, restricts or otherwise subordinates JDL Holdings, LLC ability to collect any judgment it may obtain against Solomon Bekele individually.

(Emphasis added).

JDL's recovery from EPM is entirely dependent on EPM successfully recovering in its suit with Outparcel. Key provisions of the agreement contemplate successful litigation against Outparcel, not its release. EPM's settlement payment to JDL is conditioned upon EPM's continued pursuit of its claims against Outparcel: "Payment . . . shall be due and payable if, and only if Danny Yopp and/or [EPM] are successful in obtaining a judgment

against Outparcel . . . ." EPM agrees to "vigorously pursue recovery of all of its damages as demanded in its complaint against Outparcel." Furthermore, the agreement discusses a lawsuit JDL has filed against Outparcel. In order for this section to be efficaciousness and have any purpose whatsoever, indubitably the Settlement Agreement must be interpreted as effecting solely the suit between EPM and JDL. An interpretation otherwise would render this section absurd and nugatory.

CONCLUSION

Based on the foregoing, the circuit court's grant of a directed verdict is

REVERSED.

HUFF and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Furman Thompson, Appellant.

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 4255
Submitted May 1, 2007 – Filed June 18, 2007

AFFIRMED

Appellate Defender Eleanor Duffy Cleary, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Shawn L. Reeves, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

WILLIAMS, J.: Furman Thompson appeals his convictions for first degree burglary and attempted armed robbery, claiming the judge erred in failing to direct a verdict of not guilty. We affirm.

FACTS

On the morning of February 16, 2004, Thompson met with Wanda Harris and discussed whether she knew of a "lick." Harris testified a "lick" is a target for a robbery. Later that day, Harris called Thompson and told him about a potential lick and asked him to meet her. Thompson showed up approximately one hour later with Darrel Sturkey, the codefendant in the underlying case. Sturkey and Harris planned the details of the burglary while Thompson spoke with Tyrone Scott, who accompanied Harris to the scene.

According to the plan, Harris walked alone to the apartment to investigate the potential lick under the guise of purchasing crack cocaine. Harris testified that as she approached the apartment, Scott lagged behind her. Just before Harris entered the apartment, she turned around and did not see Thompson or Sturkey.

Harris then entered the apartment and began a conversation with Torrey Hudson, who lived there, while Hudson's friend, Andre Chiles, sat on the couch watching television. Chiles had a gun on the couch next to him. While Harris attempted to buy some crack cocaine, Scott knocked on the door and was let into the apartment. Harris and Scott are frequently together so this did not alarm Hudson or Chiles. Scott informed Hudson he knew of other potential customers in case Hudson wanted to sell more crack cocaine, but Hudson informed Scott he did not have any more crack. Shortly thereafter, Harris and Scott attempted to leave the apartment.

As Harris walked out of the door, she saw Sturkey standing against the outer wall of the apartment pulling a ski mask over his head. Sturkey pushed Harris out of the way, stepped into the apartment and fired a gun into the apartment. Chiles immediately grabbed his gun and returned fire towards the

intruder. After several shots were exchanged between Sturkey and Chiles, Chiles' gun jammed and he retreated into the bathroom to clear the gun. When Chiles came out of the bathroom, the apartment was empty.

As a result of the altercation, Chiles sustained two gunshots to the abdomen. Sturkey sustained one gunshot to his right leg. Nothing was stolen from the apartment or from either of the occupants. Thompson and Sturkey were charged with first degree burglary and attempted armed robbery, and Sturkey was also charged with assault and battery with attempt to kill. Thompson and Sturkey were tried together, and the jury convicted each on their respective charges.

DISCUSSION

Thompson argues the trial judge erred by not directing a verdict of not guilty because the state failed to present any direct or substantial circumstantial evidence to show that Thompson was guilty of first degree burglary or attempted armed robbery, either as a principal or as an accomplice. We disagree.

When analyzing the denial of a directed verdict motion, this Court must view the evidence in the light most favorable to the State. State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). "The trial court, in a directed verdict motion, is concerned with the existence or nonexistence of evidence, not with its weight." State v. Elmore, 368 S.C. 230, 234, 628 S.E.2d 271, 273 (Ct. App. 2006). The trial court must be affirmed if the record contains any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused or from which guilt may be fairly and logically deduced. State v. Avery, 333 S.C. 284, 294, 509 S.E.2d 476, 482 (1998); State v. Williams, 303 S.C. 274, 276, 400 S.E.2d 131, 132 (1991).

"Under the 'hand of one is the hand of all' theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002). "A defendant may be

convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." Id. at 194, 562 S.E.2d at 325.

Mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. Id. at 195, 562 S.E.2d at 325. However, "presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a [principal]." State v. Hill, 268 S.C. 390, 395-96, 234 S.E.2d 219, 221 (1977).

A person is guilty of first degree burglary when he enters a dwelling without consent and with intent to commit a crime in the dwelling and either:

> (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime: (a) is armed with a deadly weapon or explosive; or (b) causes physical injury to a person who is not a participant in the crime; or (c) uses or threatens the use of a dangerous instrument; or (d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or . . . (3) the entering or remaining occurs in the nighttime.

