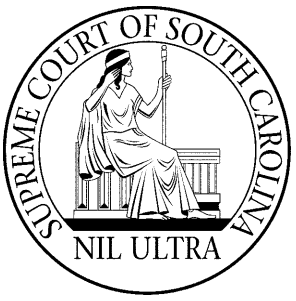

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 35
August 10, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

26678 – Craig S. Rolen v. State	Pending
26679 – Andre Rosemond v. William Catoe	Denied 8/6/09
26681 – Sherrie Floyd v. Richard Morgan	Pending
26682 – Berkeley County School District v. SCDOR	Denied 8/6/09
26692 – In the Matter of Frank Rogers Ellerbe, III	Pending
2009-MO-033 – Tony Leonard v. State	Denied 8/6/09

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

4567-Fiddie v. Fiddie	Pending
4570-In Re: The Estate of Brown	Pending
4573-State v. Vick	Pending
4575-Santoro v. Schulthess	Pending
4576-Bass v. GOPAL, Inc.	Pending
4578-Cole Vision v. Hobbs	Pending
4579-State v. Howard	Pending
4580-Lanier Construction v. Bailey & Yobs	Pending
4583-Jones v. SCDHEC	Pending
4585-Spence v. Wingate	Pending
4588-Springs and Davenport v. AAG, Inc.	Pending
4591-McCrea v. City of Georgetown	Pending
4593-Canteen v. McLeod Regional	Pending
4598-State v. Rivera and Medero	Pending
2009-UP-032-State v. James Bryant	Pending
2009-UP-222-Rashford v. Christopher	Pending
2009-UP-244-G&S Supply v. Watson	Pending
2009-UP-261-United of Omaha v. Helms	Pending
2009-UP-265-State v. H. Williams	Pending
2009-UP-266-State v. M. McKenzie	Pending
2009-UP-276-State v. N. Byers	Pending

2009-UP-281-Holland v. SCE&G	Pending
2009-UP-299-Spires v. Spires	Pending
2009-UP-300-Kroener v. Baby Boy Fulton	Pending
2009-UP-322-State v. Kromah	Pending
2009-UP-336-Sharp v. State Ports Authority	Pending
2009-UP-337-State v. Pendergrass	Pending
2009-UP-338-Austin v. Sea Crest (1)	Pending
2009-UP-340-State v. D. Wetherall	Pending
2009-UP-341-Brightharp v. SCDC	Pending
2009-UP-342-Wooten v. State	Pending
2009-UP-345-Adams v. State	Pending
2009-UP-348-Steele v. Steele	Pending
2009-UP-359-State v. Cleveland	Pending
2009-UP-361-State v. Bolte	Pending
2009-UP-364-Holmes v. National Service	Pending
2009-UP-369-State v. T. Smith	Pending
2009-UP-376-Clegg v. Lambrecht	Pending
2009-UP-382-Kuznik v. Dorman	Pending
2009-UP-385-Lester v. Straker	Pending
2009-UP-393-United Capital v. Technamax	Pending
2009-UP-395-Kenneth W. v. Gretchen D.	Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4387-Blanding v. Long Beach	Pending
4394-Platt v. SCDOT	Pending
4412-State v. C. Williams	Pending
4417-Power Products v. Kozma	Pending
4422-Fowler v. Hunter	Pending
4423-State v. Donnie Raymond Nelson	Pending
4436-State v. Edward Whitner	Pending
4439-Bickerstaff v. Prevost	Pending
4441-Ardis v. Combined Ins. Co.	Pending
4444-Enos v. Doe	Pending
4447-State v. O. Williams	Pending
4448-State v. A. Mattison	Pending
4450-SC Coastal v. SCDHEC	Pending
4451-State v. J. Dickey	Pending
4454-Paschal v. Price	Pending
4455-Gauld v. O'Shaugnessy Realty	Pending
4457-Pelzer, Ricky v. State	Pending
4458-McClurg v. Deaton, Harrell	Pending
4459-Timmons v. Starkey	Pending

4460-Pocisk v. Sea Coast	Pending
4462-Carolina Chloride v. Richland County	Pending
4463-In the Matter of Canupp	Pending
4465-Trey Gowdy v. Bobby Gibson	Pending
4469-Hartfield v. McDonald	Pending
4472-Eadie v. Krause	Pending
4473-Hollins, Maria v. Wal-Mart Stores	Pending
4476-Bartley, Sandra v. Allendale County	Pending
4478-Turner v. Milliman	Pending
4480-Christal Moore v. The Barony House	Pending
4483-Carpenter, Karen v. Burr, J. et al.	Pending
4487-John Chastain v. Hiltabidle	Pending
4491-Payen v. Payne	Pending
4492-State v. Parker	Pending
4493-Mazloom v. Mazloom	Pending
4495-State v. James W. Bodenstedt	Pending
4496-Kent Blackburn v. TKT	Pending
4500-Standley Floyd v. C.B. Askins	Pending
4504-Stinney v. Sumter School District	Pending
4505-SCDMV v. Holtzclaw	Pending
4512-Robarge v. City of Greenville	Pending

4515-Gainey v. Gainey	Pending
4518-Loe #1 and #2 v. Mother	Pending
4522-State v. H. Bryant	Pending
4525-Mead v. Jessex, Inc.	Pending
4528-Judy v. Judy	Pending
4542-Padgett v. Colleton Cty.	Pending
4544-State v. Corley	Pending
4550-Mungo v. Rental Uniform Service	Pending
2007-UP-364-Alexander Land Co. v. M&M&K	Pending
2007-UP-498-Gore v. Beneficial Mortgage	Granted 08/11/08
2008-UP-116-Miller v. Ferrellgas	Pending
2008-UP-285-Biel v. Clark	Pending
2008-UP-424-State v. D. Jones	Pending
2008-UP-512-State v. M. Kirk	Pending
2008-UP-534-State v. C. Woody	Pending
2008-UP-539-Pendergrass v. SCDPP	Pending
2008-UP-546-State v. R. Niles	Pending
2008-UP-552-Bartell v. Francis Marion	Pending
2008-UP-565-State v. Matthew W. Gilliard	Pending
2008-UP-591-Mungin v. REA Construction	Pending
2008-UP-596-Doe (Collie) v. Duncan	Pending

2008-UP-604-State v. J. Davis	Pending
2008-UP-606-SCDSS v. Serena B and Gerald B.	Pending
2008-UP-607-DeWitt v. Charleston Gas Light	Pending
2008-UP-629-State v. Lawrence Reyes Waller	Pending
2008-UP-645-Lewis v. Lewis	Pending
2008-UP-646-Robinson v. Est. of Harris	Pending
2008-UP-647-Robinson v. Est. of Harris	Pending
2008-UP-648-Robinson v. Est. of Harris	Pending
2008-UP-649-Robinson v. Est. of Harris	Pending
2008-UP-651-Lawyers Title Ins. V. Pegasus	Pending
2008-UP-664-State v. Davis	Pending
2008-UP-673-State v. Randall Smith	Pending
2008-UP-705-Robinson v. Est of Harris	Pending
2008-UP-712-First South Bank v. Clifton Corp.	Pending
2009-UP-007-Miles, James v. Miles, Theodora	Pending
2009-UP-008-Jane Fuller v. James Fuller	Pending
2009-UP-010-State v. Cottrell	Pending
2009-UP-028-Gaby v. Kunstwerke Corp.	Pending
2009-UP-029-Demetre v. Beckmann	Pending
2009-UP-030-Carmichael, A.E. v. Oden, Benita	Pending
2009-UP-031-State v. H. Robinson	Pending

2009-UP-035-State v. J. Gunnells	Pending
2009-UP-039-State v. Brockington	Pending
2009-UP-040-State v. Sowell	Pending
2009-UP-042-Atlantic Coast Bldrs v. Lewis	Pending
2009-UP-060-State v. Lloyd	Pending
2009-UP-066-Darrell Driggers v. Professional Finance	Pending
2009-UP-067-Bernard Locklear v. Modern Continental	Pending
2009-UP-076-Ward, Joseph v. Pantry	Pending
2009-UP-079-State v. C. Harrison	Pending
2009-UP-113-State v. Mangal	Pending
2009-UP-138-State v. Summers	Pending
2009-UP-147-Grant v. City of Folly Beach	Pending
2009-UP-159-Durden v. Durden	Pending
2009-UP-172-Reaves v. Reaves	Pending
2009-UP-208-Wood v. Goddard	Pending
2009-UP-226-Buckles v. Paul	Pending
2009-UP-228-SCDOT v. Buckles	Pending
2009-UP-229-Paul v. Ormond	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

K&A Acquisition Group, LLC, Appellant,

v.

Island Pointe, LLC; South Carolina Department of Transportation, Elizabeth S. Mabry, in her Official Capacity as Executive Director of the South Carolina Department of Transportation; and City of Folly Beach, South Carolina, Respondents.

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

Opinion No. 26696
Heard April 21, 2009 – Filed August 10, 2009

AFFIRMED AS MODIFIED

C. Mitchell Brown, of Nelson, Mullins, Riley & Scarborough, of Columbia, Robert H. Brunson and Erin E. Richardson, both of Nelson, Mullins, Riley & Scarborough, of Charleston, for Appellant.

Beacham O. Brooker, Jr., of Columbia, Ellison D. Smith, IV, of Smith, Bundy, Bybee & Barnett, of Mt. Pleasant,

James B. Richardson, Jr., of Columbia, Michael R. Daniel, of Elloree, Otis B. Peeples, Jr., of Charleston, for Respondents.

JUSTICE BEATTY: In this declaratory judgment action, K&A Acquisition Group, LLC (K&A), appeals the master-in-equity's order finding that a .42 acre parcel of coastal property, which was part of a former Folly Beach toll road, was "abandoned" by the South Carolina Department of Transportation (SCDOT) and properly conveyed by a quitclaim deed to private landowners. Pursuant to Rule 204(b), SCACR, this Court certified this appeal from the Court of Appeals. We affirm as modified.

FACTUAL/PROCEDURAL HISTORY

In March 2005, K&A purchased Long Island located to the east of Peas Island across from Folly Creek. Long Island is annexed into the City of Folly Beach. K&A purchased this property with the expectation that it would construct a residential development on Long Island with approximately fifty to sixty home sites.

Because there is no means of vehicular access to Long Island across Folly Creek, K&A sought to purchase a .42 acre parcel of property on neighboring Peas Island from Henry and Linda Walker ("the Walker tract"). This parcel constituted a portion of the "old" Folly Beach toll road which originated in 1923 and has a lengthy procedural history.

Prior to 1923, the Folly Beach Corporation, which owned and developed a significant portion of Folly Island, built a private road which: started on James Island, crossed Peas Island, bridged Folly Creek to Long Island, crossed Long Island, extended from Long Island to Big Oak Island and Little Oak Island, and ultimately crossed Folly River and ended on Folly Island.

On March 16, 1923, the General Assembly created the Folly Roadway Company "for the purpose of constructing, maintaining, and

operating a toll and turnpike road from a point on James' Island, in the County of Charleston, to Folly Island in the said county, over the route of the existing road, causeways and bridges now connecting said islands, with the right to charge tolls on said route as fixed by law, and to erect one or more gates on said route for the collection of the same." ("1923 Legislative Act"). Act No. 288, 1923 S.C. Acts 557.

Subsequently, the Folly Beach Corporation conveyed the existing road to the Folly Roadway Company by deed recorded on April 13, 1923.

After two years of operation, the Folly Roadway Company decided to rebuild the road and bridges and straighten the route of the toll road by extending the causeway, which connected James Island and Peas Island, all the way to Folly Beach. The construction of this new route would eliminate a portion of the original toll road which crossed Peas Island, Long Island, and two other marsh islands.

By legislative act, the General Assembly authorized the Folly Roadway Company to implement its plan to relocate the toll road. Act No. 34, 1926 S.C. Acts 1441. In order to finance the construction of the "new" Folly Beach Road, the Folly Roadway Company issued $380,000 in bonds secured by mortgage of its properties, including the property underlying the "old" toll road route, to Citizens and Southern Bank of Savannah, Georgia. According to the Folly Roadway Company, the project resulted in "practically a new road with its necessary bridges, causeways . . . connecting said Folly Island with James Island, S.C."

On November 28, 1939, Charleston County offered to purchase the toll road. The Folly Roadway Company rejected the offer on the ground it refused to sell the roadway for less than the amount due on its outstanding bonds. Subsequently, the bank securing the bonded indebtedness foreclosed on the Folly Roadway Company's property. At the foreclosure sale, Charleston County purchased all of the property owned by the Folly Roadway Company.

On April 3, 1943, the General Assembly authorized and directed the State Highway Commission (n/k/a "SCDOT") to purchase from Charleston County the "Folly Beach Road in Charleston County, to Free the Said Road of Toll Charges and to Authorize Charleston County to Sell Said Road to the Said Commission." Act No. 64, 1943 S.C. Acts 85.

According to the SCDOT's records, there was no maintenance performed on the remnants of the "old" route to Folly Beach which remained on Peas Island, Long Island, Big Oak Island, and then ran into private property. These records also reflect that no portion of the "old" route was ever assigned a number as part of the State Highway System.

Not until 2002, did the SCDOT realize that it owned the property at issue. At that time, an attorney for the Walkers requested a quitclaim deed from the SCDOT to remove a cloud on the title to their property. The Walkers, while attempting to sell their property, discovered that their house on Peas Island was located on top of a portion of the "old" Folly Beach Road toll route.

By quitclaim deed dated April 3, 2002, the SCDOT conveyed to the Walkers the .42 acre tract of land on Peas Island for consideration in the amount of $1.00.

Because K&A believed the "chief and most available means of access from Long Island to Folly Road" was a portion of property located across neighboring Peas Island, it sought to purchase the Walker tract and to obtain regulatory approval for a bridge connecting Long Island to Peas Island. K&A claimed the purchase of the parcel was necessary to ensure a right of way from the residential development on Long Island to the mainland.

Shortly after K&A purchased Long Island, Island Pointe, LLC ("Island Pointe") purchased Peas Island and obtained title insurance on

the entire tract which included the Walker tract.[1] After the City of Folly Beach approved the residential development of Peas Island, Island Pointe proceeded with its development plan.

K&A filed this declaratory judgment action against Island Pointe, the SCDOT, and the City of Folly Beach. In terms of relief, K&A essentially sought for the trial court to declare that the Walker tract remained a public right of way. In support of this request for relief, K&A claimed the SCDOT did not abandon the property and did not properly convey it to the Walkers.

After a hearing, the master-in-equity ruled against K&A, finding: (1) the right of way dedicated to the public on the "old" Folly Beach toll road was transferred to the "new" Folly Beach toll road, (2) the SCDOT properly abandoned the portion of its property that once comprised the "old" Folly Beach toll road, (3) the SCDOT properly disposed of a portion of the property by means of a quitclaim deed to the Walkers, and (4) it did not have jurisdiction to declare that a public right of way still existed over the "old" route in question given such a decision would deprive landowners along this route, who were not joined as parties, an opportunity to protect their property interests. The master-in-equity denied K&A's motion for reconsideration.

K&A appealed the master-in-equity's decision to the Court of Appeals. Pursuant to Rule 204(b), SCACR, this Court certified this appeal from the Court of Appeals.

ISSUES

I. Should the court enforce a deed that purports to convey a fee simple interest from the State to a private party if the State did not "vigorously attempt to sell the property by advertising for competitive bids in local newspapers or by direct negotiations" as required by South Carolina Code Ann. § 57-5-340?

[1] The Walkers sold the .42 acre tract with an additional 1.5 acres on Peas Island to Island Pointe for $2,000,000.

II. If a deed states that it is "subject to any and all existing reservations, easements, rights of way, [and] control of access," does the deed transfer the public right of way existing on the property conveyed in the deed to the grantee?

III. Is a dedicated public right of way on the path of a former toll road "abandoned" when the route of the toll road is moved but there was no "unequivocal act showing a clear intent to abandon" the right of way and undisputed evidence supports continued public use of the road after the supposed "abandonment in fact?"

IV. Are current owners of property potentially subject to a public right of way "indispensable parties" to litigation in which a non-adjoining property owner is challenging a deed potentially subject to a similar public right of way?

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991).

The determination of whether property has been dedicated to the public is an action in equity. State v. Beach Co., 271 S.C. 425, 248 S.E.2d 115 (1978); Mack v. Edens, 320 S.C. 236, 464 S.E.2d 124 (Ct. App. 1995). "If the action is viewed as interpreting a deed, it is an equitable matter and the appellate court may review the evidence to determine the facts in accordance with the court's view of the preponderance of the evidence." Slear v. Hanna, 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998).

Because this is an action in equity referred to a master-in-equity for final judgment, we may find facts in accordance with our own view of the preponderance of the evidence. Thomas v. Mitchell, 287 S.C. 35, 336 S.E.2d 154 (Ct. App. 1985). We, however, are not required to

ignore the findings of the trial judge, who heard and saw the witnesses. Id. at 38, 336 S.E.2d at 155.

DISCUSSION

Although K&A argues its issues in the above-listed sequence, we believe that in the interest of clarity and logical progression the issues should be addressed out of the "briefed" order.

We find this appeal essentially presents four questions: (1) was the "old" Folly Beach toll road dedicated to the public; (2) if so, did the construction or relocation of the "new" Folly Beach toll road effectively abolish the public easement on the "old" Folly Beach Road; (3) if the public easement on the "old" Folly Beach toll road remained intact after the relocation, was it abandoned by the SCDOT; and (4) if abandoned, did the SCDOT properly convey a portion of this property?[2]

In short answer, we find the "old" Folly Beach Road was dedicated to the public and this public easement remained intact after the new road was created and until the SCDOT affirmatively abandoned the route of the former toll road. Additionally, we hold the SCDOT properly conveyed by quitclaim deed a portion of this abandoned property to the Walkers.

I.

Although K&A agrees with the master-in-equity's finding that the "old" Folly Beach toll road was dedicated to the public, it contends the master-in-equity erred in finding this was a "qualified public

[2] We note the Respondents question whether K&A has standing to challenge the SCDOT's conveyance of the Walker tract and, in turn, Island Pointe's ownership of the Walker tract. Because this issue was neither raised to nor ruled upon by the master-in-equity, we find it is not preserved for this Court's review. See Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 511, 598 S.E.2d 712, 715 (2004) (stating an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review).

easement" that ran with the toll road. Because the right of way in the "old" Folly Beach toll road was properly dedicated to the public, K&A claims it remained dedicated to the public even after the Folly Roadway Company relocated the road and ceased operation of the original toll road.

We agree with K&A's contention. For reasons that will be discussed, we find the relocation of the "new" Folly Beach toll road did not abolish the public right of way that was properly created in the "old" Folly Beach toll road.

"The essence of dedication is that it shall be for the use of the public at large." Safety Bldg. & Loan Co. v. Lyles, 131 S.C. 542, 544, 128 S.E. 724, 724 (1925). A dedication "must be made to the use of the public exclusively, and not merely to the use of the public in connection with a user by the owners in such measure as they may desire." Id. at 545, 128 S.E. at 724.

