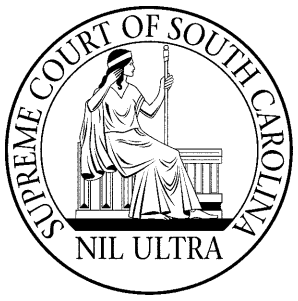

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 33
September 19, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

EXTENSION TO FILE PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5009-State v. B. Mitchell	Pending
5010-SCDOT v. Revels	Pending
5013-Watson v. Xtra Mile Driver Training	Pending
5016-SC Public Interest Foundation v. Greenville County	Pending
5017-State v. C. Manning	Pending
5019-Johnson v. Lloyd	Pending
5020-Rhame v. Charleston County School District	Pending
5021-Southern Glass & Plastics Co. Inc. v. Kemper	Pending
5022-Gregory A. Collins v. Seko Charlotte	Pending
5023-Robin Holmes v. Rita Kay Holmes	Pending
5025-State v. Randy Vickery	Pending
5026-State v. Glenn Lee	Pending
5027-Regions Bank v. Richard C. Strawn et al.	Pending
5028-Travis A. Roddey v. Wal-Mart Stores East, LP, et al.	Pending
2012-UP-226-State v. C. Norris	Pending
2012-UP-267-State v. J. White	Pending
2012-UP-286-Rainwater v. Rainwater	Pending
2012-UP-295-L. Hendricks v. SCDC	Pending
2012-UP-321-State v. J. Tinsley	Pending
2012-UP-330-State v. D. Garrett	Pending
2012-UP-332-Tomlins v. SCDPPS	Pending
2012-UP-351-State v. K. Gilliard	Pending

2012-UP-353-Shehan v. Shehan Pending

2012-UP-371-State v. T. Smart Pending

2012-UP-385-Suresh J. Nandwani et al. v. Queens Inn Motel et al. Pending

2012-UP-388-State of South Carolina ex rel. Robert M. Arial, Solicitor, Thirteenth Judicial Circuit v. $88,148.45, $322, and $80 and Contents of Safe Deposit Box 22031 and Moon Magruder et al. Pending

2012-UP-399-Bowen v. S.C. Department of Motor Vehicles Pending

2012-UP-417-HSBC v. McMickens Pending

2012-UP-420-E. Washington v. A. Stewart Denied 09/13/12

2012-UP-433-Jeffrey D. Allen, individually et al., v. S.C. Budget and Control Board Employee Insurance Program and Blue Cross and Blue Shield of South Carolina Pending

2012-UP-443-Tony A. v. Candy A., O.K.S. and D.F.K Pending

2012-UP-479-Elkachbendi v. Elkachbendi Pending

2012-UP-480-State v. A. Gearhart Pending

2012-UP-481-State v. J. Campbell Pending

2012-UP-487-David Garrison and Diane G. Garrison v. Dennis Pagette and Melanie Pagette v. Nesbitt Surveying Co., Inc. Pending

2012-UP-493-State v. Travis Teasley Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4592-Weston v. Kim's Dollar Store Pending

4670-SCDC v. B. Cartrette Pending

4675-Middleton v. Eubank Pending

4685-Wachovia Bank v. Coffey, A	Pending
4705-Hudson v. Lancaster Convalescent	Pending
4711-Jennings v. Jennings	Pending
4725-Ashenfelder v. City of Georgetown	Pending
4742-State v. Theodore Wills	Pending
4750-Cullen v. McNeal	Pending
4764-Walterboro Hospital v. Meacher	Pending
4766-State v. T. Bryant	Pending
4770-Pridgen v. Ward	Pending
4779-AJG Holdings v. Dunn	Pending
4787-State v. K. Provet	Pending
4798-State v. Orozco	Pending
4799-Trask v. Beaufort County	Pending
4810-Menezes v. WL Ross & Co.	Pending
4815-Sun Trust v. Bryant	Pending
4819-Columbia/CSA v. SC Medical	Pending
4823-State v. L. Burgess	Pending
4824-Lawson v. Hanson Brick	Pending
4826-C-Sculptures, LLC v. G. Brown	Pending
4831-Matsell v. Crowfield Plantation	Pending
4832-Crystal Pines v. Phillips	Pending

4833-State v. L. Phillips	Pending
4838-Major v. Penn Community	Pending
4842-Grady v. Rider (Estate of Rider)	Pending
4847-Smith v. Regional Medical Center	Pending
4851-Davis v. KB Home of S.C.	Pending
4857-Stevens Aviation v. DynCorp Intern.	Pending
4858-Pittman v. Pittman	Pending
4859-State v. Garris	Pending
4862-5 Star v. Ford Motor Company	Pending
4863-White Oak v. Lexington Insurance	Pending
4865-Shatto v. McLeod Regional Medical	Pending
4867-State v. J. Hill	Pending
4872-State v. K. Morris	Pending
4873-MRI at Belfair v. SCDHEC	Pending
4877-McComb v. Conard	Pending
4879-Wise v. Wise	Pending
4880-Gordon v. Busbee	Pending
4887-West v. Morehead	Pending
4888-Pope v. Heritage Communities	Pending
4889-Team IA v. Lucas	Pending
4890-Potter v. Spartanburg School	Pending
4894-State v. A. Jackson	Pending

4895-King v. International Knife	Pending
4897-Tant v. SCDC	Pending
4898-Purser v. Owens	Pending
4902-Kimmer v. Wright	Pending
4905-Landry v. Carolinas Healthcare	Pending
4907-Newton v. Zoning Board	Pending
4909-North American Rescue v. Richardson	Pending
4912-State v. Elwell	Pending
4914-Stevens v. Aughtry (City of Columbia) Stevens (Gary v. City of Columbia)	Pending
4918-Lewin v. Lewin	Pending
4921-Roof v. Steele	Pending
4923-Price v. Peachtree	Pending
4924-State v. B. Senter	Pending
4926-Dinkins v. Lowe's Home Centers	Pending
4927-State v. J. Johnson	Pending
4932-Black v. Lexington County Bd. Of Zoning	Pending
4933-Fettler v. Genter	Pending
4934-State v. R. Galimore	Pending
4936-Mullarkey v. Mullarkey	Pending
4940-York Cty. and Nazareth Church v. SCHEC et al	Pending
4941-State v. B. Collins	Pending