S.C. Code Ann. § 16-11-311 (Supp. 2006). A person is guilty of attempted armed robbery if the person has a specific intent to commit armed robbery. State v. Nesbit, 346 S.C. 226, 231, 550 S.E.2d 864, 866-67 (Ct. App. 2001). "Robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear." State v. Bland, 315 S.C. 315, 317, 457 S.E.2d 611, 612 (1995). The crime is "armed robbery" when a person commits a robbery while armed with a deadly weapon. State v. Tasco, 292 S.C. 270, 272, 356 S.E.2d 117, 118 (1987).

Testimony in this case establishes that the codefendant, Sturkey, entered the apartment without permission, during the nighttime, with a gun, and intended to commit the crime of armed robbery. Therefore, the crime of burglary in the first degree with respect to Sturkey was established

sufficiently to withstand a directed verdict motion. Testimony also showed that it was the intent of Sturkey, at the very least, to use a deadly weapon to rob Hudson of money, goods, or personal property. Therefore, the crime of attempted armed robbery with respect to Sturkey was sufficiently established to withstand a directed verdict motion. The question that remains before us is whether Sturkey's crimes can be imputed to Thompson either as a principal or under a theory of accomplice liability.

Sturkey's statement, which was read into evidence during Officer Bobby Carias' testimony, establishes that Sturkey and three others were together when they came up with the plan to rob Hudson. Later when everyone ran from the scene, "the guy asked if [Sturkey] was okay. [Sturkey] told him [he] was okay. . . . We got in the car and went home." Sturkey's statement constitutes direct evidence that Sturkey arrived at the scene and left the scene with one of the three other participants.

Harris' testimony constitutes direct evidence that Thompson asked her if she knew of a lick, then later spoke to her on the phone about a possible lick. Further, it establishes Thompson then showed up with Sturkey at the apartment complex where Harris informed him there was a possible lick, and Thompson was present in the vicinity while Harris and Sturkey planned the robbery.

In Hill, the appellant previously discussed the robbery with the perpetrators, appeared at the crime scene, and may have viewed the commission of the robbery, but he was possibly unaware of the final planning and did not accompany the perpetrators as they committed the robbery. Hill at 396, 234 S.E.2d at 221. The Court in Hill found the evidence justified submission of the case to the jury. Id. Likewise, here Thompson discussed the robbery, appeared at the crime scene with Sturkey, and may have viewed the attempted robbery. At the very least, Thompson aided the commission of the crime by driving Sturkey to the scene and encouraged the crime by setting the events in motion earlier that day.

Thus, under the hand of one is the hand of all theory of accomplice liability, acts committed by Sturkey are imputed to Thompson making him

guilty of any acts done incidental to the execution of the common design or scheme of the crime. State v. Curry, 370 S.C. 674, 684, 636 S.E.2d 649, 654 (Ct. App. 2006). Therefore, viewing the evidence in the light most favorable to the State, the trial judge properly denied Thompson's motion for a directed verdict on each charge and submitted the case to the jury.

Accordingly, the trial court's decision is

AFFIRMED.[1]

STILWELL, and SHORT, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frederick D. Shuler, Appellant,

v.

Tri-County Electric Co-op, Inc., Employer, and Federated Rural Electric Insurance Corp., Carrier, Respondents.

Appeal From Richland County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 4256
Heard April 10, 2007 – Filed June 18, 2007

AFFIRMED

Kevin Hayne Sitnik and John Gressette Felder, Jr., both of Columbia, for Appellant.

W. Hugh McAngus, Weston Adams, III, and Mary Margaret Hyatt, all of Columbia, for Respondents.

Samuel F. Painter, of Columbia, for Amicus Curiae.

STILWELL, J.: Frederick D. Shuler filed this action alleging entitlement to workers' compensation benefits. Shuler appeals the circuit court's ruling he was not an employee of Tri-County Electric Co-op, Inc. (the Co-op) and therefore not entitled to coverage. We affirm.

FACTS

The Co-op is a rural electric cooperative.[1] Shuler served on the Co-op's Board of Trustees. Shuler requested authorization from the Co-op to attend the annual convention of the National Rural Electric Cooperative Association in Dallas. Although Shuler's attendance was not mandatory, and he was not a voting delegate at the meeting, the Co-op approved his request. Shuler was injured in an automobile accident while driving to Dallas and filed a workers' compensation claim. The Co-op denied the claim, contending Shuler was not an employee.

As a board member, Shuler received compensation from the Co-op, including reimbursed expenses and a per diem allowance for attendance at meetings. This compensation was designated on Shuler's IRS 1099 form issued by the Co-op as "Nonemployee compensation." Shuler also received benefits from enrollment in the Co-op's retirement and health insurance plans.

The single commissioner found Shuler was not the Co-op's employee and was therefore ineligible for workers' compensation benefits. The full commission reversed the commissioner. The circuit court reversed the full commission, reinstating the single commissioner's decision.