Applying these principles to the instant case, we find the "old" Folly Beach toll road was unequivocally dedicated to the public. Pursuant to the 1923 Legislative Act, the General Assembly incorporated the Folly Roadway Company and authorized it to operate the "old" Folly Beach Road as a toll road. Upon receiving this charter, the Folly Beach Corporation conveyed the "old" Folly Beach Road to the Folly Roadway Company. In turn, the Folly Roadway Company began operating the existing route as a toll road and effectively dedicated the road to the public.

Two years later, this Court explicitly recognized the Folly Roadway Company's dedication of the "old" Folly Beach Road to the public. In State v. Olasov, 133 S.C. 139, 130 S.E. 514 (1925), this Court affirmed the conviction of Olasov for trespass on the land of another which arose out of Olasov's refusal to pay the toll on the "old" Folly Beach Road. Because Olasov had purchased several lots on Folly Beach from the Folly Beach Corporation, which included a "free right" to use the "old" Folly Beach Road, Olasov claimed he did not have to pay the toll. In affirming Olasov's conviction, this Court found

Olasov's easement to use the "old" Folly Beach Road was terminated upon the sale of the road to the Folly Roadway Company. Id. at 144, 130 S.E. 515. In a concurring opinion, one justice stated, "While unquestionably the turnpike company has dedicated the highway to the public and the easement is a public easement and not private property, the turnpike company still retains the fee-simple title to the land. The public has an easement to use the road upon the payment of tolls provided for in the act incorporating the turnpike company; that is, the public has a qualified easement." Id. at 146, 130 S.E. 516 (Cothran, J., concurring).

Furthermore, there is evidence in the record that the Folly Roadway Company believed the toll road was dedicated to the public. In its Complaint dated July 22, 1940, in which it challenged Charleston County's condemnation action, the Folly Roadway Company specifically stated that the "old" Folly Beach toll road had been dedicated to the public.

II.

Because the "old" Folly Beach Road had been dedicated to the public, K&A asserts the master-in-equity erred in determining that the construction of the "new" Folly Beach toll road effectively "transferred" the original public dedication from the "old" road to the "new" road.

We find the master-in-equity erred in concluding that the public dedication was "transferred by the changing of the route of the road." Given the "old" Folly Beach Road was established as a highway and dedicated to the public, the public right of way continued until it was affirmatively abandoned by the SCDOT.

The mere act of relocating the toll road did not have the effect of abolishing the public easement created in the original route. Although the Folly Roadway Company may have vacated the "old" Folly Beach route, this action did not operate to eliminate the public right of way. Thus, the "old" Folly Beach Road remained dedicated to the public

despite the relocation. See 39A C.J.S. Highways § 128 (Supp. 2008) ("While the relocation of a highway by the public authority may be sufficient to show the abandonment of the old highway, such relocation does not automatically effect the abandonment of an old easement."); 39 Am. Jur. 2d Highways, Streets, & Bridges § 148 (2008) ("Once established, a public highway does not lose its character as a public road unless it is either vacated by the authorities in the manner prescribed by statute or abandoned."); see also A.C. McI., Annotation, What Justifies Discontinuance of a Highway?, 68 A.L.R. 794 (1930 & Supp. 2008) (noting that highways cannot be vacated unless they are useless, inconvenient or burdensome and concluding that whether a highway should be vacated, or discontinued, is determined primarily by considerations of its necessity or public utility).[3]

Moreover, this Court has specifically found that once a toll road is dedicated to the public the easement is not revoked upon cessation of the toll road operation. Scheper v. Clark, 124 S.C. 302, 312, 117 S.E. 599, 602 (1923) ("'The weight of authority and sound reason concur in holding that, upon termination of the franchise, the road [a toll road] remains as before, a public highway, wholly freed from the burden of tolls.'" (quoting Allison v. R.C. Gravel-Road Co., 39 S.W. 910, 913 (Mo. 1897))).

[3] Although not expressly stated, section 57-5-120 of the South Carolina Code supports this conclusion in that the SCDOT may abandon a section of highway which is relocated. This section implies that the SCDOT must take additional steps to abandon a road beyond mere relocation. See S.C. Code Ann. § 57-5-120 (2006) ("The department may abandon as a part of the state highway system any section of highway which may be relocated, and every such section so abandoned as a part of the state highway system shall revert to the jurisdiction of the respective appropriate local authorities involved or be abandoned as a public way. But the department, in its discretion, may retain in the system any such relocated section when it serves as a needed connection to the new section or when it serves as a proper part of the state highway system.").

III.

In view of our conclusion that the relocation of the original toll road did not operate to eliminate the public easement, the question becomes whether SCDOT properly abandoned the right of way. See Hoogenboom v. City of Beaufort, 315 S.C. 306, 319 n.7, 433 S.E.2d 875, 884 n.7 (Ct. App. 1993) ("A right of way created by dedication may be lost by abandonment.").

As we interpret the trial order, the master-in-equity equated the term "discontinuance" with "abandonment." In his order, the master-in-equity states, "abandonment or discontinuance of the 'old' route was effectively accomplished in 1926 upon completion of the 'new' road by the Folly Roadway Company pursuant to legislative action." Based on this belief, the master-in-equity concluded "this discontinuance operated as an affirmative abandonment in fact of the old roadway."

Although we agree with the master-in-equity's determination that the SCDOT abandoned the old route, we disagree that the "discontinuance" or relocation of the route was sufficient to constitute abandonment. The terms "discontinuance" and "abandonment" are not synonymous. See Marrin v. Spearow, 646 A.2d 254, 257 (Conn. App. Ct. 1994) ("'Discontinuance' and 'abandonment' are not synonymous terms as applied to highways. A highway may be extinguished by direct action through governmental agencies, in which case it is said to be discontinued; or by nonuser by the public for a long period of time with the intention to abandon, in which case it is said to be abandoned." (citation omitted)); Ord v. Fugate, 152 S.E.2d 54, 59 (Va. 1967) (noting that discontinuance of public road should not carry the same effect as abandonment and stating "under the present statutes the discontinuance of a secondary road means merely that it is removed from the state secondary road system. Discontinuance of a road is a determination only that it no longer serves public convenience warranting its maintenance at public expense. The effect of discontinuance upon a road is not to eliminate it as a public road or to render it unavailable for public use"); see also Wilson v. Greenville County, 110 S.C. 321, 325,

96 S.E. 301, 302 (1918) (recognizing that discontinuance of a public highway and abandonment are two acts which are "separate and distinct in fact and in law").

The discontinuance of a highway may be evidence of abandonment. However, mere discontinuance is not sufficient to prove abandonment.[4] This conclusion is supported by our case law and our state's statutory scheme governing the procedure required for abandonment.

Under our state's case law, for a party to prove abandonment it must present evidence beyond the mere relocation of a road. See Wessinger v. Goza, 231 S.C. 607, 611, 99 S.E.2d 395, 397 (1957) ("It is axiomatic that a public highway is not abandoned simply because a new highway is built."). Instead, a party must "show the abandonment by clear and unequivocable evidence." Carolina Land Co. v. Bland, 265 S.C. 98, 109, 217 S.E.2d 16, 21 (1975). This Court has explained the principles of abandonment as follows:

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[4] We note the existence of an old case which appears to equate the term "discontinuance" with "abandonment." However, we find the case is distinguishable and the statement constitutes dicta.

In Keenan v. Broad River Power Co., 163 S.C. 133, 161 S.E. 330 (1931), a private landowner brought suit to recover damages resulting from the defendants' trespass. Prior to the action, the defendants had acquired an easement over the landowner's property for the operation of their railroad. Because the defendants ceased operation of the railway over this property, this Court found the "discontinuance" operated as an "abandonment" of the right of way which could not be revived. Thus, the plaintiff was entitled to compensation for the damages incurred by the defendants' re-entry upon the property.

Keenan is distinguishable from the instant case in that it involved a private right of way. Moreover, this Court's statement regarding the two terms constituted dicta given the "Defendants practically admit[ted] that they had abandoned the right of way" even though they used the term discontinued. Id. at 136, 161 S.E. at 331. Thus, it was unnecessary for this Court to define or analyze these two terms.

> 'An abandonment occurs where the use for which the property is dedicated becomes impossible of execution, or where the object of the use for which the property is dedicated wholly fails. Any use which is not inconsistent with the declared purpose of a dedication will not support a charge of abandonment.'
>
> 'Acts of municipality. The rights of purchasers under a map and of the general public cannot be lost by the unauthorized acts of the governing or controlling officials of the municipality, or by their neglect, but only by legal abandonment by the public as well as the officials.' 26 C.J.S. Dedication s 63 at page 552.
>
> 'An easement created by dedication may be abandoned by unequivocal acts showing a clear intent to abandon. To constitute abandonment, the use for which the property is dedicated must become impossible of execution, or the object of the use must wholly fail. Generally, a mere misuser or nonuser does not constitute abandonment of land dedicated to public use.' 23 Am.Jur.(2d) 57, Dedication, Sec. 66.

City of Myrtle Beach v. Parker, 260 S.C. 475, 486, 197 S.E.2d 290, 295-96 (1973).

Turning to the instant case, we find the SCDOT offered evidence of "unequivocal acts showing a clear intent to abandon" the public easement.

Although not dispositive, the Folly Roadway Company re-routed the "old" Folly Beach Road. After this relocation, the use and maintenance of the old road significantly diminished because vehicular travel used the newly-created road. Notably, after the relocation of the road in 1926, a one-hundred-foot private right of way over Big Oak Island was granted to property owners on Long Island as a means of access to Long Island from the "new" road. That same year, the Folly

Roadway Company deeded to H.T. and Alice Ebner a portion of the "old" route from the end of Little Oak Island to Folly Island, which included the bridge over the Folly River. In 1986, the SCDOT also issued by quitclaim deed to Harry L. Joye, Jr. and Cecelia Self a portion of the "old" route which crossed Big Oak Island. Significantly, the Walkers built their home over a portion of the "old" route. If the public right of way still remained on the "old" road, then the above easement would have been unnecessary, the SCDOT would not have deeded the property to the Ebners, and the Walkers would not have been able to construct their home in that particular location.

Based on the foregoing, we find the SCDOT properly abandoned the "old" Folly Beach Road, which included the Walker tract. Cf. Williams v. Woodward, 240 S.W.2d 94 (Ky. Ct. App. 1951) (holding that where the State Highway Department abandoned roadway and relocated new highway, abutting property owners built fences around roadway and otherwise obstructed it, and roadway had not been used to any substantial extent by public for some years, the actions of the State Highway Department, and of the abutting property owners and non-user by the public, constituted an abandonment of the roadway); Hart v. Town of Shafter, 810 N.E.2d 489, 491 (Ill. App. Ct. 2004) ("[A]n abandonment will be found only where the public has acquired the legal right to another road or where the necessity for another road has ceased to exist."); see J.E.M., Annotation, Alteration or Relocation of Street or Highway as Abandonment or Vacation of Parts Not Included, 158 A.L.R. 543 (1945 & Supp. 2008) (analyzing cases and considering question of whether, or under what circumstances, a change in a public way will work an abandonment, vacation, or discontinuance of the former way to the extent of the change).

Furthermore, once the public easement on the "old" Folly Beach Road was abandoned, we find it could not be essentially "rededicated," as contended by K&A, through nominal use by two or three Peas Island landowners or the placement of utilities during the 1970s or 1980s.

IV.

K&A argues the master-in-equity erred in enforcing the conveyance by quitclaim deed from the SCDOT to the Walkers on two grounds. Initially, K&A claims the SCDOT failed to comply with the statutory requirements of section 57-5-340 of the South Carolina Code. Even if the statutory requirements were satisfied, K&A asserts the language of the deed expressly subjected the transferred property to existing easements.

A.

As stated in the deed, the SCDOT conveyed the property to the Walkers pursuant to the authority established in section 57-5-340 of the South Carolina Code. This section provides in relevant part:

> The department shall continuously inventory all of its real property. When, in the judgement [sic] of the department any real estate acquired as provided in this chapter is no longer necessary for the proper operation of the department or highway systems, the department shall vigorously attempt to sell the property by advertising for competitive bids in local newspapers **or** by direct negotiations, but in every case of the sale or transfer of any real estate by the commission or the department, the sale or transfer shall be made public by publishing notice of it in the minutes of the next succeeding meeting of the commission. The commission and the department shall convey by deed, signed by the Secretary of the Department of Transportation and the Deputy Director of the Division of Finance and Administration, any real estate disposed of under this section. Any funds derived from the sale of surplus property by authority of this section shall be credited to the funding category from which funds were drawn to finance the department's acquisition of the property.

S.C. Code Ann. § 57-5-340 (2006 & Supp. 2008) (emphasis added). K&A asserts the deed should not be enforced because the SCDOT did not "vigorously attempt to sell the property by advertising for competitive bids in local newspapers or by direct negotiations."

K&A is correct that the SCDOT did not advertise for competitive bids on the Walker property. However, we find this was not necessary to be in compliance with section 57-5-340. As evidenced by the correspondence between the Walkers' attorney and the SCDOT, there were "direct negotiations" between the parties. Because the requirements for the SCDOT are written using the disjunctive "or," we conclude the General Assembly has authorized the SCDOT to sell surplus property either through advertisement or direct negotiations. See 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"); see also Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003) (recognizing the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature); Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (noting the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation). Furthermore, as testified to at the hearing before the master-in-equity, the SCDOT published notice of the transfer "in the minutes of the next succeeding meeting of the commission." Accordingly, we find the SCDOT sale of the Walker tract for consideration of $1.00 was sufficient to satisfy the requisite statutory procedure.[5]

[5] Our decision should in no way be construed as providing the SCDOT with "unbridled" authority to convey public property to private landowners. We believe the facts of this case are unique and will not recur on a frequent basis. Moreover, the term "direct negotiations" necessarily requires a good faith effort on the part of the SCDOT to procure the best deal given the "funds derived from the sale of surplus property by authority of this section shall be credited to the funding category from which funds were drawn to finance the department's acquisition of the property." S.C. Code Ann. § 57-5-340 (2006 & Supp. 2008). In view of this

B.

Even assuming the requirements of section 57-5-340 were satisfied by the means of conveyance, K&A contends a provision of the Walker deed identifies the existence of the public right of way on Peas Island. The provision relied on by K&A states, "This conveyance is being made subject to any and all existing public utility rights of user, reservations, easements, rights of way, control of access, zoning ordinances and restrictions or protective covenants that may appear on record or on the premises, other than those hereby released."

In construing a deed, "the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." Wayburn v. Smith, 270 S.C. 38, 41, 239 S.E.2d 890, 892 (1977). "In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law." Gardner v. Mozingo, 293 S.C. 23, 25, 358 S.E.2d 390, 391-92 (1987). "The intention of the grantor must be found within the four corners of the deed." Id. at 25, 358 S.E.2d at 392. "When intention is not expressed accurately in the deed evidence *aliunde* may be admitted to supply or explain it." Id. "The instrument is not thereby varied or contradicted but is explained or corrected." Id. "'A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments.'" Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) (quoting 28A C.J.S. Easements § 57 (1996)).

Applying these established rules of interpreting deeds, we find the property conveyed to the Walkers was not subject to a public easement. As previously stated, any public easement on the "old" Folly Beach Road had been abandoned by the SCDOT well before the 2002 conveyance. Significantly, the SCDOT did not even realize it had an

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statutory provision, it is in the best interest of the SCDOT to receive the most favorable financial return on its conveyance of surplus property.

interest in the property until the Walkers' attorney requested a quitclaim deed. Moreover, given the Walkers' home was built on top of the .42 acre parcel, it would have been nonsensical for the SCDOT to reserve a public right of way over this property. Additionally, we believe the terms of the deed referencing a right of way constituted "boilerplate" language which did not specifically identify any right of way. Furthermore, we note the SCDOT issued a similar quitclaim deed to other Peas Island landowners in a 1986 conveyance, thus, indicating the absence of a public easement.

V.

Finally, K&A argues the master-in-equity erred in concluding he was without jurisdiction to find that a public right of way existed over the "old" Folly Beach Road given the other potentially-affected landowners were not joined in the lawsuit. K&A avers this ruling was erroneous because a ruling that the public right of way continues to exist would not disturb the property rights of landowners on Big Oak Island or Little Oak Island.

In view of our conclusion that the SCDOT abandoned the public easement on the "old" Folly Beach Road, we need not address this issue. See Hagood v. Sommerville, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005) (stating the appellate court need not address additional issues when resolution of prior issue is dispositive).

In any event, we find the master-in-equity's conclusion was erroneous given the proper parties were joined in the lawsuit. Because the evidence indisputably established that the public easement had been abandoned well before the 2002 conveyance to the Walkers, the necessary parties to the lawsuit were only those who had an interest in the specific .42 acre parcel. Thus, Island Pointe, who purchased the Walker property, as well as the SCDOT and the City of Folly Beach were the only indispensable parties. See S.C. Dep't of Transp. v. Hinson Family Holdings, LLC, 361 S.C. 649, 655, 606 S.E.2d 781, 784-85 (2004) (stating "DOT and the local municipality are the

indispensable parties that must be joined in an action to abandon a public road").

CONCLUSION

We agree with the master-in-equity's ultimate decision to find the SCDOT abandoned the "old" Folly Beach Road and properly conveyed a portion of this property to the Walkers. However, we modify the master-in-equity's order regarding the analysis of abandonment.

We find the mere relocation or "discontinuance" of the "old" Folly Beach Road did not operate to abolish the previously established public right of way and to transfer it to the "new" Folly Beach Road. Instead, we conclude the original public easement remained intact until the SCDOT affirmatively abandoned the property. Additionally, we hold the SCDOT properly conveyed the .42 acre parcel at issue by complying with the statutory requirements of section 57-5-340 and issuing a valid deed to the Walkers. Accordingly, the decision of the master-in-equity is

AFFIRMED AS MODIFIED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James Stalk, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Lancaster County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 26697
Submitted May 28, 2009 – Filed August 10, 2009

AFFIRMED AS MODIFIED

Chief Appellate Defender Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General David Spencer, all of Columbia, for Respondent.

JUSTICE PLEICONES: We granted petitioner's (Stalk's) petition for a writ of certiorari to review a Court of Appeals decision which reversed a circuit court order granting Stalk post-conviction relief (PCR). Stalk v. State, 375 S.C. 289, 652 S.E.2d 402 (Ct. App. 2007). We affirm as modified.

FACTS/PROCEDURAL HISTORY

Stalk pleaded guilty to twelve charges[1] and received an aggregate sentence of fifty years. He took no direct appeal, but filed a PCR application which was granted after an evidentiary hearing, the PCR judge finding Stalk's plea counsel rendered ineffective assistance. The Court of Appeals granted the State's petition for a writ of certiorari to review that order.