4947-Ferguson Fire and Fabrication v. Preferred Fire Protection	Pending	
4949-Crossland v. Crossland	Pending	
4953-Carmax Auto Superstores v. S.C. Dep't of Revenue	Pending	
4956-State v. Diamon D. Fripp	Pending	
4964-State v. A. Adams	Pending	
4973-Byrd v. Livingston	Pending	
4975-Greeneagle Inc. v. SCDHEC	Pending	
4979-Major v. City of Hartsville	Pending	
4989-Dennis N. Lambries v. Saluda County Council et al.	Pending	
2010-UP-090-F. Freeman v. SCDC (4)	Pending	
2010-UP-356-State v. Robinson	Pending	
2010-UP-425-Cartee v. Countryman	Pending	
2010-UP-494-State v. Nathaniel Noel Bradley	Pending	
2010-UP-523-Amisub of SC v. SCDHEC	Pending	
2010-UP-525-Sparks v. Palmetto Hardwood	Granted	06/08/12
2010-UP-552-State v. E. Williams	Pending	
2011-UP-038-Dunson v. Alex Lee Inc.	Pending	
2011-UP-052-Williamson v. Orangeburg	Pending	
2011-UP-076-Johnson v. Town of Iva	Pending	
2011-UP-084-Greenwood Beach v. Charleston	Pending	
2011-UP-091-State v. R. Watkins	Pending	

2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-125-Groce v. Horry County	Pending
2011-UP-127-State v. B. Butler	Pending
2011-UP-131-Burton v. Hardaway	Pending
2011-UP-132-Cantrell v. Carolinas Recycling	Pending
2011-UP-137-State v. I. Romero	Pending
2011-UP-138-State v. R. Rivera	Pending
2011-UP-145-State v. S. Grier	Pending
2011-UP-147-State v. B. Evans	Pending
2011-UP-148-Mullen v. Beaufort County School	Pending
2011-UP-152-Ritter v. Hurst	Pending
2011-UP-161-State v. Hercheck	Pending
2011-UP-162-Bolds v. UTI Integrated	Pending
2011-UP-174-Doering v. Woodman	Pending
2011-UP-175-Carter v. Standard Fire Ins.	Pending
2011-UP-185-State v. D. Brown	Pending
2011-UP-199-Davidson v. City of Beaufort	Pending
2011-UP-205-State v. D. Sams	Pending
2011-UP-208-State v. L. Bennett	Pending
2011-UP-218-Squires v. SLED	Granted 05/09/12

2011-UP-225-SunTrust v. Smith	Pending
2011-UP-229-Zepeda-Cepeda v. Priority	Pending
2011-UP-242-Bell v. Progressive Direct	Pending
2011-UP-263-State v. P. Sawyer	Pending
2011-UP-264-Hauge v. Curran	Pending
2011-UP-268-In the matter of Vincent Way	Pending
2011-UP-285-State v. Burdine	Pending
2011-UP-291-Woodson v. DLI Prop.	Pending
2011-UP-304-State v. B. Winchester	Pending
2011-UP-305-Southcoast Community Bank v. Low-Country	Pending
2011-UP-328-Davison v. Scaffe	Pending
2011-UP-334-LaSalle Bank v. Toney	Pending
2011-UP-343-State v. E. Dantzler	Pending
2011-UP-346-Batson v. Northside Traders	Pending
2011-UP-359-Price v. Investors Title Ins.	Pending
2011-UP-363-State v. L. Wright	Pending
2011-UP-371-Shealy v. The Paul E. Shelton Rev. Trust	Pending
2011-UP-372-Underground Boring v. P. Mining	Pending
2011-UP-380-EAGLE v. SCDHEC and MRR	Pending
2011-UP-383-Belk v. Weinberg	Pending
2011-UP-385-State v. A. Wilder	Pending

2011-UP-398-Peek v. SCE&G	Pending
2011-UP-441-Babb v. Graham	Pending
2011-UP-447-Johnson v. Hall	Pending
2011-UP-456-Heaton v. State	Pending
2011-UP-462-Bartley v. Ford Motor Co.	Pending
2011-UP-463-State v. R. Rogers	Pending
2011-UP-468-P. Johnson v. BMW Manuf.	Pending
2011-UP-471-State v. T. McCoy	Pending
2011-UP-475-State v. J. Austin	Pending
2011-UP-480-R. James v. State	Pending
2011-UP-481-State v. Norris Smith	Pending
2011-UP-483-Deans v. SCDC	Pending
2011-UP-495-State v. A. Rivers	Pending
2011-UP-496-State v. Coaxum	Pending
2011-UP-502-Hill v. SCDHEC and SCE&G	Pending
2011-UP-503-State v. W. Welch	Pending
2011-UP-516-Smith v. SCDPPPS	Pending
2011-UP-517-N. M. McLean et al. v. James B. Drennan, III	Pending
2011-UP-519-Stevens & Wilkinson v. City of Columbia	Pending
2011-UP-522-State v. M. Jackson	Pending
2011-UP-550-McCaskill v. Roth	Pending

2011-UP-558-State v. T.Williams Pending

2011-UP-562-State v. T.Henry Pending

2011-UP-565-Griggs v. Ashley Towne Village Pending

2011-UP-572-State v. R. Welch Pending

2011-UP-581-On Time Transp. v. SCWC Unins. Emp. Fund Pending

2011-UP-583-State v. D. Coward Pending

2011-UP-587-Trinity Inv. v. Marina Ventures Pending

2011-UP-590-Ravenell v. Meyer Pending

2012-UP-003-In the matter of the care and treatment of G. Gonzalez Pending

2012-UP-008-SCDSS v. Michelle D.C. Pending

2012-UP-010-State v. N. Mitchell Pending

2012-UP-014-State v. A. Norris Pending

2012-UP-018-State v. R. Phipps Pending

2012-UP-030-Babaee v. Moisture Warranty Corp. Pending

2012-UP-037-Livingston v. Danube Valley Pending

2012-UP-058-State v. A. Byron Pending

2012-UP-060-Austin v. Stone Pending

2012-UP-075-State v. J. Nash Pending

2012-UP-081-Hueble v. Vaughn Pending

2012-UP-089-State v. A. Williamson Pending

2012-UP-091-State v. M. Salley Pending

2012-UP-152-State v. Kevin Shane Epting	Pending
2012-UP-153-McCall v. Sandvik, Inc.	Pending
2012-UP-203-State v. Dominic Leggette	Pending
2012-UP-217-Forest Beach Owners' Assoc. v. Austin	Pending
2012-UP-218-State v. A. Eaglin	Pending
2012-UP-219-Dale Hill et al. v. Deertrack Golf and Country Club	Pending
2012-UP-270-National Grange Ins. Co. v. Phoenix Contract Glass, LLC, et al.	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-293-Clegg v. Lambrecht	Pending
2012-UP-302-Maple v. Heritage Healthcare	Pending
2012-UP-312-State v. E. Twyman	Pending
2012-UP-314-Grand Bees Development v. SCDHEC et al.	Pending
2012-UP-365-Patricia E. King and Robbie King Jones, as representatives of W.R. King and Ellen King v. Margie B. King and Robbie Ione King, individually and as co-representatives of the estate of Christopher G. King et al.	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Franklin Hutson, Petitioner,
v.
South Carolina State Ports Authority, Employer, and
State Accident Fund, Carrier, Respondents.