STANDARD OF REVIEW

The existence of an employer-employee relationship is a factual question that determines the jurisdiction of the Workers' Compensation Commission. Nelson v. Yellow Cab Co., 349 S.C. 589, 594, 564 S.E.2d 110, 112 (2002). When an issue involves jurisdiction, the appellate court can take

[1] The parties stipulated many of the facts before the single commissioner.

its own view of the preponderance of the evidence. Dawkins v. Jordan, 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000). "In determining jurisdictional questions, doubts of jurisdiction will be resolved in favor of inclusion of employees within workers' compensation coverage rather than exclusion." Wilson v. Georgetown County, 316 S.C. 92, 94, 447 S.E.2d 841, 842 (1994).

LAW/ANALYSIS

Shuler argues he is an employee of the Co-op and therefore entitled to workers' compensation benefits. We disagree.

To decide the issue of employment in this case, we are required to review: 1) the Workers' Compensation Act, 2) the Electric Cooperative Act, and 3) the Co-op's by-laws. We shall do so seriatim.

In interpreting the Workers' Compensation Act, we are required to construe the statutes liberally in favor of coverage. Peay v. U.S. Silica Co., 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993). The primary section of the Workers' Compensation Act involved in this case is section 42-1-130. Section 42-1-130 defines an employee as a "person engaged in an employment under any appointment [or] contract of hire, . . . expressed or implied, oral or written . . . ." S.C. Code Ann. § 42-1-130 (Supp. 2006).

In construing the Workers' Compensation Act to define an employee, our court has held that coverage depends on the existence of an employment relationship. Edens v. Bellini, 359 S.C. 433, 439, 597 S.E.2d 863, 866 (Ct. App. 2004). The 'contract of employment' is the jurisdictional factor used to determine if an employment relationship exists. Alewine v. Tobin Quarries, Inc., 206 S.C. 103, 109, 33 S.E.2d 81, 83 (1945). Although no formality is required, the contract is established if the parties recognize each other as employer and employee. Id. Furthermore, an employee's right to demand payment for his services from the employer is essential to the establishment of an employment relationship. Kirksey v. Assurance Tire Co., 311 S.C. 255, 257, 428 S.E.2d 721, 723 (Ct. App. 1993), aff'd, 314 S.C. 43, 443 S.E.2d 803 (1994). For example, in Doe v. Greenville Hosp. Sys., 323 S.C. 33, 39-40, 448 S.E.2d 564, 567-68 (Ct. App. 1994), this court held an unpaid volunteer

candy striper was not the employee of a hospital. Likewise, in McCreery v. Covenant Presbyterian, this court found an unpaid church volunteer not an employee of the church for workers' compensation purposes. 299 S.C. 218, 383 S.E.2d 264 (1989), rev'd on other grounds, 303 S.C. 271, 400 S.E.2d 130 (1990). See also Kirksey, 311 S.C. at 257, 428 S.E.2d at 723 (finding unpaid daughter of store owner not an employee). See generally 3 Larson's Workers' Compensation Law § 65.01 (2006).

To correctly determine the relationship of the parties in this case, we must next turn our attention to the language of the Electric Cooperative Act and the by-laws adopted by the individual co-op pursuant to the provisions of that act. The Electric Cooperative Act governs rural electric cooperatives in South Carolina. See S.C. Code Ann. §§33-49-10 to -1450 (2006 & Supp. 2006). Section 33-49-630 of the Electric Cooperative Act, entitled "Compensation or employment of trustee," provides:

> The bylaws may make provision for the compensation of trustees; provided, however, that compensation shall not be paid except for actual attendance upon activities authorized by the board. The bylaws may also provide for the travel, expenses and other benefits of trustees, as set by the board. A trustee, except in emergencies, shall not be employed by the cooperative in any other capacity involving compensation.

S.C. Code Ann. § 33-49-630 (2006) (emphasis in original).

While we are required to construe the Workers' Compensation Act liberally in favor of coverage, the same is not true in the interpretation and construction of either the Electric Cooperative Act or the by-laws adopted pursuant thereto. With regard to these enactments, we apply more general rules of construction. The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. S.C. Dep't of Transp. v. First Carolina Corp., 369 S.C. 150, 153-54, 631 S.E.2d 533, 535 (2006). The court should give words their plain and ordinary meaning, without resort to

subtle or forced construction to limit or expand the statute's operation. Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006).

The plain language of section 33-49-630 allows a rural electric cooperative to provide for the compensation of trustees and limits this compensation "for actual attendance upon activities authorized by the board." S.C. Code Ann. §33-49-630 (2006). However, this section does not mandate the compensation or employment of a trustee, nor does it create in the trustee a right to demand payment. See, e.g., Nallan v. Motion Picture Studio Mechs. Union, 360 N.E.2d 353, 353 (N.Y. 1976) (emphasizing, in the context of whether a board member of a labor union was an employee of the union, that the board member's stipend did not constitute a salary or compensation under workers' compensation laws). We also find instructive the language of the Electric Cooperative Act itself, which prohibits a trustee from being employed by the cooperative in any other capacity involving compensation except in emergency situations. We are able to discern no right to demand a wage arising pursuant to section 33-49-630 sufficient to satisfy the test for the creation of an employment relationship as required in court decisions. Nor do we discern from the Electric Cooperative Act any intent by the legislature to create an employment relationship for purposes of workers' compensation benefits.