A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that the applicant was prejudiced by that deficiency. Hill v. Lockhart, 474 U.S. 52 (1985). Plea counsel is ineffective within the meaning of the Sixth Amendment only when the applicant satisfies both requirements. Id. In its opinion, the Court of Appeals reversed, finding no evidence that counsel was "ineffective" or any evidence that Stalk was prejudiced by counsel's "ineffectiveness." In its analysis, the Court of Appeals mislabeled as "Ineffective Assistance of Counsel" the section analyzing whether there was evidence to support the PCR judge's finding that Stalk had shown plea counsel's "deficient performance." We modify the Court of Appeals' opinion to the extent that it confuses the requirement that Stalk must show deficient performance, with the ultimate question: whether he has demonstrated ineffective assistance of counsel entitling him to PCR.

[1] Seven counts of second degree burglary, four counts of grand larceny, and one count of resisting arrest.

ISSUE

Did the Court of Appeals misapprehend the prejudice standard in a guilty plea ineffective assistance of counsel claim?

ANALYSIS

Stalk maintains that, assuming that he has shown counsel's performance to be deficient, in order to obtain PCR he need only present testimony that but for that deficient performance, he would not have pleaded guilty but would have insisted on going to trial. Stalk maintains that the question whether counsel's deficient act(s) of omission or commission would have led to evidence which in turn would have affected the decision to plead guilty goes to the "deficiency prong" rather than to the "prejudice prong" of an ineffective assistance claim. He therefore argues the Court of Appeals in this case misapplied the ineffective assistance of plea counsel test. We find no error in the Court of Appeals' prejudice analysis.

In Hill, the United States Supreme Court explained:

> We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel. In the context of guilty pleas, the first half of the *Strickland v. Washington* test is nothing more than a restatement of the standard of attorney competence already set forth in *Tollett v. Henderson*, *supra*, and *McMann v. Richardson*, *supra*. The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable

> probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.
>
> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. See, *e.g.*, *Evans v. Meyer*, 742 F.2d 371, 375 (CA7 1984) ("It is inconceivable to us…that [the defendant] would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received"). As we explained in *Strickland v. Washington*, *supra*, these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the "idiosyncrasies of the particular decision maker." *Id.*, 466 U.S., at 695, 104 S.Ct., at 2068.

Hill, 474 U.S. at 58-59 (footnote omitted).

The Court of Appeals followed Hill when it engaged in a prejudice analysis and found no evidence to support the PCR judge's finding that Stalk had met his burden. Stalk's prejudice claim rested on his assertion that his attorney was so unprepared that Stalk felt coerced into pleading guilty. We agree with the Court of Appeals that to meet his prejudice burden Stalk was required to prove more than the fact of counsel's inattentiveness, which is the "deficiency." For example, Stalk needed to present some evidence that had counsel done an investigation he would have found a witness or evidence that was helpful to Stalk, that is, something that would have affected counsel's advice to Stalk to accept the plea bargain offered or that would have caused Stalk to decline to accept it. Although appellate courts frequently "short-hand" the prejudice prong in a guilty plea ineffective assistance claim as "but for the deficient performance is there a reasonable probability that the defendant would not have pleaded guilty but would have insisted on going to trial," Hill makes clear that this prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial. We find no error in this portion of the Court of Appeals decision.

CONCLUSION

The decision of the Court of Appeals is

AFFIRMED AS MODIFIED.

TOAL, C.J., WALLER and BEATTY, JJ., concur. KITTREDGE, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ann G. Duncan, as Personal Representative of the Estate of Frankey Galloway, deceased, and Cleo Galloway, Appellants,

v.

Samuel D. Little, personally and as Personal Representative of the Estate of Joseph A. Galloway, a/k/a Avery Galloway, deceased; Betty Joy L. Iannazzone, personally and as Personal Representative of the Estate of Joseph A. Galloway, a/k/a Avery Galloway, deceased; The Estate of Joseph A. Galloway, a/k/a Avery Galloway, deceased; and SunTrust Banks, Inc., formerly Central Carolina Bank, a/k/a CCB, Defendants,

of whom SunTrust Banks, Inc., formerly Central Carolina Bank, a/k/a CCB, is Respondent.

Appeal from Pickens County
Charles B. Simmons, Jr., Special Referee

Opinion No. 26698
Heard April 7, 2009 – Filed August 10, 2009

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED

Larry Brandt, of Walhalla, for Appellants.

Bernie W. Ellis, of McNair Law Firm, of Greenville and Robert L. Widener, of McNair Law Firm, of Columbia, for Respondent.

JUSTICE KITTREDGE: This direct appeal arises out of an action brought by Appellants Frankey Galloway[1] and Cleo Galloway against Respondent SunTrust Bank involving its surrender of the contents of two safe deposit boxes. This matter was tried before a Special Referee, who dismissed Frankey and Cleo Galloway's claims against SunTrust Bank. The Galloway brothers appeal the trial court's dismissal of their claims against SunTrust Bank. We find SunTrust Bank breached a duty owed to Cleo Galloway and reverse.

I.

FACTUAL/PROCEDURAL BACKGROUND

In June 2003, Frankey Galloway, aging and paraplegic, was admitted into a nursing home while being treated for an illness. Frankey had stored in excess of $250,000 cash throughout his home. Away from his home, Frankey was concerned for the safety of his money and asked his brother Cleo Galloway to collect the money and store it in a safe deposit box. Cleo went to Frankey's home, found the cash in the locations Frankey described,

[1] Frankey Galloway died during the pendency of this appeal and his personal representative, Ann G. Duncan, has been substituted.

and took it home where he counted it in the presence of his wife and daughter.

The precise amount of cash found in Frankey's home was $253,843. Frankey confirmed to Cleo that the cash found matched his expectation of the stored cash. Cleo placed the cash in a safe deposit box at a Wachovia Bank branch in Pickens, South Carolina.

Frankey did not approve of the selection of Wachovia Bank and so informed Cleo. Cleo removed the cash from the Wachovia safe deposit box. Cleo took the cash to the home of Avery, the third Galloway brother, where the two counted it once again. Frankey's money was taken to SunTrust Bank[2] (the Bank) and placed in two safe deposit boxes. Cleo and Avery were listed on the safe deposit box lease agreements as co-lessees and were issued four keys, two for each box.

In August 2004, Frankey was released from the nursing home and Cleo and Avery gave him the keys to the safe deposit boxes.

On November 24, 2004, Avery died. In accordance with Avery's will, his stepson Sammy Little (Sammy) and stepdaughter Betty Joy Iannazzone (Joy) were appointed personal representatives of his estate. Within a week of Avery's passing, Sammy and Joy went to the Bank to ask if Avery had any accounts. Sharon Hamilton, a customer service representative, informed them that Avery and Cleo were co-lessees of two safe deposit boxes. Hamilton instructed Sammy and Joy that if they wanted to access the boxes, they should get the keys from Cleo.

Sammy made no effort to contact Cleo or otherwise obtain the safe deposit box keys. A few days later, Sammy informed Hamilton that the keys could not be located. Relying on the "Lost Keys" provision in the lease agreement, Hamilton arranged for the boxes to be drilled opened. No notice was given to Cleo.

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[2] At the time, SunTrust was known as Central Carolina Bank ("CCB").

The safe deposit boxes were drilled open on December 1, 2004. Present on December 1 were Hamilton, Sammy and Joy. Hamilton presented Sammy and Joy with the Bank's forms entitled: "Drilling Certificate of Inventory Affidavit" and "Inventory of Contents of Safe Deposit Box." On the drilling certificate form, the "lessee signature" line was left blank. On the inventory form, Sammy signed as "surviving co-lessee witnessing the qualified person making the inventory of the box." Sammy and Joy left the Bank with the cash from both boxes and absconded with the money.

In February 2005, Frankey and Cleo went to the Bank to withdraw a portion of Frankey's cash. Only then did Frankey and Cleo learn that the safe deposit boxes were closed and that Sammy and Joy had taken the money.

Frankey and Cleo filed a complaint alleging claims against Sammy and Joy[3] as well as claims against the Bank. The parties consented to try the case before a Special Referee, who entered an order of judgment denying and dismissing Frankey and Cleo's claims against the Bank. Frankey and Cleo appeal the trial court's dismissal of their claims.

II.

ISSUE

Did the Bank violate a duty to Frankey or Cleo Galloway by releasing the contents to Sammy and Joy without notice to Cleo?

[3] Frankey and Cleo's lawsuit against Sammy and Joy sought to impose a constructive trust upon them for absconding with the cash. The trial court granted the relief and in a companion appeal we affirmed the imposition of a constructive trust. *Duncan v. Little* (*Duncan I*), Op. No. 09-MO-040 (S.C. Sup. Ct. filed July 20, 2009).

III.

STANDARD OF REVIEW

An action to construe a contract is an action at law. *Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). In resolving this appeal, we must construe the lease agreement[4] between Cleo and Avery and the Bank. Where a contract is unambiguous, the matter becomes one of law and the parties' intent as clearly set forth in their agreement must be given effect. *See McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) ("Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect."). Conversely, where a contract is ambiguous, the fact finder must ascertain the parties' intentions from the evidence presented. *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."). "In an action at law, tried without a jury, the trial court's findings of fact will not be disturbed unless found to be without evidence which reasonably supports the court's findings." *Stanley v. Atl. Title Ins. Co.*, 377 S.C. 405, 409, 661 S.E.2d 62, 64 (2008).

IV.

LAW/ANALYSIS

A.

The Bank first argues it breached no duty to Frankey, for Frankey was not a party to the safe deposit box lease agreement. We agree and affirm the trial court with respect to Frankey's claim pursuant to Rule 220(c), SCACR.

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[4] We note that two safe deposit boxes were leased, but the Bank's standard lease agreement applied to both. Hence our reference to lease agreement in the singular.

B.

Cleo asserts the Bank breached a duty owed to him under the lease agreement. The Bank counters that the lease agreement grants each co-lessee an absolute right of access to the safe deposit box. In this regard, the Bank contends a personal representative of a deceased lessee has the right to "stand in the shoes" of the decedent. The Bank's position has initial traction based on the following general lease provision:

> Co-Lessees
>
> A Box taken in the name of two or more Lessees, as co-Lessees, is under the control of each of them as fully as if it stood in each Lessee's name alone. Either co-Lessee may have access alone, may surrender the Box and terminated [sic] the Agreement, may appoint attorneys-in-fact to have access and/or surrender the Box, and may cancel any such appointment made by either co-Lessee.

The lease agreement, however, further provides explicit instructions regarding a "lost keys" situation:

> Lost Keys
>
> If Lessee loses one or both keys to the Box, Lessee shall notify Lessor immediately. Lessee shall pay all costs and expenses related to the loss of any of the keys to the Box; specifically including, but not limited to, the costs incurred in the following:
>
> i. If Lessee loses one (1) of Lessee's keys to the Box, Lessee shall bring the remaining key to Lessor's office or branch where the Box is located so that the Box may be opened and the lock changed.
>
> ii. If Lessee loses all of Lessee's keys to the Box, the Box must be forcibly broken and/or drilled open and the lock changed

> in the presence of the Lessee for which the Lessee is responsible for all fees and charges associated with the drilling.

Significantly, the lease agreement specifies that "[a]ll reference to singular shall also mean plural." When read in conjunction with the "lost keys" section, we find that the language of the lease agreement requires that all lessees must be present when a box is forcibly opened or drilled.

We reject the suggestion of an ambiguity. In any event, were we to entertain the idea of an ambiguity, such ambiguity would have to be construed against the Bank which drafted the agreement. *Williams v. Teran, Inc.*, 266 S.C. 55, 60, 221 S.E.2d 526, 529 (1976) (noting the rule of contract interpretation that an ambiguous contract will be construed against the drafting party); *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 175, 644 S.E.2d 718, 722 (2007) ("[A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement.").

Moreover, an ambiguity would allow resort to the Bank's own forms, which are manifestly at odds with the Bank's position. For example, the form entitled "Inventory of Contents of Safe Deposit Box" provides a signature block for a "surviving co-lessee." That signature block expressly provides that the signature of the "surviving co-lessee" is "[o]nly required if surviving co-lessee and the qualified person are not the same person." The Bank considered Sammy as the "qualified person," yet Sammy was permitted to sign as the "surviving co-lessee." Cleo, as the surviving co-lessee, was entitled to notice and the right to be present at the inventory.

We agree with the Bank that a personal representative has a right under law to "stand in the shoes" of the decedent to claim personal property. *See* S.C. Code Ann. §§ 62-3-709; 62-3-711; 62-3-715 (2009). The more targeted question is whether the statutory powers granted to a personal representative permit greater powers than the decedent had when living. We answer the question no. Section 62-3-711(a) speaks directly to this in providing that "a personal representative has the same power over the title to property of the estate that an absolute owner would have." Accordingly, while a personal

representative stands in the shoes of the decedent, the personal representative's shoes are no bigger than the decedent's. Because Avery (as a co-lessee) could not drill the safe deposit boxes without Cleo present, neither could Avery's personal representatives.[5]

Lastly, the Bank argues that it is protected by the "good faith" provision of the probate code. S.C. Code Ann. § 62-3-714 (2009) ("A person who in good faith either assists a personal representative or deals with him for value is protected as if the personal representative properly exercised his power."). We disagree. Cleo's direct claim against the Bank is premised on his contract with the Bank, not the propriety of the powers exercised by Avery's personal representatives. Because the Bank breached the lease agreement, the statutory good faith protection is not available.

V.

CONCLUSION

We affirm the trial court's dismissal of Frankey Galloway's claim against the Bank. We reverse the dismissal of Cleo Galloway's claim against the Bank and remand to the trial court for a determination of damages.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

WALLER, ACTING CHIEF JUSTICE, PLEICONES, BEATTY, JJ., and Acting Justice James E. Moore, concur.

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[5] Had Sammy and Joy presented the safe deposit box keys along with proof of their appointment as personal representatives of Avery's estate, the lease agreement would have entitled them to access and possession of the contents of the safe deposit boxes.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jeffrey Louis Jones, Appellant.

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

Opinion No. 26699
Heard April 7, 2009 – Filed August 10, 2009

AFFIRMED IN PART AND REVERSED IN PART

Chief Appellate Defender Joseph L. Savitz, III and Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General William Edgar Salter, III, of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

JUSTICE BEATTY: In this capital case, a jury convicted Jeffrey Louis Jones (Jones) of two counts of murder, and one count each of first-degree burglary, armed robbery, and criminal conspiracy. After the jury recommended the death penalty, the trial judge sentenced Jones to death for each murder, thirty years each on first-degree burglary and armed robbery, and a consecutive five years for criminal conspiracy.[1]

In this direct appeal, Jones alleges the trial judge erred in: (1) permitting the State to subpoena as a witness against Jones an expert the defense had engaged to advise on challenging the admissibility of the State's evidence purportedly matching Jones's footprint to the insole of a boot alleged to have left a bloody print at the crime scene; and (2) admitting "barefoot insole impression" evidence[2] that was consistent with having worn a boot linked to the murder scene because it was not scientifically reliable. This case consolidates Jones's direct appeal and the mandatory review provisions of S.C. Code Ann. § 16-3-25 (2003). Although we affirm as to the first issue, we reverse the trial judge's decision regarding the second issue. Accordingly, we reverse Jones's convictions and sentences.

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[1] This Court reversed Jones's original convictions and sentence of death in State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) (Jones I).

[2] In Jones I, this Court described this evidence as follows:

> The central thesis of "barefoot insole impression" evidence is that the primary wearer of footwear, over time, begins to leave an impression of the wearer's foot in the footwear's insole. Inked impressions of the suspected wearer's feet, photos of the suspected wearer's known insoles, and a standing cast of the suspected wearer's foot are compared to the impressions in the boots, both visually and by using calipers to compare distances between toes and other features among the various exhibits.

Jones I, 343 S.C. at 572, 541 S.E.2d at 818.

FACTS

On February 2, 1996, the victims, John Pipkin and Susan Furman, were found dead in their West Columbia home by Pipkin's stepson, John Orr. According to the autopsy, the victims were killed by blunt trauma to the head, consistent with having been beaten with a hammer and a piece of brick. An investigation of the crime scene revealed that approximately 700 to 1,000 dollars was taken from the home. Investigators did not find any physical evidence other than a bloody boot print at the scene.

The State's case against Jones was primarily based on the testimony of Jones's friend, roommate, and self-confessed accomplice, James Brown. According to Brown and other witnesses, Jones was angry with Pipkin, his employer at the canteen where he worked, because Pipkin had deducted an excessive amount from Jones's paycheck for snacks and drinks consumed on the job.

Brown testified that he and Jones planned the robbery of Pipkin. Brown claimed that on the way to Pipkin's residence, Jones gave him a hammer and picked up a brick. At the residence, Jones identified himself to Pipkin, who proceeded to open the door. Once inside, Jones hit Furman repeatedly in the head with the brick while Brown held her arms. According to Brown, he hit Pipkin once with the hammer and then gave the hammer to Jones who apparently bludgeoned Pipkin to death.

After Brown confessed to his participation in the crimes and implicated Jones, he led investigators to the hammer used in the murder.

At Jones's first trial, the State relied on Brown's testimony and evidence that the single, bloody boot print found at the scene was made by "steel toe" boots which allegedly belonged to Jones. In support of this theory, the State introduced testimony that the "barefoot insole

impressions" left in the "steel toe" boots were consistent with the boots having been worn by Jones.

The first trial resulted in the jury convicting Jones of two counts of murder, and one count each of first-degree burglary, armed robbery, and criminal conspiracy. He received two death sentences for the murders, concurrent sentences of thirty years each on the burglary and armed robbery charges, and a concurrent five-year sentence for conspiracy.

On appeal, this Court unanimously found that four errors in the guilt phase of the trial each warranted the reversal of Jones's convictions and sentences. State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001). Specifically, this Court held: (1) the defense was entitled to cross-examine Brown regarding his past dealings with the solicitor's office; (2) "barefoot insole impression" evidence was not scientifically reliable; (3) testimony that Jones was the prime suspect in the investigation was not admissible; and (4) the trial court could not change the reasonable doubt instruction after defense counsel's closing argument.

Prior to Jones's second trial, the State informed the defense that it intended to introduce "barefoot insole impression" evidence. As a result, defense counsel retained as a consultant William Bodziak, a renowned expert on this evidence. Although the defense did not intend to call Bodziak as a trial witness, the State subpoenaed him to testify at trial. The State also retained Robert Kennedy, another expert on "barefoot insole impression" evidence. Kennedy had testified for the State during Jones's first trial.

Defense counsel filed two pre-trial motions seeking to quash the subpoena of Bodziak and suppress the introduction of the "barefoot insole impression" evidence. The trial judge denied both of these motions.

Ultimately, the jury convicted Jones of two counts of murder, and one count each of first-degree burglary, armed robbery, and criminal

conspiracy. Jones appeals his convictions and his sentences on two grounds.