Appellate Case No. 2010-178226

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 27171
Heard April 4, 2012 – Filed September 19, 2012

REVERSED AND REMANDED

Thomas M. White, of The Steinberg Law Firm, of Goose Creek, for Petitioner.

Matthew C. Robertson, of Merritt, Webb, Wilson & Caruso, of Columbia, and Margaret Mary Urbanic, of Clawson & Staubes, of Charleston, for Respondents.

JUSTICE HEARN: In this workers' compensation appeal, we must determine whether speculative testimony by the claimant concerning his possible

future work as a restaurateur qualifies as substantial evidence to establish he did not sustain a wage loss pursuant to Section 42-9-20 of the South Carolina Code (1976). We hold it does not and therefore reverse and remand.

FACTS/PROCEDURAL HISTORY

Frank Hutson was working as a crane operator for the State Ports Authority when he suffered an injury to his lower back and legs while attempting to remove a container from a ship. Although he initially thought he had just pulled a muscle, he was diagnosed with a disc bulge at L2-3 and spondylosis at L5-S1. His treatment included steroid injections, physical therapy, and use of a back brace. After reaching maximum medical improvement, he filed a Form 50 with the workers' compensation commission for continued benefits alleging permanent and total disability pursuant to Sections 42-9-10 and 42-9-30 South Carolina Code (1976 & Supp. 2011) or, alternatively, a wage loss under Section 42-9-20. He also asked to receive the award in lump sum.

Although the Ports Authority and its insurance carrier, the State Accident Fund (collectively, Respondents), admitted the accident and the back injury, they disputed the claims to his legs and argued he should receive only permanent partial disability benefits. They also objected to Hutson's request that his benefits be paid in a lump sum.

The case proceeded to a hearing before the single commissioner. At the hearing, Hutson presented an employability evaluation report of a vocational specialist, Jean Hutchinson. Hutchinson noted that Hutson "had significant impairment in his ability to tolerate activities of daily living with maximum sitting and standing capability at fifteen minutes and maximum lifting capability at twenty pounds." Although Hutson had taken a few courses at Trident Technical College in business management, culinary arts, and food sanitation, he never completed a degree or certification program in any of those areas. Hutson had spent his entire working life employed in manual labor, primarily as a crane operator. Noting that he possessed no transferable skills to perform other work within his functional capacity, Hutchinson concluded:

> [Hutson] will require a myriad of services to include career counseling to determine an occupational area that is consistent with his physical restrictions, occupational skill training in either a classroom or on-the-job setting, and selected job placement. Successful completion of these steps can reduce his disability with regard to employment. Without this or a similar vocational rehabilitation plan, I am of the opinion that Mr. Hutson will encounter very significant difficulty re-entering the competitive job market and will be relegated to at or near minimum wage ($5.15-$6.50 per hours).

Thus, according to the vocational expert, Hutson's earning ability post injury was slightly less than $14,000 per year compared to the approximately $90,000 per year he earned as a crane operator.

Hutson testified at the hearing on his plans for future employment, stating that he was interested in opening a restaurant, which is why he requested the award in a lump sum. In response to questions from the commissioner, Hutson admitted he had never previously run a restaurant and acknowledged that doing so would require him to stand at the register and in the kitchen as well as sit for periods of time writing menus and paying bills. Nevertheless, Hutson stated he believed he could run a restaurant and although he could not respond with any specificity when asked how much money he expected to make, he informed the commissioner, "It depends on how many people I get coming in there. My food's good."

The single commissioner found Hutson sustained a 30% loss of use to his back under section 42-9-30. He also noted that Hutson suffered radicular symptoms which affected the function of his right leg, but did not award any benefits. With regard to the wage loss claim under section 42-9-20, the commissioner denied recovery finding "that claimant understands what it entails to run a restaurant and he believes he can do this type of work." He concluded that because Hutson could not testify as to how much he would make as a restaurateur, there was no way to determine if he would suffer any loss of earning capacity. However, the commissioner went on to express some doubt about the viability of Hutson's plan stating that "[Hutson] was given ample opportunity during my questioning to qualify or moderate his testimony concerning his perceived ability to run a restaurant. Frankly, his confidence runs contrary to the greater weight of

the evidence in the record." The commissioner further noted that "[h]ad [Hutson not made these statements], [he] would have found him to be Permanently and Totally disabled under 42-9-10."

The full commission and circuit court affirmed. Hutson then appealed to the court of appeals arguing the finding that he was capable of running a restaurant was not supported by substantial evidence, recovery should not have been limited to an award for his back because the commissioner found his back injury affected his legs, and the case should have been remanded for further fact findings on the wage loss and loss of use of his back, leg, or whole person. The court of appeals agreed that the full commission should have considered whether his back injury combined with the damage to his leg entitled him to greater benefits under section 42-9-30 and remanded for reconsideration of this issue. *Hutson v. State Ports Auth.*, 390 S.C. 108, 116, 118, 700 S.E.2d 462, 467, 468 (Ct. App. 2010). However, it found substantial evidence to support the full commission's finding that Hutson did not prove a wage loss. *Id*. at 114, 700 S.E.2d at 466. We granted certiorari solely to consider this second issue.[1]

LAW/ANALYSIS

Hutson argues no substantial evidence exists to support the commissioner's conclusion that he is not entitled to wage loss benefits under section 42-9-20. Because we find the only evidence supporting the full commission's decision is pure speculation and conjecture, we agree.

When a worker covered by the Workers' Compensation Act (Act) is injured, he can recover under the "general disability" statutes or the "scheduled loss" statutes. S.C. Code Ann. § 42-9-10 to -30. The general disability statutes offer compensation for total and partial disability, including a provision for wage loss benefits. The wage loss benefits statute provides:

> Except as otherwise provided in § 42-9-30, when the incapacity for work resulting from the injury is partial, the employer shall pay, or

[1] No writ was sought with respect to the court of appeals' decision to remand for consideration of his leg injuries, and Hutson stated in oral argument before this Court that he was no longer pursuing any claim for total and permanent disability.