Finally, we look to the by-laws of the individual co-op to determine if they provide a basis for concluding that an employment relationship existed between the Co-op and Shuler. The by-laws are an integral component establishing Shuler's relationship as a board member of Tri-County Electric Co-op. The by-laws should be construed in the same manner a contract is construed because they form the basis for the relationship between the parties, as does a typical contract. "The primary purpose of all rules of contract construction is to determine the intent of the parties." Goldston v. State Farm Mut. Auto. Ins. Co., 358 S.C. 157, 170, 594 S.E.2d 511, 518 (Ct. App. 2004). In determining the parties' intentions, the court must read the contract as a whole. S. Atl. Fin. Servs., Inc. v. Middleton, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003). When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the

contract's force and effect, and the court must construe it according to its plain, ordinary, and popular meaning. Moser v. Gosnell, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999).

Article IV, Section 9 of the by-laws provides, in pertinent part:

> Board members shall not receive any salary for their services as such, except that the board may authorize a fixed sum for each day or portion thereof spent on Cooperative business . . . . If authorized by the board, board members may also be reimbursed for expenses actually and necessarily incurred in carrying out such cooperative business or granted a reasonable per diem allowance . . . .

Other provisions of the by-laws provide that trustees are elected by the Co-op members and serve for a fixed term of three years. The by-laws provide that trustees must be members, but employees do not have to be members. They also prohibit any employee from being a trustee while being simultaneously employed by the Co-op or having been employed in the preceding five years. "No person shall be eligible to become or remain a board member . . . who . . . is employed by the Cooperative or was employed by the Cooperative at any time during the preceding five (5) years."

Although the by-laws permit compensation on a per diem basis, provide for trustees to be reimbursed for actual expenses incurred, and allow other benefits, when read as a whole the by-laws do not create an employment relationship. Rather, these benefits and compensation constitute gratuitous payments, allowed in the board's discretion, and are not compensation for services rendered.

For the foregoing reasons, we hold Shuler is not the Co-op's employee, and he is not entitled to coverage under the workers' compensation act. Accordingly, the circuit court's decision is

AFFIRMED.[2]

HEARN, C.J., and GOOLSBY, J., concur.

[2] Shuler contends the circuit court erred in several other aspects of its analysis. However, based on our conclusion that Shuler is not the Co-op's employee, we need not address these issues. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

George Spare, Appellant.

Appeal From Beaufort County
Howard P. King, Circuit Court Judge

Opinion No. 4257
Submitted May 1, 2007 – Filed June 18, 2007

VACATED AND REMANDED

Deputy Chief Attorney for Capital Appeals Robert M. Dudek, of Columbia, for Appellant.

John Benjamin Aplin, of Columbia, for Respondent.

BEATTY, J.: George Spare appeals the revocation of his probation. He contends the circuit court judge erred in revoking his probation because the record established that he was making a bona fide effort to pay the court-ordered restitution. We vacate the revocation of Spare's probation and

remand to the circuit court for proceedings consistent with the provisions of this opinion.[1]

FACTS

On May 19, 2003, Spare pleaded guilty to breach of trust in an amount greater than $5,000. Circuit Court Judge Jackson Gregory sentenced Spare to ten years imprisonment, which was suspended upon five years probation and the payment of restitution in an amount to be calculated at a later date. After a restitution hearing was held on August 13, 2003, Judge Gregory ordered Spare to pay restitution in the amount of $34,475 to the victim, plus a mandatory 20 percent collection fee, resulting in a total restitution obligation of $41,370.

On May 12, 2004, Spare's probation agent served Spare with a financial probation citation, alleging that Spare was in arrears for his restitution. By order dated June 15, 2004, Judge Gregory continued Spare on probation but ordered him to enroll in the Restitution Center.

On September 12, 2005, Spare was again served with a financial probation citation for being $4,921 in arrears on restitution. On that date, the unpaid balance of the restitution was $40,362.75.

Circuit Court Judge Howard King held a probation revocation hearing on September 15, 2005. In addressing the court regarding the violation, Spare's probation agent stated that Spare had reported on time and had paid what he could toward the restitution. He added that Spare has "some financial situations that don't particularly allow him to pay the $753 a month that he has been ordered to." In terms of Spare's employment, Spare's counsel explained that Spare was unable to work for the government, his

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

previous employer, or use his master's degree as a result of his criminal record, which included a drug conviction. Spare was employed with Cracker Barrel for forty-four hours per week. His check, however, had been garnished by the Internal Revenue Service for payment of back taxes and was also used to make payments to probation. He further stated that Spare does not own any real property, but instead, resides at a Motel 6 and eats all of his meals at his place of employment. Counsel emphasized that Spare had "not missed a payment other than . . . not having the ability to make the required payment a month." Counsel also pointed out that Spare paid less toward his financial obligation when he attended the Restitution Center for 181 days because he was making less money than he was currently earning at Cracker Barrel.

At the conclusion of the hearing, Judge King found that Spare had willfully violated the terms of his probation. As a result, Judge King revoked one year of Spare's sentence and ordered Spare to remain on probation and pay restitution when he was released from prison.

Spare appeals the revocation of his probation.

DISCUSSION

Spare argues the circuit court judge erred in revoking his probation when he was employed full time and paying restitution. He contends his failure to pay was not willful given he was making a bona fide effort to pay his court-ordered obligation.