DISCUSSION

I.

Jones argues the trial judge erred in compelling William Bodziak, a Florida resident who was a consultative expert for the defense on "barefoot insole impression" evidence, to testify for the State. Because the defense did not list Bodziak as a trial witness, Jones contends the State's subpoena to call him as a witness violated the work-product doctrine, the attorney-client privilege and, more importantly, Jones's Sixth Amendment right to the effective assistance of counsel. In support of this contention, Jones points out that the State had retained its own expert witness, Robert Kennedy, a leading proponent of "barefoot insole impression" evidence.

In contrast, the State claims the trial judge did not abuse her discretion in permitting Bodziak to testify for the State given: (1) Bodziak only testified during a pre-trial, *in camera* hearing; (2) Bodziak was not questioned regarding any matters protected by the attorney-client privilege or the work-product doctrine; and (3) it would be fundamentally unfair to the State for Jones to be allowed to challenge the scientific reliability of the "barefoot insole impression" evidence while simultaneously withholding non-privileged testimony from one of two internationally renowned experts whom the State initially contacted about retaining.

Prior to trial, the judge conducted an *in camera* hearing on Jones's motion to quash the State's subpoena of Bodziak. Defense counsel informed the trial judge that after this Court issued its decision in Jones I, the State indicated its intention to introduce "barefoot insole impression" evidence during the second trial of Jones's case. As a result, defense counsel retained Bodziak as a consultant on the evidence. Because the State declined to ship the crime scene evidence

to Bodziak in Florida, defense counsel arranged for Bodziak to review the evidence at the Lexington County Sheriff's Department. Upon his arrival at the Sheriff's Department, the State served Bodziak with a subpoena to testify for the State at the trial of Jones's case.

Defense counsel told the judge that Bodziak "has educated us as to what we need to know about this field and he has helped us devise a defense strategy to contradict or rebut this evidence." In view of the defense relationship with Bodziak, defense counsel claimed the enforcement of the State's subpoena would violate the work-product doctrine, the attorney-client privilege, and Jones's Sixth Amendment right to the effective assistance of counsel. Counsel explained that the State's actions had interfered with the defense working with Bodziak, the trial strategy, and the custodial control of Bodziak. Ultimately, defense counsel claimed the defense would "lose" its expert if Bodziak was permitted to testify for the State.

In response, the State prefaced its argument with the fact that there are only "two world class experts in this area in North America, Robert Kennedy, who is retired from the Royal Canadian Mounted Police, and Bill Bodziak who is retired from the FBI." Because Bodziak had published a book entitled Footwear Impression Evidence[3] after this Court's decision in Jones I, the State claimed it needed to call Bodziak as a witness to establish that "barefoot insole impression" evidence is now scientifically reliable. The State assured the judge that it did not intend to question Bodziak regarding any privileged communications with the defense. Instead, the State sought to elicit Bodziak's background, qualifications, experience, and his opinion regarding the validity of the science.

The State also informed the trial judge that it had contacted Bodziak via e-mail in October 2005 about potentially retaining him as an expert witness. In his response, Bodziak sent the State his curriculum vitae and a fee schedule. When the State contacted Bodziak

[3] William J. Bodziak, Footwear Impression Evidence (2d ed. 2000).

again, he indicated that he had been retained by Jones's defense counsel.

After hearing counsel's arguments, the trial judge denied defense counsel's motion to quash the State's subpoena of Bodziak. In so ruling, the trial judge characterized the factual situation as "unique" in that it did not necessarily involve the State seeking information that was clearly privileged or fell within the work-product doctrine. The judge concluded it was necessary to hear testimony regarding the reliability of the "barefoot insole impression" science. Thus, the judge found it permissible for the State to elicit testimony from Bodziak in order to assist the trial court in its "gatekeeper function" concerning the admissibility of this evidence.

The judge, however, instructed the State not to question Bodziak regarding any communication he may have had with Jones or defense counsel. The judge further prohibited the State from inquiring about any conclusions Bodziak may have reached in analyzing the crime scene evidence.

An analysis of the trial judge's decision requires us to examine the rules and theories underlying the disclosure of evidence in criminal trials. Thus, we begin with a review of Rule 5 of the South Carolina Rules of Criminal Procedure. Rule 5(b)(1)(B), which governs the reciprocal disclosure of evidence by the defendant, provides:

> If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the prosecution, the defendant, on request of the prosecution, shall permit the prosecution to inspect and copy any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness <u>whom the</u>

> defendant intends to call at trial when the results or reports relate to his testimony.

Rule 5(b)(1)(B), SCRCrimP (emphasis added).

Given this rule is limited to the defendant's disclosure of tangible material prepared by a defendant's agent, we recognize that it is not directly on point. However, we believe it provides guidance for our decision. Theoretically, this rule operates to preclude the State's subpoena of Bodziak in that a defendant's disclosure of evidence is limited to those items prepared by a witness "whom the defendant intends to call at trial." Because Jones's defense counsel did not intend to call Bodziak as a witness, the logical extension of this Rule 5 provision would not authorize the State to subpoena Bodziak, a non-testifying, consultative defense agent. Cf. State v. Northcutt, 372 S.C. 207, 217, 641 S.E.2d 873, 878 (2007) (applying Rule 5(b)(1)(B), SCRCrimP and holding the trial judge erred in requiring defendant to direct his expert witness to generate written reports for the benefit of the prosecution).

At least one other jurisdiction has adopted this analysis. Commonwealth v. Kennedy, 876 A.2d 939 (Pa. 2005). In Kennedy, the Pennsylvania Supreme Court addressed the question of "whether a court can compel an expert, who was originally hired by a criminal defendant's attorney in order to prepare for the defendant's trial, to attend and testify at a defendant's trial, where the defendant does not plan on calling the expert at trial or using any materials that the expert completed as evidence at trial." Id. at 945.

Guided by the Pennsylvania Rules of Criminal Procedure, the court resolved the issue by extending the protections of the work-product doctrine beyond the disclosure of tangible materials. Id. The court recognized that the rules generally protect work product of agents hired by defense attorneys. However, the court determined that the rules did not specifically address whether the work-product doctrine bars the prosecution from calling such an agent to testify at trial. Id. at 947. After discussing the general principles underlying the work-

product doctrine, the court concluded the same "holds true at trial regarding the disclosure of the efforts of an agent retained by a criminal defense attorney." Id. at 948. In reaching this conclusion, the court reasoned that to permit the prosecution to call an agent of the defense as a witness at trial would effectively "circumvent the purpose of the work-product doctrine" and that of the rules of discovery in criminal cases. Id. The court explained:

> While we acknowledge that the protections of the work-product doctrine traditionally have attached to the discovery of tangible materials prepared in anticipation of trial, we find that when a criminal defense counsel hires an agent in order to prepare for trial and does not plan on calling the agent as a witness at trial or to utilize materials prepared by the agent as evidence at trial, a practical application of the doctrine to trial in criminal matters bars the Commonwealth from calling such an agent as a witness on its behalf, unless the Commonwealth "first makes a showing of substantial need of that testimony and [an] inability to obtain the substantial equivalent of that testimony without undue hardship."

Id. at 948 (quoting United States v. Walker, 910 F. Supp. 861, 864 (N.D. N.Y. 1995)).

We agree with the philosophical underpinnings in Kennedy. However, our analysis would not be complete without reviewing cases from other jurisdictions which have addressed the specific arguments raised by Jones.

Aside from the Kennedy court, other jurisdictions which have analyzed this issue have done so based on the following four theories: (1) the traditional work-product doctrine, (2) the attorney-client privilege, (3) the Fifth Amendment privilege against self-incrimination, and (4) the Sixth Amendment right to the effective assistance of counsel. People v. Spiezer, 735 N.E.2d 1017, 1020 (Ill. App. Ct. 2000).

We find the first three theories did not operate to preclude the trial judge from compelling Bodziak to testify for the State. As previously discussed, the traditional work-product doctrine generally protects defense disclosure of tangible materials prepared in anticipation of trial by a defense agent. In the instant case, the State did not attempt to discover any materials prepared by Bodziak. See Vitauts M. Gulbis, Annotation, Right of Prosecution to Discovery of Case-Related Notes, Statements, and Reports—State Cases, 23 A.L.R.4th 799 (1983 & Supp. 2008) (analyzing state cases which have determined whether and under what circumstances the prosecution may be entitled to discovery of notes, statements, or reports in possession of the defense).

Furthermore, given the State did not attempt to elicit any confidential communications between Bodziak and the defense or any inculpatory information from Jones, we find the attorney-client privilege and Jones's Fifth Amendment right were not violated. See Morris v. State, 477 A.2d 1206, 1210-12 (Md. Ct. Spec. App. 1984) (holding trial judge, under the special circumstances of the case, properly denied defendant's motion to quash prosecution's subpoena of defendant's non-testifying, consultative expert witness on the ground that information gained by objective scientific analysis conducted by experts did not violate the attorney-client privilege, the work-product doctrine, or the defendant's Fifth Amendment privilege against self-incrimination).

In view of this conclusion, we find the only conceivable basis to challenge the State's subpoena of Bodziak would be Jones's Sixth Amendment right to the effective assistance of counsel, the fourth theory. Essentially, Jones is claiming that the State's actions prevented defense counsel from effectively representing him because the subpoena of Bodziak interfered with counsel's trial preparation and strategy.

At least two jurisdictions have found, under similar circumstances to the instant case, the prosecution could not compel a

defendant's non-testifying, consultative agent to testify on its behalf. See State v. Mingo, 392 A.2d 590, 581-87 (N.J. 1978) (finding trial judge's decision to permit prosecutorial discovery of report of handwriting expert retained by defendant and use of expert as witness for the State improperly intruded into zone of confidentiality essential to defendant's right to effective representation of counsel but concluding error was harmless); State v. Dunn, 571 S.E.2d 650, 656-660 (N.C. Ct. App. 2002) (concluding trial judge erred when it allowed the State to compel testimony of independent drug testing facility's employees who defendant did not intend to call as witnesses given this would have violated the defendant's Sixth Amendment right to the effective assistance of counsel and breached the work-product privilege).

Although we are persuaded by these decisions, we believe their holdings are not dispositive in the instant case. As recognized in Mingo and Dunn, there is undoubtedly a potential for abuse by the prosecution to compel a non-testifying, consultative defense agent to testify. If the prosecution is permitted to do this, defense counsel may be hampered in preparing a defense in that counsel may fear an unfavorable opinion by a defense agent will be utilized by the prosecution. Additionally, if the prosecution can "pilfer" the experts retained by the defense, the defense will inevitably be put at a trial disadvantage in that it will lose its expert witnesses. Furthermore, because defense counsel will be placed in the posture of cross-examining the expert witness, we believe counsel may be reticent in pursuing certain lines of questioning in the event the responses of the witness may "open the door" to privileged information.

In the instant case, however, we find the State did not violate any of the above-outlined theories, including Jones's Sixth Amendment right to the effective assistance of counsel. This case presents the extremely rare factual scenario where the State's actions were permissible.

Here, there were only two available expert witnesses on the "barefoot insole impression" evidence. The trial judge recognized this

anomaly and properly limited the State to only eliciting non-protected information from Bodziak. See Mingo, 392 A.2d at 595 n.3 ("In the rare case involving a subject as to which the number of qualified experts is few, any danger that the defense might deprive the State of expert assistance by 'scooping-up' all the available experts in the field . . . can be prevented by appropriate judicial action.").

Moreover, the State only called Bodziak during an *in camera* hearing for the benefit of the trial judge's ruling on the admissibility of the "barefoot insole impression" evidence. Because Bodziak did not testify during the trial, the State's decision to call Bodziak as a witness could not have affected the jury's assessment of the evidence, i.e., implicate that the defense's own expert approved of the State's assertion that this evidence was "scientifically reliable" and, thus, conclusive as to Jones's presence at the crime scene.

Additionally, the State's questioning of Bodziak was confined to general testimony regarding his expertise and his opinion regarding the scientific reliability of the evidence. Significantly, the State did not question Bodziak concerning the specifics of the crime scene evidence.

Based on the foregoing, we hold the trial judge's decision denying Jones's motion to quash the State's subpoena of Bodziak did not constitute reversible error.

We caution, however, that our decision should not be interpreted as establishing a general rule permitting the State to compel the testimony of a non-testifying, consultative defense agent. Taken to its extreme, we believe such a rule could be used by the State as a subversive tactic to circumvent discovery rules. In view of this potential for abuse, we limit this decision to the specific facts of this case and now adopt a rule which we believe will effectively balance the rights of the defendant and the interests of the State in future criminal cases.

If the State seeks to compel a defendant's non-testifying consultative expert to testify on its behalf, the State must prove that it

has a "substantial need" for the expert and that its inability to compel the expert to testify will present "undue hardship." See Walker, 910 F. Supp. at 865 (concluding that "absent a showing of substantial need and undue hardship, the government should be precluded from eliciting testimony from the defenses' consultative experts concerning the efforts these experts undertook at the request of the defendants' attorneys, or the opinions and conclusions these experts developed at the behest of defendants' attorneys 'in the compilation of materials in preparation for trial'" (emphasis added) (quoting United States v. Nobles, 422 U.S. 225, 238-39 (1975))). This rule should alleviate any concern that either side could potentially "scoop up" or contract all available experts. Faced with that situation, a party could undoubtedly establish both prongs of the rule by showing that it could not present its case without the assistance of the other party's consultative expert.

II.

In light of our decision that the State was permitted to subpoena Bodziak as a witness, the question becomes whether the trial judge erred in admitting the "barefoot insole impression" evidence during the guilt phase of Jones's trial.

In his argument, Jones primarily relies on this Court's opinion in Jones I. According to Jones, this Court definitively held that "barefoot insole impression" evidence is not sufficiently reliable under Rule 702[4] of the South Carolina Rules of Evidence and this Court's decision in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999).[5] Thus, Jones

[4] Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE.

contends the State was precluded from even attempting to introduce this evidence.

In the alternative, Jones argues the evidence was inadmissible given the State failed to prove any new developments which would deem it scientifically reliable during Jones's second trial. Additionally, Jones avers the prejudicial effect of this evidence outweighed any probative value pursuant to Rule 403[6] of the South Carolina Rules of Evidence.

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[5] In Council, this Court clarified the standard governing the admissibility of scientific evidence, stating:

> In considering the admissibility of scientific evidence under the Jones standard, the Court looks at several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.
> . . .
>
> While this Court does not adopt Daubert, we find the proper analysis for determining admissibility of scientific evidence is now under the SCRE. When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. The trial judge should apply the Jones factors to determine reliability. Further, if the evidence is admissible under Rule 702, SCRE, the trial judge should determine if its probative value is outweighed by its prejudicial effect. Rule 403, SCRE. Once the evidence is admitted under these standards, the jury may give it such weight as it deems appropriate.

Council, 335 S.C. at 19-21, 515 S.E.2d at 517-18 (citing State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979)).

[6] Rule 403 provides, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403,

In contrast to Jones's interpretation of Jones I, the State asserts this Court's decision did not operate as a bar to the admissibility of "barefoot insole impression" evidence in Jones's second trial. Because the State offered testimony that research on this evidence had been completed and peer reviewed subsequent to Jones I, the State claims it is now scientifically reliable and, thus, admissible during Jones's second trial. Moreover, the State asserts the probative value of this evidence substantially outweighed any prejudicial impact.

In analyzing this issue, we must initially define our intended holding in Jones I. In Jones I, Justice Pleicones, writing for the unanimous Court, found the trial judge erred in permitting expert testimony "purporting to demonstrate that 'barefoot insole impression' testing revealed [Jones's] foot to be consistent with the impression made by the primary wearer of the 'steel toe' boot." Jones I, 343 S.C. at 574, 541 S.E.2d at 819. In so holding, the Court found "this 'science' unreliable" based on an application of Rule 702 and Council. Specifically, the Court stated:

> We find the evidence presented here insufficient to meet the Jones' requirements that: (1) the technique be published and peer-reviewed; (2) the method has been applied to this type evidence; and (3) the method be consistent with **recognized** scientific laws and proceedings. In our opinion, it is premature to accept that there exists a science of "barefoot insole impressions."

Jones I, 343 S.C. at 573, 541 S.E.2d at 819 (emphasis in original). The Court further found the quality control procedures, as required by Jones, were not met to ensure the reliability of this type of testing. The Court recognized that neither SLED Agent Derrick, who performed the test, nor any other SLED agent, had ever done this type of test prior to Jones's case. Additionally, the Court noted that "Agent Derrick admittedly had not conducted the testing in conformity with SLED's

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SCRE.

quality control precautions." Id. at 574, 541 S.E.2d at 819. In reaching its conclusion, the Court further relied on the fact that there was no written protocol in existence when Agent Derrick conducted his testing. Id.

Based on our decision in Jones I and the lack of any subsequent research developments which would validate "barefoot insole impression" evidence, we find the trial judge erred in denying Jones's motion to suppress this evidence.

Although we stated in Jones I that it was "premature" to accept this type of testing, one of the bases for our rejection of this evidence was the fact that Agent Derrick failed to conduct his testing in conformity with any established written protocol. As will be more thoroughly discussed, Agent Derrick testified during Jones's second trial that he did not conduct any new or additional testing on the evidence since the first trial. Thus, the State's failure to rectify this problem prior to the second trial operated as a bar to its admission. Even if our holding in Jones I did not initially bar the State from introducing this evidence, we find the evolution of this evidence post-Jones I has not deemed it scientifically reliable.

During the *in camera* hearing, the State called William Bodziak as its first witness. Bodziak, a retired F.B.I. agent, specialized in footwear and tire impression evidence. As part of his job, Bodziak also examined "barefoot insole impression" evidence. After his retirement from the F.B.I., Bodziak continued to conduct these examinations and provided expert testimony in several cases involving this type of evidence. Following preliminary questions regarding his background and training, the judge qualified Bodziak as an expert in "barefoot impression" evidence and, more specifically, in "barefoot insole impression" evidence.

Bodziak testified he teaches a course on footwear impression evidence and requires his students to read his book entitled Footwear Impression Evidence, which includes a chapter on "Impressions of the Foot." This chapter references research articles that Bodziak relied on,

which included those written by Robert Kennedy, another expert retained by the State who was employed with the Royal Canadian Mounted Police. Bodziak informed the judge that both editions of this book, a 1990 edition and a 2000 edition, had been peer reviewed prior to and after publication. However, he qualified this statement by saying, "I'm not aware of anybody that's criticized what I have written in the book. Again, it's more of an informative chapter. There's really not any controversy in there for somebody to disagree with."

During his testimony, Bodziak explained the methodology for conducting an examination of suspected barefoot insole impressions where the person who wore the shoe is unknown. He admitted that this type of testing is required in only a very small percentage of shoe impression evidence. He further acknowledged that "absent [some feature] so extreme and unique," the methodology could not produce a "100 percent identification" as in DNA, fingerprint evidence, or even "outsole" evidence.