> cause to be paid, as provided in this chapter, to the injured employee during such disability a weekly compensation equal to sixty-six and two-thirds percent of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than the average weekly wage in this State for the preceding fiscal year.

Id. § 42-9-20. "It is well-settled that an award under the general disability statutes must be predicated upon a showing of a loss of earning capacity, whereas an award under the scheduled loss statute does not require such a showing." *Skinner v. Westinghouse Elec. Corp.*, 394 S.C. 428, 432, 716 S.E.2d 443, 445-46 (2011) (quoting *Fields v. Owens Corning Fiberglas*, 301 S.C. 554, 555, 393 S.E.2d 172, 173 (1990)).

The Administrative Procedures Act governs our review of the full commission's decision. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1981). Under this standard, we can reverse or modify the decision only if the claimant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2011). "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000).

We begin our analysis by repeating two principles which form the lens through which we view this case. First is the guiding principle undergirding our workers' compensation system that the Act is to be liberally construed in favor of the claimant. *Carter v. Penny Tire & Recapping Co.*, 261 S.C. 341, 349, 200 S.E.2d 64, 67 (1973); *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 350, 656 S.E.2d 753, 759 (Ct. App. 2007). The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation. *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999). Instead, "[an award] must be founded on evidence of sufficient substance to afford

a reasonable basis for it." *Wynn v. People's Natural Gas Co. of S.C.*, 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

It is undisputed that Hutson's admitted injury prevents him from continuing in his life's occupation as a crane operator. The sole question before us therefore is whether his injury will also prevent him from earning the same wages in another job. In concluding that it will not, the single commissioner, as affirmed by the full commission, focused entirely on Hutson's own wholly speculative testimony regarding the restaurant. When Hutson's counsel asked him about his future plans, Hutson responded simply that he was "looking into maybe a restaurant business." However, the sole purpose for this testimony was to support Hutson's request that his award be paid to him in a lump sum, which is evident from the following colloquy between counsel and Hutson:

> Q. And do you need that money paid in a lump sum to try to do something in the future as far as maybe starting up a business or getting invested or do something?
>
> A. Yes, sir.

Under further questioning by Respondents' counsel and the single commissioner himself, it became clear that although Hutson had family members in the restaurant business and had taken a course in culinary arts, his primary reason for believing he could run a restaurant was that he liked to cook. The *only* evidence concerning what Hutson might earn as a restaurateur came during the single commissioner's questioning when the following colloquy occurred:

> Q. You say you can run a restaurant. How much money do you expect you can make?
>
> A. It depends on how many people I get coming in there. My food's good.

Thus, despite Hutson's confidence in his own abilities, the record is clear that Hutson had no experience running a restaurant or an understanding of what doing so entails. In fact, as noted above, the revealingly candid passage from the single commissioner's written order demonstrates the single commissioner

recognized the speculative nature of Hutson's aspirations. Yet he, and ultimately the full commission, held Hutson's inability to testify as to what he could earn from this proposed venture meant Hutson could not show a loss of earning capacity. To use such unsupported and wildly optimistic goals which are in direct conflict with the only concrete evidence in the record would turn the Act on its head and violate the stated policy behind it. Worse, it would punish an employee for merely exploring the chance of overcoming an unanticipated injury by exploring other possible career options. The court of appeals and the circuit court then compounded the commission's error by holding Hutson's testimony constituted not just evidence, but substantial evidence, that he had not suffered a wage loss.[2]

Respondents rely on *Sellers v. Pinedale Residential Center*, 350 S.C. 183, 564 S.E.2d 694 (Ct. App. 2002), to support their assertion that "the Commission was correct in considering the future earnings of [Hutson] based on [Hutson's] own testimony." Respondents' reliance on *Sellers* is misplaced. In *Sellers*, the court of appeals affirmed the commission's decision to adjust an injured high-school student and part-time employee's average weekly wage and compensation rate to reflect his probable future wages in a career as an electrician, a job he did not hold at the time of his injury. *Id.* at 191, 564 S.E.2d at 699. The commission's decision was based on concrete facts that illustrated the employee's career goals were well-founded because of his "interest, aptitude, and ability to become an electrician."[3] *Id.* In addition, the commission based its decision on the vocational expert's testimony, and Sellers offered no evidence to the contrary. *Id.* at 191-92, 564

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[2] Although the court of appeals also noted that Hutson's physicians did opine he could return to light duty work, *Hutson*, 390 S.C. at 115, 700 S.E.2d at 466, the physicians presented no evidence regarding his earning capabilities.

[3] In so concluding, the commissioner weighed the fact that Sellers had joined his father, an electrician, at work on a number of occasions, since he was twelve years-old as well as the testimony of the employer of Sellers' father that "Sellers was very energetic. . . . He had a very determined approach that he wanted to learn the electrical trade, and . . . do the same thing his dad was doing." *Sellers*, 350 S.C. at 192, 564 S.E.2d at 699.

S.E.2d at 699. *Sellers* simply does not stand for the proposition that a claimant's testimony regarding his future earnings is always sufficient. Here, the testimony relied upon by the court of appeals is not only *contrary* to the vocational expert's testimony but rests solely on Huston's speculative goals. Thus, there is no evidence in the record supporting the commissioner's order, and *Sellers* has no bearing on the case before us.

In sum, the full commission's conclusion is based on rank speculation and cannot now be used as the basis for denying Hutson's claim for lost wages. *Holland v. Ga. Hardwood Lumber Co.*, 214 S.C. 195, 205, 51 S.E.2d 744, 749 (1949) ("The existence of a fact or facts cannot rest in speculation, surmise, or conjecture."); *see also Wynn*, 238 S.C. at 12-13, 118 S.E.2d at 818 (reversing commission's finding where the claimant's bare assertion that he could not work was not corroborated by his physicians). Hutson's desire to continue to have a productive work life is commendable and is, quite frankly, a refreshing change from much of the testimony normally contained in workers' compensation matters coming before this Court. However, what is abundantly clear from Hutson's testimony is that he never worked in a restaurant in his life, much less operated one, and he clearly had no idea what income he might realize from such a venture. Because his testimony was based on speculation, surmise, and conjecture, it cannot support the commission's decision that he did not sustain a wage loss. We therefore reverse the court of appeals.