The decision to revoke probation is addressed to the sound discretion of the trial court. State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006); S.C. Code Ann. § 24-21-460 (2007). "This court's authority to review such a decision is confined to correcting errors of law unless the lack of a legal or evidentiary basis indicates the circuit judge's decision was arbitrary and capricious." State v. Hamilton, 333 S.C. 642, 647, 511 S.E.2d 94, 96 (Ct. App. 1999).

In deciding whether to revoke probation, "[t]he trial court must determine whether the State has presented sufficient evidence to establish that a probationer has violated the conditions of his probation." Allen, 370 S.C. at 94, 634 S.E.2d at 655. "Probation is a matter of grace; revocation is the means to enforce the conditions of probation." Hamilton, 333 S.C. at 97, 511 S.E.2d at 648; see State v. White, 218 S.C. 130, 136, 61 S.E.2d 754, 756 (1950) ("While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice."). "However, the authority of the revoking court should always be predicated upon an evidentiary showing of fact tending to establish a violation of the conditions." Hamilton, 333 S.C. at 97, 511 S.E.2d at 648.

Our appellate courts have continued to maintain that "probation may not be revoked *solely* for failure to make required payments of fines or restitution without the circuit judge first determining on the record that the probationer has failed to make a bona fide effort to pay." Hamilton, 333 S.C. at 649, 511 S.E.2d at 97 (discussing Bearden v. Georgia, 461 U.S. 660 (1983))[2]; Nichols v. State, 308 S.C. 334, 337, 417 S.E.2d 860, 861 (1992);

[2] In Bearden v. Georgia, the United States Supreme Court established the analytical procedure required for the revocation of probation based solely on a probationer's failure to pay a fine and make restitution. Specifically, the Court stated:

> We hold, therefore, that in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would

Barlet v. State, 288 S.C. 481, 483, 343 S.E.2d 620, 622 (1986). "Therefore, in those cases involving the failure to pay fines or restitution, the circuit judge must, in addition to finding sufficient factual evidence of the violation, make an additional finding of willfulness." Hamilton, 333 S.C. at 649, 511 S.E.2d at 97.

"Willful failure to pay means a voluntary, conscious and intentional failure." People v. Davis, 576 N.E.2d 510, 513 (Ill. App. Ct. 1991); see State v. Sowell, 370 S.C. 330, 336, 635 S.E.2d 81, 83 (2006) ("A willful act is defined as one 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.'" (quoting Spartanburg County Dep't of Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988))). "The trial court may infer that the failure to pay is intentional where a probationer has the ability to pay a fee, but does not do so." Joseph v. State, 3 S.W.3d 627, 641 (Tex. Crim. App. 1999)(citations omitted).

"A proper analysis should include an inquiry into the reasons surrounding the probationer's failure to pay, followed by a determination of whether the probationer made a willful choice not to pay." Commonwealth v. Eggers, 742 A.2d 174, 176 (Pa. Super. Ct. 1999). "After making those determinations, if the court finds the probationer 'could not pay despite sufficient bona fide efforts to acquire the resources to do so,' the court should then consider alternatives to incarceration in accordance with Bearden." Id. at 176 (quoting Bearden v. Georgia, 461 U.S. 660, 672 (1983)).

Turning to the facts of the instant case, we find the circuit court judge abused his discretion in concluding that Spare's failure to pay restitution was

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> deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

Bearden v. Georgia, 461 U.S. 660, 673 (1983).

willful. Based on our review of the record, we believe the judge failed to make the requisite inquiry into Spare's ability to pay, his reasons for failing to pay, and whether his failure to pay was willful. From all indications, Spare was making progress, albeit slow, toward paying his restitution obligation. After being released from the Restitution Center, he obtained a full-time job in which he worked forty-four hours per week. As represented by counsel, Spare was using his income from this job to pay for housing at a local motel, pay the IRS for back taxes, and make payments toward his court-ordered financial obligation. Significantly, Spare's probation agent stated at the hearing that Spare has "some financial situations that don't particularly allow him to pay the $753 a month that he has been ordered to."

Therefore, without a specific accounting of Spare's total earnings, living expenses, other sources of income, and potential earning capacity, it is difficult to conclude that he had the ability to pay more toward his restitution but made a voluntary, conscious, and intentional decision not to pay. Although we understand the court's frustration with Spare's limited progress in making payments, we find the evidence does not support the court's finding of willfulness.

Based on the foregoing discussion, we vacate the revocation of Spare's probation and remand this case for a new probation revocation hearing. See Eggers, 742 A.2d at 176 (vacating revocation of probation based on probationer's failure to pay and remanding for a new hearing where trial court "made no judicial inquiry into the [probationer's] ability to pay and reasons for [probationer's] failure to make payment" and disregarded "an inquiry into whether the failure to pay was willful, and if willful, whether alternatives to incarceration were proper"); Davis, 576 N.E.2d at 513-14 (reversing revocation of probation for probationer's failure to pay and remanding for trial court to determine whether an additional period of probation should be granted within which restitution may be paid where there was evidence that probationer made restitution payments before becoming unemployed and the record did not show that defendant refused to work merely to avoid restitution); see also Jordan v. State, 939 S.W.2d 255, 257-58 (Ark. 1997)(reversing and remanding revocation of probation for failure to pay, based on state statutory guidelines, and holding that probationer's lack

of financial assistance from family and friends did not demonstrate that probationer willfully refused to pay restitution and could not be the basis for revoking probation).