Bodziak testified that he was "comfortable with the reliability" of his results but stressed that with any forensic exam, "there [are] two important components. One of those is the science and the methodology, and the other is the examiner. And if either one of those fails, then you could have incorrect conclusions."

In terms of specific changes to the methodology since this Court's decision in Jones I, Bodziak testified that neither Kennedy's recent publications nor his research had "added to or modified" the methodology that Bodziak used in his examinations.

As its second witness, the State called Robert Kennedy, a forensic investigator employed with the Royal Canadian Mounted Police between 1966 and 2006. Beginning in 1989, Kennedy conducted research involving "barefoot impression" evidence. This research involved establishing a database of barefoot impressions in order to test the hypothesis that a barefoot impression is unique to an individual. According to Kennedy, "it was readily obvious that the feet

(of the one thousand volunteers) were unique enough that we could do a comparison if and when we had the opportunity from the suspect."

As a result of this research, in 1994, Kennedy began working full-time conducting footwear and barefoot impressions. He testified that he completed this research in April of 2006. During this time period, Kennedy was elected to numerous professional organizations which specialized in forensics involving footwear impressions. He also published and presented articles concerning his research, which included a 2006 article summarizing the results of his research project. According to Kennedy, this article had been accepted for "peer review publication." After his background was established, the trial judge qualified Kennedy as an expert in barefoot impression evidence and insole impression evidence.

In terms of the specific trial evidence, Kennedy concluded that "there was support to the hypothesis that Jeffrey Jones could have been the wearer of [the boot that left the bloody print at the crime scene] or somebody that would have the identical foot markings as Jeffrey Jones." Although Kennedy re-examined the evidence prior to Jones's second trial, he conceded he conducted his examination using the same methodology he used in 1998. He further admitted that since the retirement of Bodziak, the F.B.I. no longer tested footwear for "barefoot insole impression" evidence.

The defense called Dr. Donald Edwards, a professor and department chair at the University of South Carolina's Department of Statistics. During his testimony, Edwards indicated there were statistical problems with the "composition and methods of selection" that were used by Kennedy and his colleagues in conducting their research. Specifically, Edwards believed it was a "leap of faith" to apply the results of a sample taken from Carlton University students to the general population. Because the "random sample" used in the research was not truly representative of the general population, Edwards believed the results of the research would not have any application to barefoot insole impression evidence. Given the study involved barefoot impressions, as opposed to barefoot insole

impressions, and "the measurements were not made . . . in the same fashion [as barefoot insole impressions]," Edwards concluded the findings in Kennedy's research article entitled "Large Scale Statistical Analysis of Barefoot Impressions" would be inapplicable to the situation presented in the instant case.

After hearing this testimony and the brief arguments of counsel, the trial judge stated that she wanted to hear testimony regarding the specific procedures employed by SLED Agent Derrick.

The State then called Agent Derrick as a witness. Agent Derrick testified that in 1998 he had a discussion with the State regarding Jones's case. Based on this discussion, Agent Derrick relayed to the State information regarding insole impression evidence. He learned of this information after speaking with examiners from the Royal Canadian Mounted Police. According to Derrick, he discussed Jones's case with Kennedy. Derrick testified that he collected and examined the evidence in accordance with Kennedy's instructions.

In terms of his testing procedure, Derrick admitted that the known tennis shoes of Jones that he compared with the "steel toe" boots were a size 10.5 whereas the boots were a size 9.5. He further acknowledged that he did not get exemplars from other residents of the house where the "steel toe" boots were seized despite the fact that these people had unlimited access to Jones's bedroom, a bedroom which self-confessed accomplice Brown formerly occupied, admittedly still spent a great deal of time in, and where he left another pair of boots on the day of the murders. Derrick admitted that this was the first case of its type for SLED. He also acknowledged that SLED did not a have a protocol for this type of examination at the time he conducted the test.

When asked about any additional testing since Jones's first trial, Derrick admitted that he had not conducted any additional testing. Instead, he stated that he had re-examined the evidence in order to refresh his memory prior to the second trial. He also acknowledged that SLED no longer performs barefoot insole impression comparisons.

After Derrick's testimony, the State recalled Kennedy as a witness. Although Kennedy testified that Derrick did the testing in accordance with his instructions, Kennedy admitted that these instructions were conveyed in a half-hour telephone call.

Following Kennedy's testimony, the defense called two additional witnesses. SLED Agent Joseph Leatherman, a lieutenant with the latent print crime scene section, testified that Major Joseph Vaught, the Assistant Director of Forensics for SLED, made a written request for him to provide information regarding barefoot insole impression examinations conducted at SLED since January 24, 2001. In response to this request, Agent Leatherman sent Major Vaught a copy of a 1999 protocol developed by Lieutenant Tom Darnell and Agent Derrick. Leatherman testified that his research revealed that five cases since 1999 had used this protocol with the last case in 2001. In terms of training, Leatherman testified there was not any internal "training process for having someone trained to do this kind of comparison test" and no one at SLED was currently trained in this area.

Major Vaught, the final witness, conducted a cost/benefit analysis of performing "barefoot insole impression" evidence testing. Based on his research, Vaught concluded that if this type of testing were needed then SLED would outsource it.

In a detailed oral ruling, the trial judge denied Jones's motion to suppress the State's introduction of "barefoot insole impression" evidence. Initially, the judge recognized that this state has not adopted the standards set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) or Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Accordingly, the judge analyzed Jones's motion to suppress pursuant to Rule 702, Council, and Jones. Primarily relying on the testimony of Bodziak and Kennedy, the judge found that each of the requisite factors was met and, thus, the science of "barefoot insole impression" evidence was reliable. The judge further concluded that the probative value of the evidence outweighed any prejudicial effect. In reaching these conclusions, the judge found that "this testimony will provide the jury with the technical analysis of barefoot insole

impressions by utilizing methodology and comparisons performed on the footwear which is outside of the ambit of a layperson or lay-jurors[’] common knowledge of this subject or subject matter type of analysis." The judge further stated that "the subjectivity of the analysis would go to the weight of the opinion and not its admissibility."

At trial, Agent Derrick and Kennedy essentially reiterated the testimony they gave during the *in camera* hearing.

Because our research has revealed very few cases analyzing the admissibility of this evidence, we do not believe there is a prevailing view or any particular case that provides definitive guidance on this issue.

At least three jurisdictions have admitted this evidence. Thiel v. State, 762 P.2d 478, 485 (Alaska Ct. App. 1988) (finding Bodziak could testify as an expert in forensic foot morphology that the running shoes worn by the defendant matched the impressions left at the robbery scene based on his comparison of the insoles of the running shoes and impressions of the defendant’s feet; concluding that forensic foot morphology involves "no novel scientific theory or technique" and stating "[a]lthough the comparison of insole wear patterns and foot morphology may be a relatively rare field of expertise, the underlying technique of physical comparisons is neither novel nor unaccepted"), abrogated on other grounds by Matthew v. State, 152 P.3d 469 (Alaska Ct. App. 2007); United States v. Ferri, 778 F.2d 985 (3rd Cir. 1985) (holding trial court did not abuse its discretion in admitting testimony from physical anthropologist that shoes found at the crime scene belonged to the defendants based on a comparison of the insoles of these shoes with the defendants’ inked footprints); cf. Hurrelbrink v. State, 46 S.W.3d 350 (Tex. Crim. App. 2001) (applying Daubert and finding trial court did not abuse its discretion in admitting testimony of two anthropologists as to footprint comparison and analysis of bloody sock footprint found at the crime scene to that of defendant’s footprint despite Kennedy’s contrary testimony for the defense); see James T. Watson, Annotation, Admissibility of Expert Testimony that Item of Clothing or Footgear Belonged To, or Was Worn By, Particular

Individual, 71 A.L.R.4th 1148 (1989 & Supp. 2008) (analyzing cases in which federal and state courts have addressed the admissibility of expert testimony for the purpose of establishing that an item of clothing or footgear belonged to, or was worn by, a particular person).

Two jurisdictions have rejected this evidence in cases where Kennedy was the primary witness for the prosecution. State v. Berry, 546 S.E.2d 145 (N.C. Ct. App. 2001) (discussing Jones I and finding it was harmless error to admit testimony regarding "barefoot insole impression" evidence; concluding "barefoot impression analysis" as presented by Kennedy was not yet a reliable science at the time of defendant's trial); R. v. Dimitrov, 68 O.R.3d 641 (Ontario Ct. App. 2003) (referencing Jones I, rejecting "barefoot insole impression" evidence presented by Kennedy, and stating "[i]n light of the significant issues as to reliability of the evidence, its lack of logical relevance and risk of distortion in the fact-finding process, the trial judge erred in principle in admitting Sergeant Kennedy's evidence").

Cognizant of these cases and our limited standard of review,[7] we find the evidence presented in the instant case does not satisfy the requisite reliability factors in Jones. As stated in Jones I, these reliability factors take into consideration: (1) the publications and peer reviews of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Jones I, 343 S.C. at 573, 541 S.E.2d at 819.

Although the research of Kennedy and Bodziak has been presented and published, this does not satisfy the requirement of "peer review." Significantly, Bodziak's own book, Footwear Impression Evidence, discounts the technique. In Chapter 13, Bodziak presents an overview of the types of footwear impression evidence. In terms of "barefoot insole impression" evidence, Bodziak concludes:

[7] See Council, 335 S.C. at 21, 515 S.E.2d at 518 (recognizing the admission of evidence is reviewed on appeal under an abuse of discretion standard).

> There have been many previously reported "identifications" of a suspect as the wearer of a shoe. The consensus among experienced examiners is that identifications are rare because the random individual characteristics necessary for an identification are rarely encountered. Although, in theory, random individual characteristics could exist in a foot and be transferred to the shoe or foot impression, those characteristics are normally not present nor are they retained with the detail necessary to achieve an identification.

In view of this conclusion, "experienced examiners," i.e., peer reviewers, have not accepted this evidence as reliable. Furthermore, Bodziak's own testimony casts doubt on the reliability of this testing procedure wherein he stated it could not produce "100 percent identification."

In terms of prior application, the testimony revealed that Jones's case was one of the first cases where this procedure was utilized by SLED. Significantly, the procedure is no longer used by SLED or the F.B.I.

Regarding the third factor, this Court in Jones I found there was no established protocol or quality control procedure in place for Agent Derrick's testing of the evidence. Agent Derrick admitted that he did not conduct any additional testing prior to Jones's second trial other than to re-examine the evidence prior to his trial testimony.

As to the consistency of the methodology, Dr. Edwards, a statistician, testified that the results from the research conducted by Kennedy and his colleagues were a "leap of faith" given the random sample used for the research could not be applied to the general population. Given the study involved barefoot impressions, as opposed to barefoot insole impressions, and "the measurements were not made . . . in the same fashion [as barefoot insole impressions]," Edwards concluded the findings in Kennedy's research would be inapplicable to the situation presented in the instant case.

Furthermore, we disagree with the trial judge's finding that the probative value of this evidence outweighed its prejudicial effect under a Rule 403 balancing test. Although we agree that "barefoot insole impression" evidence is outside the realm of an average juror's knowledge, the potential probative value of the evidence is clearly outweighed by the prejudicial impact. As previously discussed, we find the evidence is not scientifically reliable. In the absence of scientific reliability, the evidence could only operate to provide inaccurate and inconclusive information for the jury.

Admittedly, this is a horrific case. However, given the fact that investigators did not find any physical evidence at the crime scene other than a bloody boot print, we cannot employ a harmless error analysis. See State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) ("Error is harmless when it could not reasonably have affected the result of the trial.").

CONCLUSION

Based on the foregoing, we affirm the trial judge's decision denying Jones's motion to quash the State's subpoena of Bodziak. Under the specific facts of this case, we conclude the State's actions did not violate the rights of Jones. However, we reverse the trial judge's decision denying Jones's motion to suppress the admission of "barefoot insole impression" evidence. Because the State did not present any evidence in Jones's second trial to establish that this procedure is now scientifically reliable, we hold the evidence should not have been admitted. Accordingly, we reverse Jones's convictions and sentences.[8]

AFFIRMED IN PART AND REVERSED IN PART.

[8] In view of our decision to reverse Jones's convictions and sentences, we need not conduct the proportionality review as required by section 16-3-25(C) of the South Carolina Code. S.C. Code Ann. § 16-3-25(C) (2003).

WALLER, ACTING CHIEF JUSTICE, KITTREDGE, J., and Acting Justice James E. Moore, concur. PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I agree that this case must be reversed because the trial judge erred in admitting the "barefoot insole impression evidence." In light of this reversible error, and the fact that this evidence will not be admissible at a future trial,[9] I do not join the majority's discussion of the State's right to subpoena the "expert" originally retained by the appellant.

[9] While the possibility that the evidence would be admissible was left open in Jones I, that possibility is foreclosed by today's decision.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William A. Harris, Appellant,

v.

Ideal Solutions, Inc.,
Carolina Pay, Inc.,
Steven A. Ivester, and
Michael Surprenant, Respondents.

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

Opinion No. 4603
Submitted June 1, 2009 – Filed August 5, 2009

AFFIRMED

George E. Lafaye, IV, of Greenville, for Appellant.

O.W. Bannister, of Greenville, for Respondents.

SHORT, J.: William Harris appeals from the master-in-equity's final order of dissolution of a partnership, arguing the master erred in: (1) finding the separation agreements were ambiguous; and (2) if the agreements were ambiguous, interpreting them to include the health insurance claims and attorneys' fees as liabilities of all three parties because they were not specifically included in the parties' agreement. We affirm.

FACTS

In December 1997, Harris, Steven Ivester, and Michael Surprenant incorporated Ideal Solutions, Inc. and Carolina Pay, Inc.[1] Ideal Solutions provided its customers with employees and services, including health insurance and workers' compensation insurance. Carolina Pay provided only payroll services to its customers. Ideal Solutions used a broker to acquire health insurance for its customers; however, it was discovered in December 2001 that the insurance company chosen by the broker was fraudulent. By the time Ideal Solutions learned of the sham, claims of covered employees had not been paid. Ideal Solutions also had similar problems with its workers' compensation insurance. The unpaid employee claims from the thirteen-month period when Ideal Solutions did not have health insurance coverage were potential liabilities of Ideal Solutions and its three partners. Ideal Solutions hired attorneys to sue the responsible parties and to defend it against claims from employees for unpaid health insurance claims.

In February 2004, the parties discussed ending their business relationship and signed a separation agreement on March 30, 2004. The March 30, 2004 agreement divided the assets of Ideal Solutions into thirds, including its customer lists. After the division of the assets and liabilities, Ivester and Surprenant decided to remain partners. All three partners agreed Harris was to receive $8,476 less than their assets for leaving the partnership. Following the agreement, the parties continued to negotiate and signed a new

[1] Although the business was incorporated, the parties ran it as a partnership.

agreement on April 30, 2004.[2] After the April 30, 2004 agreement was signed, additional health care and workers' compensation claims were filed against Ideal Solutions. All of the claims arose from the incidents which occurred more than two years prior to the April 30, 2004 agreement. However, the parties disagreed about the interpretation of the April 30, 2004 agreement as it related to the health insurance and workers' compensation insurance claims. Harris claimed the April 30, 2004 agreement excused him from any responsibility for any claims that were unknown at the time the agreement was executed. Ivester and Surprenant contended the agreement included the newly-filed claims.

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[2] The April 30, 2004 agreement stated: "All revenue and expenses incurred after April 30, 2004 will be the responsibility of Steven A. Ivester and Michael G. Surprenant with the following exceptions . . . ." Under the section titled "Income/Revenue," item number ten stated, "Awards from law suites [sic] filed for Health Insurance problems." The agreement also excluded ten items under the section titled "Expenses/Liabilities." Only four of the ten items are pertinent to this appeal:

> 1. Nominal attorney fees . . . for pursuing E&O [errors and omissions] coverage related to previous Health problems
> 2. Workers Comp claim payments, if needed, to ISI [Ideal Solutions, Inc.] employers while ISI was self-insured
>
> . . .
>
> 9. Expenses related to correcting mistakes and day to day client activities for clients prior to May 1, 2004
> 10. Any other expenses/liabilities as agreed to by all partners
>
> All partners must approve any expenses or liabilities after April 30, 2004 in writing.

Harris filed a complaint against Ivester and Surprenant in circuit court on January 15, 2005; however, by agreement, the parties waived a jury trial and referred the matter to the master with leave to appeal directly to the Court of Appeals. The parties referred the matter to the master for the purposes of dissolving the joint business entity on partnership principles; conducting an accounting as to assets, liabilities, and interpreting the agreement of the parties as to the dissolution of the business relationship. The master found the April 30, 2004 agreement to be ambiguous and allowed parol evidence to determine the parties' intent. In the final order of dissolution, the master held the agreement included the health care claims that arose prior to April 30, 2004, but became known after April 30, 2004.[3] This appeal followed.

STANDARD OF REVIEW

An action to construe a contract is an action at law. Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). "In an action at law, tried without a jury, the trial court's findings of fact will not be disturbed unless found to be without evidence which reasonably supports the court's findings." Stanley v. Atl. Title Ins. Co., 377 S.C. 405, 409, 661 S.E.2d 62, 64 (2008).

LAW/ANALYSIS

I. Separation Agreements

Harris argues the master erred in finding the separation agreements were ambiguous. We disagree.

"The cardinal rule of contract interpretation is to ascertain and give

[3] The master's order also ordered that Harris "immediately pay to the partnership the $48,636.75 he has withheld, and such payment shall be made immediately on the filing and service of this Order." Harris did not appeal this amount.

legal effect to the parties' intentions as determined by the contract language." McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) (quoting Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)). A contract must be read as a whole document so that ambiguity is not created by a single sentence or clause. Id. Whether the contract is ambiguous is a question of law for the court. Id. "A contract is ambiguous when the terms of the contract are reasonably susceptible to more than one interpretation." Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 242, 672 S.E.2d 799, 803 (Ct. App. 2009) (quoting S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001)). If an agreement is found to be ambiguous, the court should seek to determine the parties' intent. Ward v. West Oil Co., 379 S.C. 225, 239, 665 S.E.2d 618, 626 (Ct. App. 2008). "[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." Charles v. B & B Theatres, Inc., 234 S.C. 15, 18, 106 S.E.2d 455, 456 (1959).

Harris argues the three agreements made between the parties should be construed as one contract and considered as a whole to determine the parties' intentions.[4] "The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the Court will consider and construe them together." Cafe Assocs. v. Gerngross, 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991). In Cafe Associates, the Court found the master did not err in reading the Asset Purchase Agreement and the Covenant Not to Compete together because the two agreements were substantially the same, covered the same subject matter, and were executed during the course of the same transaction by the same parties for the same purpose. Id. at 10, 406 S.E.2d at 164-65.