CONCLUSION

Based on the above, we reverse the court of appeals' decision that Hutson did not show a wage loss within the meaning of section 42-9-20, and therefore remand this matter to the commission. The only evidence in the record bearing on Hutson's future earning capabilities is from the vocational expert who offered uncontradicted testimony that Hutson's present earning potential is approximately $14,000 per year. However, this figure is what Hutson could expect to earn without successful completion of a vocational rehabilitation plan. Because the record does not reveal what Hutson might earn if he were to complete this plan, we remand for the commission to determine his earning capabilities upon successful completion, if possible. The commission will then enter an award as necessary under section 42-9-20.

BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur. PLEICONES, J., dissenting in a separate opinion

JUSTICE PLEICONES: I respectfully dissent. While it may seem a harsh result to deny petitioner partial disability under S.C. Code Ann. § 42-9-20 (1985), I believe there is substantial evidence to uphold the finding that he did not meet his burden of proof. I would therefore affirm.

I begin by noting that petitioner bears the burden of proving wage loss under § 42-9-20. *E.g. Bass v. Kenco Group*, 366 S.C. 450, 622 S.E.2d 577 (2005). Petitioner was interviewed by a vocational specialist in September 2005, and she issued a written report in October 2005. In this report, the expert noted petitioner had a "high school level of education with some course work at Trident Tech." She opined that if petitioner were to obtain an above minimum wage job, he would require "a [sic] myriad of services to include career counseling . . . occupational skill training in either a classroom or the job setting, and selected job placement . . . ." There is no evidence in the record that petitioner discussed his interest in the hospitality industry with this expert. Thus, her report does not address the viability of petitioner's subsequent decision to enter the restaurant business.

At the hearing in August 2006, petitioner introduced the vocational specialist's report. He also took the stand and testified to his intent to enter the restaurant business in the near future. The single commissioner found the following factual findings regarding petitioner's wage loss claim:

> Claimant has failed to prove that he suffered a loss of earning capacity under § 42-9-20. Claimant testified that at the **time of the hearing** that [sic] he is planning on getting into the restaurant business. Claimant testified that he has family members in the restaurant business and he is aware of what it entails to work in the business. Claimant testified that he is able to manage or supervise a restaurant. Claimant testified that he would like to have a restaurant that seats 120 people. **Claimant was unable to testify as to what his productive earnings would be in the restaurant business, therefore, there is absolutely no way for this Commissioner to determine any loss of earning capacity** based on the testimony of the Claimant. Furthermore, when asked by this Commissioner, Claimant testified that he understood that even if he owned a

> restaurant he would still have to figure out the menu, write the checks, pay the bills and stand if he worked the registers. In addition, he admitted that he would have to stand to help in the kitchen as well. Based on Claimant's testimony I find that claimant understands what it entails to run a restaurant and he believes that he can do this type of work.
>
> (Emphasis supplied.)

The single commissioner found that, by his own testimony concerning his intention to run a restaurant, petitioner failed to prove a loss of earning capacity. The question of proof of a loss of earning ability is one of substantial evidence. *E.g. Fields v. Owens Corning Fiberglas*, 301 S.C. 554, 393 S.E.2d 172 (1990). Substantial evidence exists to support an administrative factual finding if, viewing the record as a whole, reasonable minds could reach the same conclusion. *E.g., Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981). Evidence of probable future earning capacity is not unduly speculative where supported by the evidence such as the employee's own testimony. *See Sellers v. Pinedale Residential Center*, 350 S.C. 183, 564 S.E.2d 694 (Ct. App. 2002) (substantial evidence of future earning capacity to determine average weekly wages). Further, the fact that one could draw inconsistent conclusions from the evidence does not mean the administrative decision is not supported by substantial evidence. *E.g., S.C. Coastal Conserv. League v. Dep't of Health and Envtl. Control*, 363 S.C. 67, 610 S.E.2d 482 (2006). Finally, neither the commission nor a court is required to accept expert evidence over lay testimony. *E.g., Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 513 S.E.2d 843 (1999).

Here, the Full Commission, circuit court, and Court of Appeals all found substantial evidence supported the single commissioner's finding that petitioner did not meet his burden of proving wage loss. Given petitioner's extensive testimony regarding his intent to operate or work in a restaurant, I agree that substantial evidence supports the finding that petitioner has future earning capacity. I also agree that petitioner’s failure to present any evidence of the income he can be expected to earn as a result of his change in

profession supports the Full Commission's finding, affirmed by the circuit court and the Court of Appeals, that petitioner did not meet his burden of proof under § 42-9-20 to prove wage loss.

I would affirm.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David R. Martin and Patricia F. Martin,
Respondents/Appellants,

v.

Ann P. Bay, Harvie Goddin, Tony L. Hannon and Diann F. Hannon, Defendants,

Of Whom Ann P. Bay and Harvie Goddin are,
Appellants/Respondents.

Appellate Case No. 2010-167366

Appeal From Charleston County
Mikell R. Scarborough, Master-In-Equity

Opinion No. 5035
Heard March 13, 2012 – Filed September 19, 2012

AFFIRMED

G. Dana Sinkler, of Warren & Sinkler, L.L.P., of Charleston, for Appellants/Respondents Ann P. Bay and Harvie Goddin.

David R. Martin and Patricia F. Martin, pro se, of Edisto Island, for Respondents/Appellants.

LOCKEMY J.: In this direct appeal, Appellants/Respondents Ann P. Bay and Harvie Goddin argue the Master-In-Equity (Master) erred in admitting evidence to interpret the extent of the easement at issue when the Master had found the covenant language determining the boundaries of the easement was unambiguous. Further, Bay and Goddin contend the Master erred in taking judicial notice of the propensity of the critical line to migrate and then imposing a setback in excess of the setback established by the county. On cross-appeal, the Patricia and David Martin argue the Master erred in reconsidering his decision to award attorney's fees. We affirm.

FACTS

The Martins initiated this action on June 9, 2008, seeking a declaration of the rights of the owners of four lots (Lots A, B, C, and D) to an easement for use of a gazebo, dock, and boat ramp constructed on Lot C. Specifically, the Martins sought a declaratory judgment that the covenants in a Declaration of Covenants, Conditions and Restrictions (Covenants) were binding on the owners of Lots A,B,C, and D and that they hold an easement permitting them full use of an easement allowing access to the community gazebo, dock, and boat ramp located on Lot C. The easement is shown on a recorded plat and traverses the length of the property line between Lots C and D. While the width of the easement at one end, where it is bounded by a cul de sac, is fifteen feet, as the easement continues towards the marsh, it expands to over one hundred feet at the water. The Martins own Lots B and D, while Lot C is owned by Bay and Lot A is owned by Tony and Diann Hannon. Goddin is Bay's husband. Before the trial, the parties stipulated that the Covenants were binding on all four lots in the subdivision.