VACATED AND REMANDED.[3]

ANDERSON and HUFF, JJ., concur.

[3] Although the State indicates in its brief that Spare was released from prison during the pendency of this appeal, we do not believe the issue presented is moot given the restitution is still outstanding and Spare will undoubtedly be issued another financial probation citation for being in arrears.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Peter C. Plott and Demitria C. Votta, Respondents,

v.

Justin Enterprises, a South Carolina General Partnership, Russ Pye, and Lee Pye, Appellants.

Appeal from Charleston County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 4258
Heard May 7, 2007 – Filed June 18, 2007

AFFIRMED

Eugene P. Corrigan, III, and Michael A. Timbes, both of Charleston, for Appellants.

Marvin I. Oberman and Harold A. Oberman, both of Charleston, for Respondents.

GOOLSBY, J.: Justin Enterprises, Russ Pye, and Lee Pye (collectively Appellants) appeal an order holding their actions interfered with the right of Peter C. Plott and Demitria C. Votta (collectively Respondents) to use an easement and directing them to cease these actions. In addition, Appellants contend the trial judge erred in refusing to apply res judicata or collateral estoppel to bar Respondents' suit. We affirm.

FACTS

Encampment Plantation is an 852-acre tract of land in Charleston County. Robert Lawson Horner and Lisa J. Horner owned 64.57 acres of real property known as "Tract 1" in Encampment Plantation. In April 1994, the Horners obtained the approval of the Charleston County Planning Board to subdivide Tract 1. As part of the process, they agreed to dedicate a fifty-foot wide right-of-way easement known as "Encampment Plantation Drive" in between the two new tracts, known as "Tract 1A" and "Tract 1B," respectively.[1] On April 20, 1994, they recorded a plat showing Tracts 1A and 1B, as well as Encampment Plantation Drive.

On May 12, 1994, the Horners conveyed Tract 1B to Myrtis M. Jenkins, Lisa Horner's mother. Jenkins immediately sold the tract to Susan Dillard, who eventually deeded it to Respondents. Each deed contains the following pertinent language creating an easement for the benefit of Tract 1B:

> TOGETHER with a perpetual, non-exclusive, appendant and appurtenant easement for ingress and egress upon, over and across that certain 2.22 acre 50' right-of-way known as "ENCAMPMENT PLANTATION DRIVE" . . . . This easement is for the commercial and economic benefit of [Tract 1B] and is appurtenant to and transferable with the title to said [Tract 1B].

[1] Within Encampment Plantation Drive lies an existing avenue that serves other properties in the area.

On December 29, 1994, the Horners conveyed both Tract 1A and Encampment Plantation Drive to Appellants, with the following language in the property description:

> SAID PROPERTY IS CONVEYED SUBJECT to the ingress and egress easement over and across that certain 2.22 acre 50' right-of-way known as Encampment Plantation Drive granted to Susan P. Dillard by deed of Myrtis M. Jenkins . . . .

Encampment Plantation Drive provides access to Highway 17 from various properties within Encampment Plantation. From Highway 17, a traveler would turn onto Encampment Plantation Drive and proceed north. Several hundred feet from Highway 17, Tract 1A would lie to the west and Tract 1B to the east of Encampment Plantation Drive. Encampment Plantation Drive ends at a cul-de-sac. Tract 1B fronts the eastern side of Encampment Plantation Drive for approximately 451 feet.

In 1997, Appellant Justin Enterprises instituted an action against Respondents, alleging Respondents trespassed on Tract 1A and removed timber. Respondents answered and asserted several counterclaims for trespass and interference with their use of Tract 1B.[2] On March 14, 2000, Respondents moved to amend their answer and assert additional counterclaims. Of relevance to this appeal is Respondents' attempt to claim Justin Enterprises placed stakes along the eastern boundary of Encampment

[2] The counterclaims included allegations that (1) Justin Enterprises prevented Respondents and those hired by them from performing work on Respondents' property; (2) Justin Enterprises trespassed on and damaged Respondents' property by constructing and maintaining an underground power line without permission; and (3) the maintenance of a pond and ditch system by Justin Enterprises on its property caused flooding problems on Respondents' land.

Plantation Drive and set a log within the cul-de-sac. Respondents further argued these actions interfered with their use of the easement.

The trial court denied Respondents' motion to amend, emphasizing the motion was made approximately one month before the trial scheduled for April 17, 2000. At trial, Respondents referenced the actions leading to the proposed amendment and referenced the prohibited counterclaim in closing argument. The jury awarded Justin Enterprises $1,300 on the causes of action it raised in its complaint and denied Respondents relief on their counterclaims.[3]

In September 2002, Appellants began planting large shrubs on the eastern boundary of Encampment Plantation Drive. Eventually, Appellants built a wire fence on the same boundary. These actions prevented Respondents from accessing Tract 1B at any point prior to the cul-de-sac.