Here, however, the two March 30, 2004 agreements were signed before Ivester and Surprenant decided to remain partners. Thus, the situation had

[4] The other two agreements Harris refers to are the two March 30, 2004 separation agreements, one for Ideal Solutions and one for Carolina Pay.

changed when the April 30, 2004 agreement was signed. As a result, the three agreements were not executed during the course of the same transaction for the same purpose. Thus, the March 30, 2004 agreements should not be construed as the same agreement as the April 30, 2004 agreement.

Harris argues the language of the April 30, 2004 agreement established that no new expenses or liabilities were to be incurred unless they were specifically agreed to by the parties and there was no evidence Harris agreed to accept liability for health claims or attendant attorneys' fees after April 30, 2004. Harris asserts the agreement provided that Ivester and Surprenant were to be responsible for all expenses arising after April 30, 2004, including the new health claims. He also maintains item number nine under the expenses and liabilities section of the April 30, 2004 agreement should not be read to include the claims from the insurance company fraud that happened more than two years prior to the signing of the agreement. Harris testified his goal when drafting the agreement was "to make sure that we all documented what we needed to document here right upfront before I left" and that all the assets and liabilities were identified. He also testified it was his understanding that the errors and omissions insurance would take care of all the health insurance claims that were pending in April 2004.

Ivester and Surprenant argue the later-filed health claims were a liability that existed prior to the April 30, 2004 agreement; thus, they were implicitly included in the agreement. They argue they did not specifically include the health claims in the April 30, 2004 agreement because they did not know how much the claims were going to be. Also, Ivester testified they did not include them in the agreement because "[a]t that time [they] really thought that [they] would be able to get awards from Mr. Brown and other people by bringing lawsuits against them to pay for anything that would come up." However, the agreement specifically includes workers' compensation claim payments even though Ivester testified they did not know at that time exactly how much they were going to have to pay. They also included "nominal" attorneys' fees for the health insurance claims.

Additionally, various other income and expenses that they did not know the exact amount of were included in the agreement. Ivester testified there were no new agreements signed by Harris after the April 30, 2004 agreement.

Surprenant testified Harris knew there were pending health care claims, and the partners would be personally liable if they were not covered by the insurance. Thus, he argues the health care claims were a known liability at the time the April 30, 2004 agreement was signed. He further testified the partners had discussions about the future health claims, and they all agreed they would continue to pay them as they had paid them in the past. Surprenant testified item number nine of the expenses and liabilities section of the April 30, 2004 agreement covered any mistakes created prior to the split up of the partners and those would be liabilities of the partnership. He also testified item number nine included the pending health care claims.

Daniel Livengood, who was Ideal Solutions' accountant and was involved in the agreement negotiations, testified that during one of the meetings, he was told that item number nine under the expense and liability section of the April 30, 2004 agreement was to be viewed "as a catchall for other items that might occur after . . . May 1st, but be tied back to having accrued prior to that time." Livengood testified that purchasing fraudulent health insurance was a mistake that would fall under this category, and thus, the April 30, 2004 agreement included the pending health care claims. He also testified all three partners discussed the contingent claims from the health care fraud and the attorneys' fees were a contingent liability because they resulted from actions that were taken prior to April 30, 2004. He further testified the health care claims were paid by Ideal Solutions prior to the April 30, 2004 agreement.

The master found the April 30, 2004 agreement was ambiguous and admitted parol evidence to determine the intent of the parties concerning the health care claims filed after the date of the agreement. The master found Livengood's testimony was "determinative of the intention of the partners to their agreement as to whether [the health care] claims were to be included as a liability under item [nine], "Expenses/Liability." The master further found

Harris's interpretation of the agreement would lead to an absurd result because he would share with his partners the awards from lawsuits filed for health insurance problems, but would not be responsible for health care claims that were filed after April 30, 2004. Therefore, the testimony supports the master's finding that the parties intended for the later-filed health care claims to be included in the agreement as a liability of the partners.

II. Liabilities

Harris argues that if the agreements were ambiguous, the master erred in including the health insurance claims and attendant attorneys' fees as liabilities of all three parties because they were not specifically included in the parties' agreement. We disagree.[5]

Harris argues the April 30, 2004 agreement covered the issues regarding the health insurance fraud and he was not responsible for expenses and liabilities that arose after April 30, 2004. Specifically, he argues the agreement mentioned the health insurance claims and the attorneys' fees related to them, but did not state he was liable for them. Also, the agreement included workers' compensation claim payments, but did not mention the health insurance claims that resulted from the same event. Thus, Harris asserts Ivester and Surprenant's failure to include the health insurance claims and attorneys' fees in the April 30, 2004 agreement bars them from now holding him partially responsible because the new claims arose after the agreement was signed.

In contrast, Ivester and Surprenant assert the health care claims were not specifically included in the April 30, 2004 agreement because they were an old liability, and thus, they were implicitly included in the agreement. Surprenant testified item number nine under the expenses and liabilities section of the April 30, 2004 agreement covered any mistakes created prior to the split up of the partners and those would be liabilities of the partnership. He also testified item number nine included the pending health care claims.

[5] This issue addresses Harris's second and third issue.

He further testified the partners had discussions about the future health claims and they all agreed they would continue to pay them as they had been.

Additionally, Livengood testified item number nine was a catchall for other items that might occur after the agreement was signed, but had accrued prior to that time. He also testified that purchasing fraudulent health insurance was a mistake that would fall under this category, and thus, the April 30, 2004 agreement included the pending health care claims. He further testified all three partners discussed that the health care fraud and attorneys' fees were a contingent liability because they resulted from actions that were taken prior to April 30, 2004. Therefore, the evidence supports the master's finding that Harris was responsible for health insurance claims and attendant attorneys' fees that arose after April 30, 2004.

CONCLUSION

Accordingly, the master's order is

AFFIRMED.

WILLIAMS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Ricky L. Hatcher, Appellant.

Appeal From Marlboro County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 4604
Heard May 27, 2009 – Filed August 5, 2009

REVERSED AND REMANDED

Appellate Defender Elizabeth A. Franklin-Best, 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 Harold M. Coombs, Jr., all of Columbia; and Solicitor Jay E. Hodge, Jr., of Cheraw, for Respondent.

KONDUROS, J.: Ricky L. Hatcher appeals his conviction and sentence for distribution of crack cocaine and distribution of crack cocaine within proximity of a park. He argues the trial court erred in admitting drug evidence for which the State failed to prove the chain of custody and in misstating to the jury the State's burden of proof. We reverse and remand.

FACTS

On October 6, 2006, a confidential police informant purchased forty dollars' worth of crack cocaine from Hatcher. Two police officers followed the informant and maintained visual contact with him as he traveled to meet Hatcher. The informant wore a concealed microphone and made the purchase with money the police provided. The drugs were tied up in two small plastic baggies, which the informant concealed in his mouth before leaving Hatcher's home.[1] Maintaining one-way radio contact with police, the informant left Hatcher's home by a different route than he had arrived, met his police contacts, and delivered the drugs to them.

Officer Jeffrey Locklear accepted the drugs from the informant, placed the baggies in a plastic evidence bag, sealed the bag, and wrote certain identifying information on it. At trial, Officer Locklear testified he placed the evidence bag in a "BEST kit" plastic bag for processing by the State Law Enforcement Division (SLED). Officer Locklear transported the BEST kit to SLED. Agent Marjorie Wilson, a SLED chemist, testified she received the BEST kit from SLED's Log-In Department, processed the drugs, and returned them in a newly sealed bag to SLED's Log-In Department. Officer Locklear testified the evidence was returned to him in a heat-sealed bag that he brought to trial.

At trial, Hatcher objected to the admission of the drugs into evidence because the State failed to establish a complete chain of custody. The trial court overruled Hatcher's objection, noting the drugs remained sealed in the

[1] The informant hid the drugs under his tongue because he was concerned other police officers not involved in the operation might find him with the contraband. Hiding drugs under the tongue is a common method for transporting smaller quantities of illegal drugs.

bags identified by the witnesses and a substantial chain of custody was established. The jury convicted Hatcher of both offenses and the trial court sentenced him to fifteen years' imprisonment on each count to run concurrently. This appeal followed.

STANDARD OF REVIEW

The admission of evidence is addressed to the sound discretion of the trial court. State v. Williams, 297 S.C. 290, 293, 376 S.E.2d 773, 774 (1989). "On appeal, the question presented is whether the trial court's decision is controlled by an error of law or is without evidentiary support." State v. Taylor, 360 S.C. 18, 23, 598 S.E.2d 735, 737 (Ct. App. 2004). If any evidence supports the trial court's decision, the appellate courts will affirm it. Id.

I. Chain of Custody

Hatcher contends the trial court erred in admitting the drug evidence when the State failed to establish a complete chain of custody. We agree.

"[A] party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). When "the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis." Benton v. Pellum, 232 S.C. 26, 33-34, 100 S.E.2d 534, 537 (1957) (quoting Rodgers v. Commonwealth, 90 S.E.2d 257, 260 (Va. 1955)). However, each person who handled the evidence is not required to testify. Sweet, 374 S.C. at 7, 647 S.E.2d at 206.[2] When "other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts

[2] When an evidence custodian does not testify at trial, the party offering the evidence may submit the custodian's certified or sworn statement identifying the substance or its container, stating the custodian possessed it, and indicating the substance "was delivered in substantially the same condition as when received." Rule 6(b), SCRCrimP.

have been willing to fill gaps in the chain of custody due to an absent witness." Id. Nevertheless, evidence is inadmissible under this rule when the offering party omitted a link in the chain of possession by failing to establish the identity of each custodian at least as far as practicable. State v. Governor, 362 S.C. 609, 612, 608 S.E.2d 474, 475 (Ct. App. 2005).

First, the State argues Hatcher's objection at trial does not specifically mention the whereabouts of the drugs during the 276-day period between the purchase and the analysis, a matter he now complains of on appeal. However, we believe his objection was sufficiently specific to identify the grounds for the trial court. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n objection must be sufficiently specific to inform the trial court of the point being urged by the objector."). Hatcher objected:

> Your Honor, I have not heard any testimony about where the drugs were located in-between the alleged buy on October the 6th, 2006, and when it was transported to SLED. I don't know where it was kept. I have not heard anything about where at SLED – Ms. – Ms. Wilson says that she got it from Log-In, she analyzed it, she took it back to Log-In. I don't think there's really been a complete chain of custody here, and I would object to the drugs being entered into as evidence.

Hatcher's point was the State failed to establish each link in its chain of custody. The trial court clearly understood this point and ruled: "[I]n my view, based on recent cases, that is sufficient. You don't have to have every dot and cross every 'T', but there is a substantial chain here that would justify my admitting it into evidence."

Having determined the issue was adequately preserved, we now turn to the merits. Officer Locklear and Agent Wilson both acted as custodians of the evidence. However, neither is directly linked to the other by testimony or documentary evidence. The party who received the evidence at SLED is not identified and the State presented no testimony regarding how the evidence

was handled while in Officer Locklear's possession or once it was surrendered at SLED. Officer Wilson testified she received the evidence from the Log-In Department, but that is the extent of her testimony regarding how the evidence came to be in her custody. The record does not reveal the date the evidence was left at SLED or where it was stored pending Officer Wilson's receipt and analysis more than eight months after the undercover drug buy.[3]

While the chain of custody is only required to be established as far as is reasonably practicable, South Carolina courts have consistently held that all persons in the chain of custody must be identified and the manner of handling the evidence must be demonstrated.[4] Sweet, 374 S.C. at 7-8, 647 S.E.2d at 206-07 (holding chemist's report inadmissible in absence of evidence the confidential informant procured drugs from defendant); State v. Cribb, 310 S.C. 518, 522, 426 S.E.2d 306, 309 (1992) (reversing trial court's admission of blood alcohol evidence when the identity of person who drew sample or transported it to the hospital laboratory was not in evidence); Raino v. Goodyear Tire & Rubber Co., 309 S.C. 255, 258, 422 S.E.2d 98, 100 (1992) (affirming trial court's suppression of blood alcohol evidence when the identity of any party handling the blood was unknown even though the laboratory was in close proximity to the trauma where sample was drawn); State v. Taylor, 360 S.C. 18, 27-28, 598 S.E.2d 735, 739 (Ct. App. 2004) (holding chain of custody was established when identity of each custodian was established through documentary evidence and testimony although

[3] We also note the record contains no testimony regarding how the drug evidence was transported back to Officer Locklear. However, this link in the chain of custody would not necessarily prevent admission of Officer Wilson's report provided the other previous links were sufficiently established.

[4] In South Carolina Department of Social Services v. Cochran, 364 S.C. 621, 628-30, 614 S.E.2d 642, 646-49 (2005), the court approved the admission of test results relating to a blood sample although DSS was unable to identify the courier who transported the samples from the collection facility to the testing facility. While Cochran can be construed to loosen the requirements of custodial identification, the court was careful to limit its holding to the specific facts of that case. Id. at 629 n.1, 614 S.E.2d at 646 n.1. We find the facts of Cochran to be readily distinguishable from this case.

evidence custodian was unavailable to testify at trial or via affidavit); State v. Joseph, 328 S.C. 352, 364-65, 491 S.E.2d 275, 281-82 (Ct. App. 1997) (holding chemist's report was inadmissible when chemist was not produced to testify after timely objection to report and chemist was party who retrieved evidence from SLED drop box, retained possession for six months, and conducted testing). These requirements are not met in this case.

The confidential informant, Officer Locklear, and Officer Wilson all testified the drug evidence had not been tampered with between its procurement from Hatcher and its receipt and analysis. However, evidence the drugs had not been tampered with is not sufficient to overcome missing links in the chain of custody. See State v. Chisolm, 355 S.C. 175, 584 S.E.2d 401 (Ct. App. 2003) (overruled on other grounds by Taylor, 360 S.C. at 27, 598 S.E.2d at 739). In Chisolm, the trial court admitted drug evidence when the State offered no testimony or affidavit from the two custodians in the chain of custody between the investigating officer and the analyst. Id. at 177-78, 584 S.E.2d at 403. In reversing the trial court, this court stated:

> There is no dispute that the State did not submit the testimony of each individual who handled the evidence nor did the State comply with Rule 6(b). The trial court, however, allowed the introduction of the evidence despite the missing links in the chain because the State demonstrated that the evidence had not been tampered with by the time [the chemist] received it for analysis. This was error.

Id. at 180, 584 S.E.2d at 404 (emphasis added).

Just as in Chisolm, the trial court in this case relied on the lack of proof that the evidence was somehow tainted. However, that alone is not enough to establish a sufficient chain of custody.

We note the case before us is distinguishable from the line of cases in which the identity of the custodian and method of handling are known but the manner of handling was irregular in some respect. In such cases, evidence may be admissible with any irregularities going to the weight of the evidence

as opposed to its admissibility. See Governor, 362 S.C. at 613, 608 S.E.2d at 476 (finding chain of custody requirement satisfied when all custodians of blood sample were identified although officer did not follow department directives in handling evidence); State v. Horton, 359 S.C. 555, 567-68, 598 S.E.2d 279, 286 (Ct. App. 2004) (finding urine sample admissible when custodians were identified even though it could not be explained how sample became packaged in a Styrofoam container); State v. Johnson, 318 S.C. 194, 196, 456 S.E.2d 442, 444 (Ct. App. 1995) (holding crack-cocaine evidence admissible when parties in chain of custody were identified although dates of transfer were not entirely consistent).

Therefore, based on the application of chain of custody law in the aforementioned cases, we find the State did not establish a sufficient chain of custody and the drug evidence should have been suppressed.

II. Jury Instruction

Hatcher asserts the trial court erred in providing the jury with an inaccurate instruction. He argues by stopping its instruction in the middle of the phrase "beyond a reasonable doubt," the trial court implied to the jury the burden of proof was lower than constitutionally mandated.

We decline to reach this issue because our resolution of the first issue is dispositive. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

For the foregoing reasons, Hatcher's distribution convictions are

REVERSED AND REMANDED.

HEARN, C.J., and THOMAS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Auto-Owners Insurance Company, Appellant,

v.

Samuel W. Rhodes, Piedmont Promotions, Inc., and Marion L. Eadon d/b/a C&B Fabrications, C&B Fabrications, Inc., and Low Country Signs, Inc., Respondents.

Appeal From York County
Lee S. Alford, Circuit Court Judge

Opinion No. 4605
Heard June 10, 2009 – Filed August 6, 2009

AFFIRMED AS MODIFIED

A. Johnston Cox and John L. McCants, both of Columbia, for Appellant.

Creighton Coleman, of Winnsboro and Hoover C. Blanton and William O. Sweeny, both of Columbia, for Respondents.

HEARN, C.J.: Auto-Owners Insurance Company appeals from the denial of its motion to vacate and/or stay this declaratory judgment action to determine coverage under an insurance policy, following this court's reversal and remand of the companion tort action for damages. In the alternative, Auto-Owners contends the circuit court erred in finding Marion Eadon d/b/a C&B Fabrication an insured under the policy, there was an occurrence resulting in property damage, and that none of the argued exclusions contained in the policy apply. We affirm as modified.

FACTS/PROCEDURAL HISTORY

Marion Eadon is the sole owner and shareholder of the businesses C&B Fabrication, Inc. (C&B) and Lowcountry Signs, Inc. (Lowcountry), which both conducted business under the name C&B Fabrication. Samuel Rhodes is the sole owner and shareholder of Piedmont Promotions, Inc. (Piedmont), which owns or leases outdoor advertising space in various locations. In 1999, Rhodes entered into discussions with Eadon and C&B to design, fabricate, and erect three outdoor advertising signs on property owned by Rhodes that bordered Interstate 77 in Fairfield County, South Carolina. In addition, Rhodes obtained the necessary permits in the name of Piedmont with the South Carolina Department of Transportation (SCDOT) to erect the three signs. As a result of those discussions, C&B agreed to complete the signs for $153,960. Throughout the period of fabrication and installation of Rhodes' signs, C&B and Lowcountry held a Commercial General Liability Policy (the Policy) with Auto-Owners Insurance Company (Auto-Owners).

Approximately ten months following the installation of the signs, the middle sign was discovered to be leaning towards I-77. Rhodes contacted Eadon, informing him of the problem, and Eadon eventually sent a crew to address the issue. Three days after the crew visited the site, one of the other signs fell across I-77, blocking both lanes of southbound traffic. Rhodes

immediately requested that Eadon remove all three signs; however, Eadon removed only the one that previously had been leaning, refusing to take down the sole remaining sign. SCDOT investigated the incident, requiring Rhodes to remove all the signs, and also revoked Piedmont's permits to maintain signs on the property in the future. Accordingly, Rhodes had the remaining sign removed.