The grant of the perpetual easement and indemnification agreement was properly executed on May 31, 1996 between the original developer, John L. Gramling, and the Martins. The easement's description is as follows:

> A pedestrian/vehicular easement for ingress and egress from Jumbo Lane, across Tract C to the community dock, gazebo and boat landing, said route shall be the route shown on the plat by David W. Spell, RLS dated January 31, 1996 a copy of which is attached hereto and specifically incorporated herein by reference; said

> easement is for the mutual benefit of the property being simultaneously conveyed to David Martin and Patricia F. Martin and property of the Grantor as shown on the above Plat and is a perpetual non-exclusive, appendant, appurtenant easement which shall run with the land and is essentially necessary to the enjoyment of the property conveyed above, and such property of the prior Grantor as is shown on the above referred to Plat, and shall be transmissible by deed or otherwise upon conveyance or transfer of the above conveyed property.

The referenced plat shows the easement as fifteen feet wide at its access point from the cul de sac on Jumbo Lane joining a triangular shaped area approximately one hundred and fifty feet from Jumbo Lane. The southern boundary of the easement is also the boundary between Lots C and D. The Martins testified that when they acquired the easement, it was their understanding the easement entitled them to access the easement by entering from any point along the boundary, including pedestrian access across the property line directly to the dock.

Bay purchased Lot C on October 10, 2003. Title of the property was held by her alone. In late 2007, a disagreement arose between Bay and the Martins about the Martins' access to the easement. Bay argued at trial the Martins do not have the right to cross the easement line at any point, but must access the easement at Jumbo Lane and traverse the easement to the community area. While the walk from the Martins' back porch across the property line between Lot C and D to the community area is approximately 150 feet, the route Bay suggested creates a distance of approximately 400 feet. Patricia testified she suffers from a condition that makes it difficult for her to walk. She stated if she could no longer use their normal route across the property line, she would have to drive her car and park it in the easement while using the community area. Bay stated a car parked in the easement would create a greater burden than if the Martins used the route crossing the property line. However, Bay also stated she wished to build a fence along the property line of Lots C and D, which the Martins argued would interfere with their right to access the easement.

The Master took judicial notice that Lot C, due to its Agricultural Residential (AGR) zoning, had restrictions placed on it, specifically that a party was prohibited

from constructing a fence in the buffer zone defined to be thirty-five feet back from the critical line, pursuant to the Charleston County Zoning and Land Development Regulations (ZLDR).[1] S.C. Code Ann. § 6-29-720 (Rev. 2004 & Supp. 2011) ("[T]he governing body of a municipality or county may adopt a zoning ordinance to help implement the comprehensive plan."); ZLDR § 9.7.1(B)(1). The Master also took judicial notice of the fact "that the [c]ritical [l]ine is not a permanently fixed line, but tends to move further inland with ocean level rise and/or erosion." Further, the Master noted that because of this buffer, it would "not be permissible for Bay to place a fence of a sufficient length to prevent access by the Martins by both vehicle and foot along the end of such a fence near the marsh."

Regarding the extent of the easement, the Master concluded the "language of the grant of easement is not ambiguous." The Master found the language of the easement similar to that in *Plott v. Justin Enterprises*, 374 S.C. 504, 649 S.E.2d 92 (Ct. App. 2007). Moreover, in addition to the thirty-five foot buffer zone, the court ordered an additional five feet to allow for the acknowledged inland migration of the critical line. The Master noted that because Bay and Goddin were prohibited from erecting a fence in the forty feet[2] above the critical line, the Martins would be allowed to access the easement at any point in the unobstructed portion of the property line between Lots C and D at the marsh end. The Master held "no fence constructed by the owner of Lot C may be extended to the edge of the marsh so as to deny access to the easement by the owners of Lot D."

Also at issue in the trial stage were Bay and Goddin's violations of the Covenants. Alleged incidents between Bay and Goddin and the Martins were ongoing from 2006 to 2008. At trial, the Master inquired of the Martins' counsel: "As I read these restrictions they talk as an either or injunctive relief or damages. Do you agree with that?" The Martins' counsel answered in the affirmative and stated they

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[1] The ZLDR states these buffer zones are intended to "provide a natural vegetated area between the furthermost projection of a structure, parking or driveway area, or any other building elements, and all saltwater wetlands, waterways and OCRM (saltwater) critical lines." ZLDR § 9.7.1(A).

[2] The forty feet of unobstructed property line consists of the thirty-five foot buffer zone required by the ZLDR and the additional five feet added to the buffer zone by the Master.

sought injunctive relief, because it was "[m]uch more important." At the trial's conclusion, the Master stated,

> But in response to my request about the injunctive relief is it looked like a question of damages. I don't know if it covered this question of attorney's fees; haven't looked that far. I think the prevailing party can get those attorney's fees. I'll look that up when the time comes.

In his order, the Master noted the Martins elected the remedy of injunction and not damages, and then found Bay and Goddin violated several of the Covenants. Bay and Goddin were enjoined from any further violations of the Covenants. In addressing attorney's fees, the Master acknowledged that Paragraph 2 of the Covenants provided for an award of reasonable attorney's fees to any party required to file an action to enforce the Covenants. The Master awarded attorney's fees and costs incurred in filing this action to the extent that the fees and costs were incurred to enforce the Covenants and to establish the above violations of the Covenants by Bay and Goddin.

Bay and Goddin filed a Rule 59(e) motion to alter or amend the trial court's judgment on February 26, 2010. At the Rule 59(e) hearing, Bay and Goddin contended that because the Master found the description of the easement was unambiguous, the Master must construe the easement from only the plat and deed themselves, and not from any further testimony. The Master responded:

> There wasn't a movement or a change in the location of the easement. There was only a determination as to when, where and how they could utilize the easement . . . Use of the easement by the Martins and their access which had been continuous, that they would walk out of their house, across their property line, directly to the gazebo and dock rather than walking the half mile route or whatever it would take . . . I just don't agree with your premise that they could only access it from the entrance on Jumbo Lane. I just don't agree with that. And I think that that's both the practicality of the situation as well as the use that it's been put to for all those years. So the

> easement itself I don't find to be ambiguous; the location of the easement. The issue of access to the easement, if that's the word we want to use, was what the case was tried over and I find that common sense should prevail over any literal meaning which, if that's what you're getting at, I would find that the access to this easement should be anywhere along the line.