Respondents then filed this action for declaratory judgment defining the rights of the parties in and to the easement, as well as an injunction ordering Appellants to tear down the fence and remove the newly-planted shrubs. Appellants answered, asserting the prior action between the parties barred Respondents' suit under the doctrines of res judicata and collateral estoppel. Appellants also denied their actions interfered with Respondents' rights.

After a bench trial, the trial judge granted injunctive relief to Respondents. The trial judge also found "the grant and scope of the easement . . . was not at issue in the previous litigation and . . . neither the doctrine of res judicata nor collateral estoppel bar suit in the present action." Appellants moved for reconsideration or a new trial, both of which the trial judge denied. This appeal followed.

[3] The verdict form failed to delineate the individual counterclaims, leaving this court to speculate which issues the jury decided.

STANDARD OF REVIEW

Although the existence of an easement is a question of fact in a law action,[4] the determination of the extent of an easement is an equitable matter.[5] Accordingly, an appellate court may review the trial judge's findings de novo.[6] "Our broad scope of review, however, does not require this Court to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility."[7]

LAW/ANALYSIS

1. Appellants contend the trial judge erred in refusing to apply the doctrine of res judicata. We disagree.

"Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties."[8] Under res judicata, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit."[9]

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[4] Jowers v. Hornsby, 292 S.C. 549, 551, 357 S.E.2d 710, 711 (1987).

[5] Tupper v. Dorchester County, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997).

[6] Hardy v. Aiken, 369 S.C. 160, 165, 631 S.E.2d 539, 541 (2006).

[7] Gordon v. Drews, 358 S.C. 598, 605, 595 S.E.2d 864, 867 (2004), cert. denied (Sept. 22, 2005) (citing Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000)).

[8] Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999).

[9] Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C., 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987).

"Res judicata requires three elements be met: 1) a final, valid judgment on the merits; 2) identity of parties; and 3) the second action must involve matters properly included in the first suit."[10] "The rule as to the conclusiveness of the prior adjudication has a different application where the prior and subsequent causes of action are identical and where the subsequent action is on a different cause of action."[11] Although res judicata may apply even though the plaintiff in the first suit proceeded under a different legal theory,[12] "where the second suit is upon a different claim, the former judgment is conclusive only as to those issues actually determined."[13]

According to the amended complaint from the 1997 action, Justin Enterprises alleged Respondents were "continuously trespassing on [its] property, removing marketable timber, destroying landscape and burning evidence of such conduct . . . ." In their answer and counterclaim, Respondents alleged Justin Enterprises "deliberately interfered with the free use and enjoyment . . . of their property by preventing [them] and those hired by them from performing work on [their] property . . . ." They also alleged Justin Enterprises trespassed on their property "by constructing and maintaining an underground power line without permission" and maintaining a pond and ditch system that caused flooding on their property. We have found nothing in the arguments Appellants presented either in their briefs or during oral argument that would explain how resolution of any of the claims or counterclaims would necessarily involve a determination of where Respondents could access their property from the right-of-way.[14] Moreover,

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[10] Stone v. Roadway Express, 367 S.C. 575, 580, 627 S.E.2d 695, 697 (2006).

[11] Lowe v. Clayton, 264 S.C. 75, 81, 212 S.E.2d 582, 586 (1975).

[12] Aliff v. Joy Mfg. Co., 914 F.2d 39, 43-44 (4th Cir. 1990).

[13] Johnston-Crews Co. v. Folk, 118 S.C. 470, 483, 111 S.E. 15, 19 (1922).

[14] Likewise, we reject Appellants' argument that Respondents' present lawsuit is barred by res judicata as a compulsory counterclaim in the prior

the trial court's refusal to allow Respondents to proceed on their claim for interference with their use of the right-of-way was not a ruling on the merits of that cause of action.[15] We therefore hold there were no circumstances that would support a determination that res judicata barred Respondents' cause of action for interference with their easement.

2. Appellants also contend Respondents were collaterally estopped from relitigating the issue of the scope of the easement. We disagree.

"Collateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action."[16] "In order to successfully assert collateral estoppel, the party seeking issue preclusion must show that the issue was actually litigated and directly determined in the prior action, and that the matter or fact directly in issue was necessary to support the first judgment."[17]

In support of their argument that Respondents were collaterally estopped from relitigating the issue of the scope of the easement, Appellants have quoted extensively from the trial transcript of the 1997 lawsuit. In the

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lawsuit. Appellants have not identified the requisite "logical relationship" between the cause of action in this appeal and the claims asserted by both sides in the 1997 litigation. See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989) (holding a counterclaim is compulsory only if a "logical relationship" exists between the claim and the counterclaim).

[15] See 47 Am. Jur. 2d Judgments § 495, at 56 (2006) ("[A] judgment is not res judicata as to any matters which a court expressly refused to determine.").

[16] Jinks v. Richland County, 355 S.C. 341, 349, 585 S.E.2d 281, 285 (2003).