Subsequently, Auto-Owners sent a reservation of rights letter to Eadon regarding the incident, stating it was unsure as to whether a claim existed under the Policy. Over the next few months, Auto-Owners paid several claims for damages caused by the fallen sign, but stated the Policy did not cover the majority of expenses that would be incurred following the loss. Thereafter, Rhodes and Piedmont brought suit (Tort action) against Eadon d/b/a C&B Fabrication, alleging damages to the real estate owned by Rhodes and lost income by Piedmont due to the negligent design, fabrication, and erection of the signs by C&B, which led to the destruction of the three signs and the loss of the SCDOT permits. While the Tort action was pending, Auto-Owners filed this declaratory judgment action (DJ action) against Rhodes, Piedmont Promotions, Eadon, and Lowcountry, to determine coverage provided under the Policy. Auto-Owners contended there had been no occurrence, as defined under the policy, or alternatively, that certain exclusions contained within the Policy avoided coverage. The complaint also sought a stay of the Tort action pending the resolution of the DJ action. It does not appear that this request for a stay was ever considered by the court, and, in fact, the DJ action was deferred pending the resolution of the Tort action.

The Tort action resulted in a jury verdict in Rhodes' favor for three million dollars in actual damages and three million five hundred thousand dollars in punitive damages. Following the verdict, Auto-Owners moved to continue the DJ action in order to obtain a copy of the Tort action transcript, which was granted. Thereafter, all parties to the DJ action made motions for summary judgment. Auto-Owners also made a motion to amend its complaint, which was granted. In its amended complaint, Auto-Owners proposed changing its caption from "Marion L. Eadon d/b/a C&B

Fabrications, Inc." to "Marion L. Eadon d/b/a C&B Fabrication," as well as contending in its pleadings for the first time that Eadon d/b/a C&B was not insured under its policy. The circuit court denied all motions for summary judgment.

The DJ action was set for a jury trial with respect to one issue; however, prior to the introduction of any evidence, the parties entered into a stipulation which, for the purposes of the DJ action only, reformed the named insureds on the Policy to reflect the fact that Eadon had insured several different companies under the Policy over its life, and each of the companies was understood to have done business under the name C&B Fabrication. The circuit court then decided the remaining issues before it non-jury, finding: there was an "occurrence" under the Policy that resulted in property damage to Rhodes; none of the argued exclusions applied; Eadon d/b/a C&B Fabrication was an insured under the Policy, and with the exception of the actual contractual cost of the three signs, the judgment rendered in the Tort action should be paid by Auto-Owners up to the Policy's limits; and post-judgment interest would accrue on the jury verdict until such time as Auto-Owners paid, offered to pay, or deposited a sum certain with the court.

While the litigation in the DJ action continued, and before the order of the circuit court referenced above was published, Eadon appealed the verdict in the Tort action to this court. In an unpublished opinion, the verdict was reversed based on the trial court's failure to grant Eadon's motion to transfer venue, and the matter was remanded for a new trial in Eadon's county of residence, Clarendon County. Rhodes v. Eadon, Op. No. 2006-UP-413 (S.C. Ct. App. filed Dec. 15, 2006). In light of this development, Auto-Owners filed a supplemental Rule 59(e), SCRCP, motion,[1] and/or in the alternative, a Rule 60(b)(2), (4) and (5), SCRCP motion, contending that because the underlying verdict in the Tort action had been reversed by this court, the court's order in the DJ action was also null and void, based on the order's reliance on the evidence and testimony of the vacated action.

[1] Prior to the reversal of the verdict in the Tort action, Auto-Owners had filed both an initial and an amended Rule 59(e) motion, as well as a motion for a new trial.

The circuit court took the matter under advisement, and thereafter issued a supplemental, and then a revised supplemental order. Based on this court's reversal of the Tort action, the circuit court granted Auto-Owners' motion in part, striking the portion of its order referencing the money damages awarded by the jury; however, the remaining portions of the order, including the determination that Eadon d/b/a C&B Fabrication was an insured, there was an occurrence, and that none of the exclusions applied, remained in full force and effect.[2] Auto-Owners now appeals this determination.

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Hardy v. Aiken, 369 S.C. 160, 164-65, 631 S.E.2d 539, 541 (2006) (citations omitted). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." Auto Owners Ins. Co., Inc. v. Hamin, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006). "When reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law." Epworth Children's Home v. Beasley, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005). "[T]he appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings." Hamin, 368 S.C. at 540, 629 S.E.2d at 685.

LAW/ANALYSIS

I. RULE 60(b)(2), (4), and (5), SCRCP, MOTION

Auto-Owners contends the circuit court erred in denying its post-trial motion under Rule 60(b)(2), (4), and (5), SCRCP, to both vacate its prior order and/or stay the case pending the resolution of the Tort action. Auto-

[2] This court's unpublished reversal was later appealed to the supreme court, which denied certiorari.

Owners maintains that, because the underlying Tort action was reversed by this court, no duty to indemnify exists, and the retrial of the underlying action could produce a verdict for Auto-Owners, under which no duty to indemnify would exist. Auto-Owners further contends that, based on the only partial-vacation of the circuit court's order, there still exists repeated reliance on findings of the jury in the Tort action to support its rulings, which amounts to cause for relief under Rule 60. We disagree.

A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief. Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991). Whether to grant or deny a motion under Rule 60(b) is within the sound discretion of the trial court. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). On review, we are limited to determining whether the trial court abused its discretion in granting or denying such a motion. Saro Invs. v. Ocean Holiday P'ship, 314 S.C. 116, 124, 441 S.E.2d 835, 840 (Ct. App. 1994).

Rule 60(b) states in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
> . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> . . . (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Rule 60(b)(2), (4), and (5).

While there is authority elsewhere[3] that a DJ action is not ripe for adjudication until the underlying action for damages has been resolved, this does not appear to be the law in South Carolina. In order to state a cause of action under the Uniform Declaratory Judgments Act,[4] a party must demonstrate a justiciable controversy. Power v. McNair, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." Id. "The Declaratory Judgments Act is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy." Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004). In Peoples Federal Savings & Loan Ass'n of South Carolina v. Resource Planning, the supreme court affirmed a previous holding from this court to the effect that a case or controversy regarding the validity of a pre-emptive right does not accrue until the right has been asserted. 358 S.C. 460, 596 S.E.2d 51 (2004) (concurring in the result reached in Webb v. Reames, 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997)). Here, under the Peoples Federal court's reading of a justiciable controversy, a right has been asserted against

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[3] See Certain Underwriters at Lloyd's, London v. Boeing Company, 895 N.E.2d 940, 959 (Ill. App. Ct. 2008) (an insurer's duty to indemnify was not ripe, because an actual controversy, e.g. a legal obligation to pay damages in the underlying action, did not yet exist). In addition, other courts have held that in order to eliminate the risk of inconsistent factual determinations that could prejudice an insured, a stay of a DJ action pending resolution of a third-party suit is appropriate when the coverage question turns on facts to be litigated in the underlying action. See Montrose Chem. Corp. v. Superior Court, 861 P.2d 1153 (Cal. 1993); Cal. Ins. Guarantee Ass'n v. Superior Court, 231 Cal. Rptr. 104 (Cal. Ct. App. 1991); Gen. of Am. Ins. Co. v. Lilly, 65 Cal. Rptr. 750 (Cal. Ct. App. 1968); Constitution Assocs. v. N.H., Ins. Co., 930 P.2d 556 (Colo. 1996); Citizens Communications Co. v. Am. Home Assurance Co., 2004 WL 423059 (Me. 2004); Chantel Assocs. v. Mount Vernon Fire Ins. Co., 656 A.2d 779 (Md. 1995).

[4] S.C. Code Ann. §§ 15-53-10 to -140 (Supp. 2008).

Eadon and C&B, the alleged insureds under the Policy; therefore, this DJ action appears to be ripe for review.

Additionally, several South Carolina courts have tacitly approved the ripeness of a DJ action during the pendency of the underlying action for damages. In Isle of Palms Pest Control Co. v. Monticello Insurance Co., this court discussed a general liability policy in a DJ action, determining the insurance company had a duty to defend an underlying action, and that if the damages alleged in the complaint in the underlying action were proven, the insurance company had a duty to indemnify the insured. 319 S.C. 12, 14-20, 459 S.E.2d 318, 319-22 (Ct. App. 1994).

Moreover, the supreme court was faced with a very similar procedural scenario in Owners Insurance Co. v. Clayton, when the underlying tort action was filed by a third party, and the insurer defended the insured under a full reservation of rights. 364 S.C. 555, 557, 614 S.E.2d 611, 612-13 (2005). Prior to the trial for damages, the insurer filed a DJ action to determine its liability under the policy. Id. at 557-58, 614 S.E.2d at 613. The underlying action was tried to a verdict, and the jury awarded the third party $1.25 million dollars. Id. While the DJ action was pending, the verdict was appealed and ultimately affirmed. The court in the DJ action found the insurer had a duty to indemnify the insured, and that order was both appealed and affirmed during the pendency of the appeal from the underlying jury award. Id. Clayton is illustrative of the approach this court should take in the case at bar. Although there is no indication that any party in Clayton requested a stay, or otherwise challenged the continued validity of the DJ action as not being ripe, the situation presented in Clayton is extremely similar to the situation presented here, with the exception that the underlying action was not reversed on appeal. While certiorari was still pending in the underlying action, the supreme court affirmed the insurer's duty to indemnify the insured; accordingly, we address the merits of this appeal, even in the absence of a specified damages award.[5]

[5] This case is easily distinguishable from the situation faced by the supreme court in Park v. Safeco Insurance Co. of America, 251 S.C. 410, 162 S.E.2d 709 (1968). In Park, the supreme court held that a DJ action was not ripe for

Considerations of fairness and judicial economy also dictate that Auto-Owners' request to set aside or stay the judgment in the DJ action should be denied. It was Auto-Owners itself that filed this DJ action, and it was Auto-Owners that requested in its complaint that the Tort action be stayed pending resolution of this action. Auto-Owners obviously believed at that time that its DJ action could and should be resolved independent of what transpired in the Tort action. It would be a waste of judicial time and resources to set aside the judgment in the DJ action simply because the jury verdict in the Tort action was reversed and remanded. The propriety of the circuit court's resolution of the coverage issues can be addressed whether or not a judgment against Rhodes is in place. Accordingly, the circuit court's denial of Auto-Owners' Rule 60(b) motion is affirmed, and this court will review the substantive arguments Auto-Owners presents on appeal.

However, the continued inclusion of references to the Tort action jury, verdict, and damages in the circuit court's order is moot in view of the reversal of that verdict. We therefore vacate the portions of the order under "The Policy Provisions" section, referencing the Tort action.

II. EADON d/b/a C&B'S STATUS AS AN INSURED UNDER THE POLICY

Auto-Owners contends the circuit court erred in concluding "Marion L. Eadon d/b/a C&B Fabrication" is an insured under the Policy. Auto-Owners

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judicial pronouncement due to the lack of a justiciable controversy, when the third-party, injured plaintiff brought suit against the insurer prior to filing a legal complaint against the alleged at-fault insured. Finding the injured third party lacked the contractual privity to preemptively sue to establish the parties' liabilities under the insurance contract, the court found the insured must first become liable for damages before any rights vested in the injured party. The case before us is substantially different than Park, because here, the insured instituted this action after the Tort action complaint had been filed, against both Eadon and Rhodes; therefore, an actual controversy exists, and the Park court's concerns over privity are not present.

alleges error in finding: Marion L. Eadon d/b/a C&B Fabrication is the same entity as C&B Fabricators, Inc. and LowCountry Signs & Fabrication, Inc.; Eadon met the definition of an insured based on his actions being on behalf of the corporations listed on the policy; and Eadon reasonably expected to be covered for his actions regardless of what entity was actually listed as the named insured.

The circuit court found Eadon d/b/a C&B Fabrication is an insured under the Policy. The court based its conclusion on several factors. First, the court noted that, although the Policy was issued to Eadon and named the insured as "C&B Fabrications Inc. & Low Country Signs Inc.," neither of those two companies actually existed at the time the Policy was issued. Instead, the two companies, C&B Fabricators, Inc. and Lowcountry Signs & Fabrication, Inc., were chartered by Eadon, and in the stipulation entered into by the parties to this DJ action, the Policy was reformed to reflect the fact that these two companies were the named insured under the Policy, and they both did business under the trade name, C&B Fabrication. Additionally, Eadon was sued in the underlying Tort action as doing business under the same name, C&B Fabrication. Thus, the circuit court determined, it was the belief of all the parties privy to the Policy that it would serve as coverage for the sign-making business conducted by C&B and by Eadon.

The Policy sets out who is considered an insured under Section II:

> Who is an insured
>
> 1. If you are designated in the Declarations as:
>
> > c. An organization other than a partnership or joint venture, you are insured. Your executive officers and directors are insureds, but only with respect to their duties as your officers or directors.

The circuit court found the foregoing provision controlling, as C&B Fabrication was listed under the Policy as a corporation. Moreover, based on the testimony, evidence, and pleadings presented at trial, it was established that Eadon d/b/a C&B Fabrication served as the contact person for the contract with Rhodes and Piedmont for the fabrication, delivery and installation of the three outdoor billboard signs. Eadon also served as the conduit for acquiring the necessary insurance coverage for C&B. Based on this evidence the circuit court found that coverage applied to Eadon under Section 1.c. of the Policy, because his dealings with Rhodes and Piedmont were conducted with respect to his duties as an officer of the company.

Auto-Owners' contention centers around its argument that Eadon fails to meet the definition of an insured under the contract because none of the activities for which he was sued in the Tort action fall within his duties as an officer of the corporation. Auto-Owners relies on several cases from other jurisdictions to support this argument, primarily Creel v. Louisiana Pest Control Insurance, Inc., 723 So.2d 440 (La. App. 3. Cir. 1998). In Creel, the Louisiana court found that under the plain meaning of the policy, "an executive officer is precluded from being an employee and, thus, an insured except when performing his executive duties." Id. at 443. Because the facts leading to the action involved an accident that occurred when the executive in question was en route to spray a house for insects and pests, the Creel court found he was not performing his duties as an "executive" when the accident occurred, thus the language of the policy excluded his coverage under any duties he conducted as an "employee." Id. Auto-Owners argues we should infer a similar result here because the allegations contained in the Tort action related only to the negligent fabrication and installation of the billboard signs, with which Eadon did not participate.

In order to reach a similar result, this court would have to find, for what appears to be the first time in South Carolina, that the duties of an officer and those of an employee, as delineated by a general commercial liability policy, are mutually exclusive. We decline to make that distinction the law in South Carolina. As a natural by-product of any contention regarding the activities that Eadon undertook, Auto-Owners additionally maintains Rhodes and

Piedmont should be judicially estopped from arguing that coverage under the Policy should be applied to Eadon because he was acting on behalf of the corporation. In the Tort action, Rhodes sued Eadon as an individual, and was in the first instance successful, arguing that Eadon should be liable for negligence because he was not acting on behalf of the corporation in contracting for the signs. Auto-Owners maintains that Rhodes should be estopped from now arguing the exact opposite to this court. However, Auto-Owners' contention fails the fourth element of the test[6] for judicial estoppel: the inconsistency must be part of an intentional effort to mislead the court. While it is true that during the Tort action against Eadon, Rhodes argued Eadon had acted in an individual capacity, in this DJ action, Rhodes is a party only by virtue of having been included by Auto-Owners, and is not in privity with either party under the Policy at issue. While we are mindful of the implications a decision that Eadon is an insured under the Policy could have on Rhodes' case in the retrial of the Tort action, such implications may not influence our analysis of the legal issues before us. Instead, we are required to answer the questions before us based on the facts alleged. Therefore, insofar as Eadon's responsibilities involved him in the procurement of the contract with Rhodes and Piedmont, or the commercial general liability policy with Auto-Owners, we hold he was an insured under the Policy.

Auto-Owners also contends the circuit court erred in applying the reasonable expectations doctrine, because it has been rejected and generally discredited as a basis for interpreting a contract that is found to be ambiguous. A close reading of the circuit court's opinion reveals several instances where it refers to the expectations of both parties; however, the

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[6] The elements of judicial estoppel include: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. Cothran v. Brown, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004).

order goes on to clearly state that any potential ambiguity arising from the confusion of the corporations and trade names of the parties involved in the litigation was resolved with the parties' stipulation prior to the case's submission to the court. The court's order clearly finds coverage based on Eadon's actions as a director of the corporation. As a result, Auto-Owners' contention is without merit, and coverage under the policy was not based on the reasonable expectations of the parties.

III. EXISTENCE OF AN OCCURRENCE

Auto-Owners contends the circuit court erred in finding an occurrence took place, as defined under the Policy, because the alleged damage sustained was only to the fabricated signs as a result of the insured's own faulty workmanship.

The Policy in this case reads, in pertinent part:

> Coverage A. Bodily Injury and Property Damage Liability
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.
>
> . . .
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory."
>
> . . .
>
> Section V – Definitions
>
> . . .

> 9. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
> . . .
> 12. "Property damage" means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the "occurrence" that caused it.

An occurrence, as described above, means an accident, although that term is not specifically defined in the Policy; however, the term has been defined by the supreme court in a case concerning an identical commercial general liability policy as "[a]n unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt." Green v. U. Ins. Co. of America, 254 S.C. 202, 206, 174 S.E.2d 400, 402 (1970).

The circuit court found there was an occurrence, distinguishing the case of L-J v. Bituminous Fire & Marine Insurance Co., 366 S.C. 117, 621 S.E.2d 33 (2005). In L-J, the supreme court found the alleged damage did not constitute property damage under a similar commercial general liability policy, because the claim was merely one for faulty workmanship that resulted in damages to the work product alone. Id. at 123, 621 S.E.2d at 36. However, the supreme court did note that a commercial general liability policy could provide coverage when a claim for faulty workmanship alleged third party bodily injury or damage to other property. Id. n. 4.

The L-J court examined the case of High Country Associates v. New Hampshire Insurance Co., in which a condominium homeowners' association sued the condominium builder seeking damages due to the negligent construction of the buildings. 648 A.2d 474 (N.H. 1994). The High Country case dealt with the alleged continuous moisture intrusion from a subcontractor's defective installation of siding resulting in moisture seeping into the buildings, which caused pervasive decay of the interior and exterior walls and loss of structural integrity of the condos. Id. at 476. The High Country court found the claim under a similar commercial general liability policy was not simply one for damages resulting from faulty workmanship, but rather, was a claim for negligent construction resulting in property damage to the other property. Id. at 477. This amounted to an occurrence for which coverage would be provided. Id. at 478.

Finding a parallel between the facts in this case and those present in High Country, the circuit court found the damage alleged by Rhodes to not merely be damages sustained to the work product alone, due to faulty workmanship, but also to the "other property" of Rhodes. We find the circuit court's analysis of the alleged damages to Rhodes' property to be a proper extension of the supreme court's notation in L-J of the potential for recovery under facts similar to High Country.[7] As a result, the circuit court's finding that the damages were a result of the unexpected happening of the sign falling, thus constituting an occurrence under the Policy, is upheld.