Addressing the issue of attorney's fees during the Rule 59(e) hearing, the Master found that while the Martins adequately pled their request and the amount was reasonable and fair, the language of the Covenants required a party to choose between damages suffered by reason of violation of the Covenants or an injunction requiring the Covenants be followed. Because the Martins sought to enforce the Covenants through an injunction, the Master decided the Covenants did not provide for an award of fees; thus, the Master modified the original order to eliminate the award of attorney's fees and costs to the Martins.

This direct appeal and cross appeal followed.

ISSUES ON APPEAL

A. Bay and Goddin's Direct Appeal

1. Did the Master err in admitting evidence beyond the easement conveyance documents to interpret the extent of the easement?

2. Did the Master err in imposing a setback line of an additional five feet in excess of the setback line established by the county for construction of Bay's fence?

B. The Martins' Cross Appeal

1. Did the Master err in failing to allow the Martins to request relief in both law and equity?

STANDARD OF REVIEW

"Although the existence of an easement is a question of fact in a law action, the determination of the extent of an easement is an equitable matter." *Plott*, 374 S.C. at 510, 649 S.E.2d at 95 (citing *Jowers v. Hornsby*, 292 S.C. 549, 551, 357 S.E.2d 710, 711 (1987); *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997)). "Accordingly, an appellate court may review the [Master's] findings de novo." *Id.* (citing *Hardy v. Aiken*, 369 S.C. 160, 165, 631 S.E.2d 539, 541 (2006)). "'Our broad scope of review, however, does not require this [c]ourt to disregard the findings of the [Master] who saw and heard the witnesses and was in a better position to judge their credibility.'" *Id.* at 510-11, 649 S.E.2d at 95 (quoting *Gordon v. Drews*, 358 S.C. 598, 605, 595 S.E.2d 864, 867 (2004)).

LAW/ANALYSIS

Admission Of Evidence To Interpret Extent Of Easement

Bay and Goddin contend the Master erred in allowing further testimony regarding access to the easement because the language and plat of the easement are unambiguous, thus, taking any further testimony on the extent of the easement is improper. We find that even if portions of the testimony were admitted in error, it was harmless.

"'The language of an easement determines its extent.'" *Plott*, 374 S.C. at 513, 649 S.E.2d at 96 (quoting *Binkley v. Rabon Creek Watershed Conservation Dist.*, 348 S.C. 58, 67, 558 S.E.2d 902, 906-07 (Ct. App. 2001)). "Clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in plain, ordinary, and popular sense." *S.C. Public Serv. Auth. v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981). "'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.'" *Plott*, 374 S.C. at 514, 649 S.E.2d at 96 (quoting *Smith v. Comm'rs of Pub. Works of Charleston*, 312 S.C. 460, 467, 441 S.E.2d 331, 336 (Ct. App. 1994)). "The intention of the parties must be determined by a fair interpretation of the grant or reserve creating the easement." *Springob v. Farrar*, 334 S.C. 585, 595, 514 S.E.2d 135, 141 (Ct. App. 1999) (citing *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 420, 143 S.E.2d 803, 807 (1965)).

"If the language in the grant or reservation is uncertain or ambiguous in any respect, the court may inquire into and consider all surrounding circumstances, including the construction which the parties have placed on the language." *Id.*; *see Smith*, 312 S.C. at 467, 441 S.E.2d at 336 (finding that whether grant in written instrument creates easement and type of easement created are to be determined by ascertaining intention of parties as gathered from language of instrument; grant should be construed so as to carry out that intention); *see also* 25 Am.Jur.2d Easements and Licenses § 18 (2004) (stating if language is uncertain or ambiguous in any respect, all surrounding circumstances, including construction which parties have placed on language, may be inquired into and taken into consideration by court, to end that intention of parties may be ascertained and given effect). "An ambiguous agreement is one capable of being understood in more ways than one, an agreement obscure in meaning, through indefiniteness of expression, or containing words having a double meaning." *Smith*, 312 S.C. 460, 465, 441 S.E.2d 331, 335 (Ct. App. 1994) (citing *Carolina Ceramics, Inc. v. Carolina Pipeline Co.*, 251 S.C. 151, 155-56, 161 S.E.2d 179, 181 (1968); *Proffitt v. Sitton*, 244 S.C. 206, 136 S.E.2d 257 (1964)). The ambiguity "must be interpreted, however, in light of good faith, reasonableness and what was necessarily the intent of the parties" to the original agreement. *Id.*at 468, 441 S.E.2d at 336. "In determining the extent of the easement (number of access points or routes), consideration must be given to what is essentially necessary to the enjoyment of the [dominant estate]." *Id.* (citing *Sandy Island Corp.*, 246 S.C. at 419-20, 143 S.E.2d at 806; *Carolina Land Co. v. Bland*, 265 S.C. 98, 217 S.E.2d 16 (1975); *Jacobs v. Service Merchandise Co.*, 297 S.C. 123, 375 S.E.2d 1 (Ct. App. 1988); 12 S.C. Juris. Easements § 20)).

We share understanding with the Master's interpretation of access to the easement. The pertinent portion of the easement description states:

> A pedestrian/vehicular easement for ingress and egress from Jumbo Lane, across Tract C to the community dock, gazebo and boat landing, said route shall be the route shown on the plat by David W. Spell, RLS dated January 31, 1996 a copy of which is attached hereto and specifically incorporated herein by reference . . . .

After examining the easement description and plat referenced in the conveyance, the location is shown as being bounded by Jumbo Lane, following down the

property line between Lot C and Lot D, to the community area. We must "construe unambiguous language in the grant of an easement according to the terms the parties have used," and thus, we find it is not within our authority to alter the location or boundaries of the easement. However, despite the unambiguous description of the easement's location and boundaries, there is no mention of access to the easement.

Due to the absence of language regarding access to the easement, the Master was permitted to consider all surrounding circumstances in determining the access that was intended by the conveyance. The Martins testified to having travelled to the community area by passing over their property line onto the easement from when the developer, also the grantor, first finished constructing the dock. Because Bay cannot construct a fence or any other obstruction within a certain distance from the marsh due to the setback requirements and buffer zone provided in the ZLDR, there would not be an obstacle to vehicular or pedestrian access by the Martins to the community dock along a portion of their shared property line with Bay. The sole purpose of the easement as stated in the conveyance was for "pedestrian/vehicular" use by the Martins. The Master's ruling simply allows the Martins to step over their property line, directly onto their express easement, for the very purpose for which the easement was intended. This is a reasonable determination of access to the easement, and one that fits within the intent of the original parties to the easement. Based on the foregoing, we hold the Master correctly admitted testimony regarding access to the easement.