[17] Town of Sullivan's Island v. Felger, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (1995) (emphasis added) (citing Richburg v. Baughman, 290 S.C. 431, 351 S.E.2d 164 (1986) and Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984)).

previous action, however, Justin Enterprises also advanced the position that Respondents could have removed the stakes placed along the eastern boundary of Encampment Plantation Drive. The verdict for Justin Enterprises in that action, then, could have been based on the jury's determination that the obstructions were not unreasonable rather than on any finding concerning Respondents' right to access their property at any point other than the cul-de-sac. Under these circumstances, we hold Appellants have not shown that resolution of the issue in controversy in the present appeal, namely where Respondents could access Encampment Plantation Drive from Tract 1B, was necessary to support the prior judgment.

3. Appellants argue the trial judge erred in finding their placement of the fence and shrubbery along the eastern boundary of Encampment Plantation Drive improperly interfered with Respondents' use of the easement. We disagree.

"The language of an easement determines its extent."[18] Thus, this court must construe unambiguous language in the grant of an easement according to the terms the parties have used.[19]

"The general rule is that the character of an express easement is determined by the nature of the right and the intention of the parties creating it."[20] The easement in this case was expressly "for the commercial and economic benefit of" Tract 1B. It grants Respondents a right of ingress and egress "upon, over and across" Encampment Plantation Drive and provides no express limits on the right of Respondents to traverse Encampment

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[18] Binkley v. Rabon Creek Watershed Conserv'n Dist., 348 S.C. 58, 67, 558 S.E.2d 902, 906-07 (Ct. App. 2001).

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

[20] See Smith v. Comm'rs of Pub. Works of City of Charleston, 312 S.C. 460, 467, 441 S.E.2d 331, 336 (Ct. App. 1994).

Plantation Drive as it existed at the time the easement was created.[21] The word "across" means "so as to intersect or pass at an angle (as a right angle) to . . . ."[22] Respondents presented ample testimony supporting their contention that the fence and shrubbery prevented them from proceeding across Encampment Plantation Drive at several points along its eastern boundary.[23] Accordingly, we hold a preponderance of the evidence supports the trial judge's determination that the shrubbery and fence interfered with Respondents' use and enjoyment of the easement.[24]

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[21] Cf. Carolina Land Co. v. Bland, 265 S.C. 98, 106, 217 S.E.2d 16, 20 (1975) ("Generally, where a deed which describes land as bounded by a way indicates that the way extends beyond the land conveyed, . . . the grantee acquires a right of way, not merely in front of his property, but also to the full extent of the way as indicated.").

[22] Webster's Third New Internat'l Dictionary 20 (1986); see also Zimmerman v. Am. Tel. & Tel. Co., 71 S.C. 528, 530, 51 S.E. 243, 244 (1904) ("The word 'along' means by length of, as distinguished from 'across.' ").

[23] See Sheppard v. Justin Enters., Op. No. 4245 (S.C. Ct. App. filed May 14, 2007) (Shearouse Adv. Sh. No. 20, at 76, 79) (holding a servient estate owner could not relocate an express easement because, among other reasons, the relocation increased the burden on the dominant estate).

[24] Appellants argue the purpose of the fence and landscaping was "to preserve the historic and rustic nature of the 200-year-old drive" and point to documentation showing the Horners sought and received certain variances from the County that were premised on this objective. The need to maintain particular characteristics of Encampment Plantation Drive, however, was never expressly mentioned in any of the documents granting the easement over the drive to access Tract 1B. Appellants also assert the trial judge's determination that Respondents "may enter and exit at any point along the boundary line between their property and the easement" is "clearly inconsistent with the singular and definite language used by the parties creating the easement." This specific argument was not explicitly ruled on by the trial judge, and Appellants did not raise this issue in their motion to alter

4. Finally, we reject Appellants' contention that "the disputed easement was created through a process tainted by misrepresentation in violation of the Charleston County Subdivision Regulations and was thus void *ab initio*."

Appellants argue that, because Robert Horner used his mother-in-law, Myrtis Jenkins, as a "straw purchaser" to circumvent applicable county regulations when he subdivided Tract 1, the subdivision failed to meet the requirements of the applicable regulations and was by definition invalid. We disagree. Notwithstanding the allegedly suspect nature of both the conveyance to Jenkins and her sale of Tract 1B to Respondents' predecessor-in-interest the same day she received title from the Horners, the initial transfer conformed to the regulations relevant to intra-family conveyances, and we are unaware of any restrictions on subsequent conveyances to other persons.[25] Moreover, there appears to be no dispute that both the subdivision and the easement were properly platted and recorded. To invalidate the easement to which Appellants' property is subject because of some impropriety allegedly tainting a prior transfer within their chain of title would be inherently unfair to subsequent purchasers, who rely on public documents to determine their rights under recorded plats and deeds.

AFFIRMED.

KITTREDGE, J., and CURETON, A.J., concur.

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or amend; therefore, we cannot address it on appeal. See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding the court of appeals improperly addressed an issue that the "circuit court did not explicitly rule on" when the appellant did not raise the issue in a motion to alter or amend).

[25] See Newington Plantation Estate Ass'n v. Newington Plantation Estates, 318 S.C. 362, 365, 458 S.E.2d 36, 38 (1995) ("As between an owner who has conveyed lots according to a plat and the grantee, the dedication of a private easement is complete when the conveyance is made.").