Regarding the potential of a fence along the easement, the Martins argued the Master ordered a fence could not be constructed along any portion of Lot C and D's property line, but could be placed on the outside of the easement on Bay's side. However, the Master's original order stated:

> Erection of a fence by Bay will not interfere with the easement rights of the owners of Lots A and B to any degree so long as it is constructed close enough to the boundary of the easement so as not to narrow the easement and diminish its utility. Such a fence will of necessity block the Martins from accessing the easement along the length of the fence . . . A fence which ends a sufficient distance from the edge of the marsh to permit

> vehicular access from Lot D onto Lot C will not interfere with the use the Martins have made of the easement for eleven years.

The Master's ruling regarding this decision was not altered in his Rule 59(e) order. The order, as written, allows for a fence to be built on the property line. Thus, we disagree with the Martins' contention. However, because there is a setback requirement in the ZLDR, there will be a portion of the property line that cannot have a fence constructed upon it.

Establishing Setback Line By Judicial Notice

Bay and Goddin argue the Master erred in taking judicial notice of the migration of the critical line, which led to the Master imposing an additional five foot setback in excess of the mandatory buffer zone required by the ZLDR. We disagree.

Rule 201, SCRE governs judicial notice. The pertinent portion states:

> (a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.
>
> (b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Rule 201(a)-(b), SCRE.

"'A trial court may take judicial notice of a fact only if sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof.'" *Bowers v. Bowers*, 349 S.C. 85, 94, 561 S.E.2d 610, 615 (Ct. App. 2002) (quoting *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171-72, 470 S.E.2d 397, 401 (Ct. App. 1996)). "A fact is not subject to judicial notice unless the fact is either of such common knowledge that it is accepted by the general public without qualification or contention, or its accuracy may be ascertained by reference to readily available

sources of indisputable reliability." *Id.* (quoting *Eadie*, 322 S.C. at 172, 470 S.E.2d at 401).

Here, the Master explained the basis for its judicial notice at the Rule 59(e) hearing by stating:

> [T]his is based on personal observation and, therefore, that's why I think judicial notice should be sufficient. There is both, in this county, erosion of property and accretion of property, and I believe that, based upon my experience on the Planning Board, that every five years the requirement is that the critical line be readjusted on properties in the event of future development. So that's one notice that [this court has] had.
>
> Two will be my personal observation in my own yard . . . .

We find the Master properly took judicial notice of the critical line as stated in § 9.7 of the ZLDR. *See Massey v. War Emergency Co-op. Ass'n.*, 209 S.C. 292, 299, 39 S.E.2d 907, 912 (1946) (finding the trial court took proper notice of the rules and regulations promulgated by an agency pursuant to applicable statutes). We also find the Master properly took judicial notice of the setback from the critical line, as stated in §§ 9.7.1, 9.7.2 of the ZLDR. However, we are not convinced it was proper for the Master to take judicial notice of the migration of the critical line. The Master inaccurately stated his personal knowledge of the critical line's migration created a basis for judicial notice. We do not believe that fact is one of common knowledge accepted by the general public without qualification or contention. The Master does not cite any readily available source in reference to this fact, nor does a review of the ZLDR establish this fact to be true either.

While it might have been improper to take judicial notice of the migration of the critical line based upon personal experience, we believe there is evidence on the record for the Master to determine there can be a migration of the critical line. The dialogue between the Master and the expert surveyor was as follows:

> The Court: Before you go, what would be the length of that easement along the waterfront? 76 ten plus --
> The Witness: 76 ten, L-4 would be 32.05 and L-3 would be 8.34. That would be the DHEC critical line.
> The Court: Which does move from time to time, but that's the dimension you found?
> The Witness: Yes.

Because the Master was provided with this expert surveyor's testimony, we find it was within his discretion to order an additional five feet to the setback line. Accordingly, we affirm the Master.

The Martins' Cross Appeal

The Martins contend the Master erred in failing to allow them to request relief in both law and equity. Specifically, they argue the denial of their request for attorney's fees places the burden of enforcing Covenants upon the enforcer and favors the violator. We disagree.

As a threshold issue, Bay and Goddin claim that because the Martins did not request attorney's fees in their pleadings, they are not entitled to such relief. Bay and Goddin did not raise this issue as a ground for their appeal. Thus, as respondents in this cross-appeal, they have failed to preserve the issue; the ruling of the Master that the Martins adequately pled attorney's fees is the law of the case. *See Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 187, 512 S.E.2d 123, 129 (Ct. App. 1999) (providing that a holding contested by a respondent is the law of the case where the respondent failed to cross-appeal that holding). However, despite the Martins' assertions, we find the Master was correct in reversing his decision to award attorney's fees.

After reviewing the terms of the Covenants that all parties stipulated to, we find the Martins had two alternative remedies. Paragraph 2 of the Covenants states:

> Upon violation of any covenant or restriction, or upon the attempted violation of any of said covenants, it shall be lawful for any person or persons, firm, corporation or corporations, owning any lot or other property situated in

> said Subdivision to prosecute any proceeding at law or in equity against such violator and **either** to prevent him or them from so doing **or** to recover damages, including attorneys fees and costs incurred in enforcing these covenants and restrictions for such violation.

(emphasis added). In light of the document's plain language, we think the parties intended the word "or" in accordance with its common, disjunctive usage. *See Harris v. Anderson Cnty. Sheriff's Office*, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009) (citing *Brewer v. Brewer*, 242 S.C. 9, 14, 129 S.E.2d 736, 738 (1963) (noting that the use of the word "or" in a statute "is a disjunctive particle that marks an alternative")). While the Martins contend a decision that they must choose between injunctive relief or damages creates a situation where the burden of enforcing the Covenants falls solely on the enforcer, we disagree. By choosing damages as their relief, they may get costs and attorney's fees, which may in turn prevent the violator from violating again. With injunctive relief, they may enforce the court ordered injunction and the violators will be found in contempt if the order is violated. We also note that previously, in response to the Master's question of whether the Martins sought damages or injunctive relief, the Martins' counsel stated injunctive, as it was much more important. Therefore, we affirm the Master on this issue.

CONCLUSION

For the forgoing reasons, we affirm the Master.

AFFIRMED.

WILLIAMS AND THOMAS, JJ., concur.