[7] We note the supreme court has considered a case with facts similar to those in High Country, in Auto-Owners Insurance Co. v. Newman, Op. No. 26450 (S.C. filed March, 10 2008), reaching the same result as the circuit court in this case. However, although an opinion in Newman was issued, rehearing was subsequently granted by the court, and after arguments were held November 8, 2008, no substitute opinion has been published to date. Therefore, while the previously-released opinion is favorable to the result reached by the circuit court, we did not rely on it for considerations of this appeal.

IV. FALLING OF THE SIGN CREATED PROPERTY DAMAGE

Auto-Owners contends the property damages found by the circuit court did not comport with the definition of "property damage" in the policy. Auto-Owners also maintains that any alleged damage stemming from Rhodes' inability to reinstall signs on the property should be excluded because the evidence introduced in the Tort action is that SCDOT's refusal to reissue the necessary licenses resulted from its determination that Rhodes was conducting a sham business.

As previously described above, the Policy provides that property damage is defined as:

> 12. "Property damage" means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the "occurrence" that caused it.

Auto-Owners contends the circuit court erred in failing to apply the principles of Braswell v. Faircloth, 300 S.C. 338, 387 S.E.2d 707 (Ct. App. 1989) to this case. In Braswell, an insured lessee left hazardous waste on the lessor's property when it vacated the premises. Id. at 339, 387 S.E.2d at 708. The corrosive chemicals that were left ate through the valve of the storage tank that held them, releasing 1000 gallons of chemicals into an adjacent field. Id. at 340, 387 S.E.2d at 708. DHEC issued an order requiring the lessor to clean up the property, and thereafter, when the lessor sued the lessee, the insurer defended and denied coverage. Id. at 340-41, 387 S.E.2d at 708. Affirming in part the grant of summary judgment in favor of the insurer, this

court found an occurrence under the policy, but determined that any "damages" attributable to the costs of removing the stored wastes and chemicals that had not yet leaked were not recoverable, since no property damage had yet resulted. Id. at 345, 387 S.E.d at 711. This court relied upon two Fourth Circuit cases for its holding: the first held that an insurer was not obligated to indemnify an insured under a commercial general liability policy when the underlying action was a suit by the federal government to seek compliance with the directives of regulatory agencies. Maryland Cas. Co. v. Armco Inc., 822 F.2d 1348 (4th Cir. 1987). The second held that an insurer was not obligated to indemnify its insured in a suit to recover the response costs of removing hazardous wastes. Cincinnati Ins. Co. v. Milliken & Co., 857 F.2d 979 (4th Cir. 1988).

However, the holding in Braswell has since been modified by the supreme court, which specifically rejected the reasoning of Armco and Milliken. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004). In Helena, a business involved in the agricultural chemicals market was required by the Environmental Protection Agency (EPA) and State Department of Health and Environmental Control (DHEC) to clean up three sites that had been contaminated. Id. at 634, 594 S.E.2d at 456. Thereafter, the business sought reimbursement from its insurance company for the cost of the clean-up required by the EPA and DHEC; however, the trial court granted insurers summary judgment on the claims. Id. at 635, 594 S.E.2d at 457.

In reversing the trial court on appeal, the supreme court rejected the reasoning found in the Armco and Milliken cases that the clean-up costs were not "damages" as defined by the insurance policy. Id. at 638-41, 594 S.E.2d at 458-60. The supreme court found the fourth circuit cases too narrowly construed the term damages within an insurance contract. Instead, the Helena court cited to a Maryland case which had also rejected the reasoning of the fourth circuit cases, finding "the insurer's pledge to pay damages will apply generally to compensatory outlays of various kinds, including expenditures made to comply with administrative orders or formal injunctions." Id. at 638, 594 S.E.2d at 458 (quoting Bausch & Lomb Inc. v. Utica Mut. Ins. Co., 625

A.2d 1021 (1993)). The circuit court analogized the insurer's duty to pay expenditures having to do with environmental clean-ups to the case at hand, wherein SCDOT deemed the remaining two signs unsafe, and required Rhodes to take them down. We find the circuit court's analysis of Helena to be accurate, and, therefore, the cost associated with Rhodes' required removal of the final sign comports with the broader definition of damages or physical injury to tangible property defined in subsection 12.a.

The circuit court also found the diminution in value of Rhodes' property attributable to the loss of his permits to erect signs in the future, fit within the second part of the definition of property damage: loss of use of tangible property. Thus, the Policy would provide coverage for lost profits from the inability to maintain signs on the property and contributing to its overall diminution in value. Furthermore, the current law of this state appears to be that a commercial general liability policy is intended to provide coverage for tort liability for physical damage to property of others, but not for the insured's contractual liability which causes economic losses. See Century Indem. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 566, 561 S.E.2d 355, 358 (2002) (citing Isle of Palms Pest Control Co. v. Monticello Ins. Co., 319 S.C. 12, 459 S.E.2d 318 (Ct. App. 1995), aff'd, 321 S.C. 310, 468 S.E.2d 304 (1996)).

Auto-Owners, meanwhile, contends the circuit court ignored the evidence it presented that the reason Rhodes could not reinstall the signs on his property was not that SCDOT found them to be unsafe, but rather because Rhodes was conducting a sham business. See Rhodes v. Eadon, Op. No. 2006-UP-413 (S.C. Ct. App. filed Dec. 15, 2006) (detailing in the Facts portion of the opinion that Rhodes' application to SCDOT for new permits was denied because the Interstate was not a qualifying commercial business, but was being operated as a sham. Rhodes appealed the denial to the Administrative Law Court, which affirmed SCDOT's finding of a sham activity). However, this information and argument does not negate the existence of evidence of property damages under the Policy, requiring our affirmance of the circuit court under our standard of review on appeal. Rather, the evidence that Rhodes' application for a new license was denied as

a sham is evidence that should be introduced and properly weighed by the jury in the retrial of the Tort action.

V. APPLICATION OF EXCLUSIONS FOUND IN THE POLICY

Finally, Auto-Owners contends the circuit court erred in finding none of exclusions k, l, m, and n applicable to preclude coverage under the Policy. We disagree.

"Rules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to be broadly construed." Laidlaw Env. Serv. (TOC) v. Aetna Cas. & Sur. Co. of Ill., 338 S.C. 43, 47, 524 S.E.2d 847, 849 (Ct. App. 1999) (quoting McPherson v. Mich. Mut. Ins. Co., 310 S.C. 316, 319, 426 S.E.2d 770, 771 (1993)).

The Policy provides:

> 2. Exclusions
>
> This insurance does not apply to:
>
> . . .
>
> k. "Property damage" to "your product" arising out of it or any part of it.
>
> l. "Property damage" to "your work" arising out of it or any part of it and including [sic] in the "products-completed operations hazard."
>
> . . .
>
> m. "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
>
> (2) A delay or failure by you or anyone acting on your behalf to perform a

contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, or removal or disposal of:

(1) "Your product";

(2) "Your work"; or

(3) "Impaired property";

If such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

. . .

Section V – Definitions

. . .

5. "Impaired Property" means tangible property other than "your product" or "your work", that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

a. The repair, replacement, adjustment or removal of "your product" or "your work";

. . .

11.a. "Products-completed operations hazard"

Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2)Work that has not yet been completed or abandoned.

b. "Your work will be deemed completed at the earliest of the following times:

(1) When all of the work called for in your contract has been completed.

. . .

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

14. "Your product" means:

a. Any good or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(1) You

(2) Others trading under your name; or

. . .

"Your product" includes:

a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"

. . .

15. "Your work" means:

a. Work or operations performed by you or on your behalf; and

> b. Materials, parts or equipment furnished in connection with such work or operations.
>
> "Your work" includes:
>
> a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"
>
> . . .

Auto-Owners first contends that, although the circuit court was correct in excluding the contractual price of the signs, it erred in failing to find Exclusion k prohibits damages resulting from the loss of use of the signs. The circuit court properly analyzed Exclusion k and determined that the majority, if not all, of the damages assigned by the jury in the Tort action corresponded to the damages inflicted on Rhodes' business, rather than the actual work product – the signs – of C&B, which was properly excluded. We find evidence supports this determination.

Auto-Owners next assigns error to the circuit court's analysis of Exclusion l, which again addresses the "property damage" or "your work", but does so in the context of a "products-completed operations hazard." The circuit court discussed the case Kennedy v. Columbia Lumber & Manufacturing. Co., 299 S.C. 335, 384 S.E.2d 730 (1989), in the context of when a builder has violated a legal duty under a negligence action. The supreme court in Kennedy stated:

> A builder may be liable to a home buyer in tort despite the fact the buyer suffered only "economic losses" where: (1) the builder has violated an applicable building code; (2) the builder has deviated from industry standards; (3) the builder has constructed housing that he knows or should know will pose serious risks of physical harm.

Id. at 346-47, 384 S.E.2d at 737-38; see also Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc., 379 S.C. 181, 666 S.E.2d 247 (2008)

(discussing the exception to the economic loss rule in the context of a home buyer). Based on the evidence and testimony provided at trial, the circuit court determined Eadon violated all three of these conditions. The circuit court was correct in its determination that Exclusion l does not apply, as the "products-completed operations hazard" cannot serve as a broadly written catch-all exclusion that would prohibit recovery no matter what consequences "arise out of" the product of the insured.

Auto-Owners next contends the circuit court erred in finding Exclusion m does not apply. Exclusion m expressly states that: "[t]his exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use." The circuit court found, and we agree, that a sudden and accidental physical injury to Eadon's product is precisely what precipitated the events that led to the filing of this DJ action. Therefore, the caveat provided in the Policy itself prevents the applicability of Exclusion m under the facts of this case.

Finally, Auto-Owners contends the circuit court erred in failing to apply Exclusion n. As discussed by the circuit court, exclusions like n are commonly referred to as "sistership" exclusions. These exclusions are typically included and applied to shield insurers from liability for the costs associated with unanticipated product recalls, and do not apply to claims involving losses resulting from the failure of the insured's product or work, when there is no evidence of a general recall of similar products or materials from the market place. See Erie Ins. Exchange v. Colony Dev. Corp., 736 N.E.2d 941 (Oh. Ct. App. 1999); Standard Fire Ins. Co. v. Chester – O'Donley & Assocs., Inc., 972 S.W.2d 1 (Tenn. Ct. App. 1998). The circumstances giving rise to the Tort action, without question, did not involve a product recall; therefore, the circuit court did not err in finding Exclusion n inapplicable to this case.

CONCLUSION[8]

We find it appropriate, in the interest of judicial economy and fairness, as well as the previous positions taken by parties to this action, for this court to reach the merits of this DJ action, rather than to stay the case pending the retrial of the Tort action. However, as noted above, we vacate the portions of the circuit court's order, under "The Policy Provisions" section, referencing the former verdict in the Tort action. On the merits, we find the circuit court was correct in its determination that: Eadon d/b/a C&B Fabrication was an insured under the Policy; there was an occurrence resulting in damages; and

[8] Auto-Owners also presents several additional bases of error by the circuit court. First, Auto-Owners contends the circuit court erred in relying on findings of facts unsupported by the record before it; specifically, where the order is inconsistent with the transcript of the Tort action. This argument is without merit because the circuit court, as trier of fact in an action without a jury, is entitled to make its own findings of fact. Epworth, 365 S.C. at 164, 616 S.E.2d at 714 ("When reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law."). Second, Auto-Owners contends the circuit court erred in finding C&B is entitled to payment from Auto-Owners for the expense it incurred in the removal of the final sign left standing. As discussed above, Helena is instructive as to whether the costs of taking down the third sign, in order to comply with SCDOT's mandate, falls under the ambit of the plain and ordinary definition of the word damages. 357 S.C. 631, 594 S.E.2d 455 (2004). Under our standard of review, there exists evidence in the record to support the circuit court's determination on this matter; therefore we will not set aside this finding on appeal. See Hamin, 368 S.C. at 540, 629 S.E.2d at 685 ("[T]he appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings."). Moreover, although Auto-Owners states neither Eadon nor C&B pursued a claim for reimbursement in the DJ action, Eadon and C&B's amended answer and counterclaim specifically prays for the costs incurred by the Respondents in rectifying the consequential damages caused by the removal of the signs.

that none of the exclusions in the Policy apply. As a result, the decision of the circuit court is

AFFIRMED AS MODIFIED.

KONDUROS, J., and JONES, A.A.J., concur.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Harvey L. Foster, Respondent,

v.

Gary Foster, Jean F. Burbage, Mike Foster and Jean Burbage as Trustee, Appellants.

Appeal From Laurens County
D. Garrison Hill, Circuit Court Judge

Opinion No. 4606
Heard June 10, 2009 – Filed August 6, 2009

AFFIRMED IN PART AND REVERSED IN PART

J. Falkner Wilkes, of Greenville, for Appellants.

Rhett Burney, of Laurens, for Respondent.

LOCKEMY, J.: Gary Foster, Jean A. Burbage, and Mike Foster (Appellants) appeal the trial court's order granting summary judgment to Harvey L. Foster (Foster) in his action to recover property Foster alleges was taken by the Appellants. Specifically, the Appellants argue the trial court erred in: (1) voiding a deed; (2) ordering the transfer of funds to Foster when there was evidence the funds were a gift from Foster; (3) ordering the transfer of funds to Foster when there was evidence that a portion of the funds were used to pay Foster's assisted care expenses; and (4) finding there was no evidence as to Foster's incompetence. We affirm in part and reverse in part.

FACTS

Foster is the 88-year-old father of the Appellants. In April 2004, Foster executed a deed to his home and named Jean Burbage (Burbage) his attorney-in-fact.[1] The deed conveyed his home to Burbage as trustee while reserving a life estate for himself. In November 2005, Foster was treated for congestive heart failure and spent several weeks in the hospital. After leaving the hospital, Foster lived at Langston House, an assisted living facility, until December 2006.

While Foster was living in Langston House, Burbage handled his finances. Burbage and Foster shared a joint checking account. Foster claimed Burbage shared his account so she could use the funds to provide for his care. In October 2006, Burbage liquidated a CD belonging to Foster worth $45,000 and deposited the money into their joint checking account. She later moved the money into a money market account in the Appellants' names. After leaving Langston House, Foster moved into the home of his current wife, Vera Snow.

The Appellants failed to include Foster's complaint and their answer in the record. It appears from the trial court's order and the arguments made at the summary judgment hearing that Foster filed suit alleging the Appellants

[1] Foster revoked Burbage's power of attorney in December 2006.

took money from his checking account and other property from him. Subsequently, it appears the appellants refused to return Foster's property upon request. Foster also asked the trial court to void the deed he signed to his home.

Burbage testified she was the trustee for her brothers, and she was to divide Foster's property between the three siblings equally. However, Burbage also testified she was not aware of any written trust declaration created by Foster. Foster contends he signed the deed without reading it because he trusted his daughter to act in accordance with his wishes. Furthermore, Burbage admitted she made telephone money transfers from Foster's account into the money market account totaling $73,800. Burbage testified the money was moved so it would be protected and gain interest. She further testified that Foster's property belonged to him even though it was in an account in the Appellants' names.

At trial, the Appellants argued Foster was mentally incompetent. Burbage testified her father was not thinking rationally, exhibited behavioral changes, and suffered from severe memory lapses. The Appellants never produced any medical evidence to support their allegations, and Foster testified he had never been diagnosed with dementia or Alzheimer's disease.

The trial court granted Foster's motion for summary judgment. The trial court found there was no genuine issue of material fact as to Foster's mental competence, voided the deed, and ordered the Appellants to transfer Foster $73,800. This appeal followed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the trial court under Rule 56, SCRCP. Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Pye v. Estate of Fox, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006).

LAW/ANALYSIS

I. Deed

The Appellants argue the trial court erred in voiding the deed signed by Foster conveying his home to Burbage as trustee. Specifically, the Appellants rely on Cunningham v. Cunningham to support their assertion that a trust instrument may consist of more than one writing. 81 S.C. 506, 62 S.E. 845 (1908). They contend the signed deed and Foster's will, which leaves his home to his children, are enough evidence to prove a trust was created. Foster argues his will does not reference a trust and no written trust agreement ever existed. Furthermore, Foster contends the deed named a grantee that did not exist and is, therefore, void. We agree with Foster.

Here, the trial court found there was no trust account; therefore, no trust existed. Accordingly, the trial court voided the deed. To prove the existence of a trust, the following elements must be shown: (1) a declaration creating the trust, (2) a trust res, and (3) designated beneficiaries. Whetstone v. Whetstone, 309 S.C. 227, 231, 420 S.E.2d 877, 879 (Ct. App. 1992). Furthermore, the trust declaration must be in writing when the trust property includes realty. Id. The Appellants have not produced a written declaration creating a trust, and Burbage testified she was not aware of any trust Foster created. Moreover, while the Appellants contend they are the beneficiaries of the trust, they failed to present a trust document or any other evidence to support their position. Because no written trust document was presented to the court, we do not believe a trust existed. Therefore, Burbage was not a trustee. Without a trustee, the deed is void because it designates a grantee that does not exist.

Although there are no South Carolina cases on point, the facts of this case are similar to those in Gifford v. Linnell, where the North Carolina Court of Appeals found a deed was void for lack of a grantee. 579 S.E.2d 440, 443 (N.C. Ct. App. 2003). The deed in Gifford specified the property was conveyed to "Beth Linnell, Trustee of Droffig Family Trust." Id. at 442. The court found that because the deed referred to Linnell as a trustee, she was a grantee only in her representative capacity and not in her individual capacity. Id. at 443. Furthermore, the court found that because the trust was not in existence on the date of conveyance, the deed failed to identify a valid grantee. Id. at 442. Thus, the court ruled that Linnell was not the intended

grantee at the time of the deed's execution, but rather was the representative of a non-existing legal entity. Id. at 443. Therefore, the court voided the deed for lack of a grantee. Id. Adopting the court's reasoning in Gifford, we believe the use of the words "as trustee" following Burbage's name indicates she was not a grantee in her individual capacity. Consequently, because a trust does not exist, we find the deed is void because it designates a grantee that does not exist. Accordingly, we affirm the trial court's grant of summary judgment on this issue.

II. Transfer of Funds

A. Gift

The Appellants argue the trial court erred in granting summary judgment and ordering them to pay Foster $73,800. Specifically, they contend a portion of this sum, the $45,000 CD, was a gift from Foster.[2] Burbage contends the CD was a gift from Foster because he gave her the CD and instructed her to split the money between the Appellants when it matured. However, she also testified that the money was moved so it would be protected and gain interest. Foster testified the CD was not a gift. Because of the conflicting testimony regarding the CD, we find a genuine issue of material fact exists as to whether the CD was a gift from Foster. See Rule 56(c), SCRCP ("[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"). Accordingly, we reverse the trial court's decision to award Foster the $45,000 CD.

B. Assisted Care Expenses

The Appellants also argue the trial court erred in granting summary judgment regarding the remaining portion of the $73,800. Specifically, they allege a portion of the funds was used to pay Foster's assisted care expenses.

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[2] Foster argues this issue is not preserved for review because the Appellants did not raise it to the trial court. We find this issue is preserved because Burbage testified in her deposition that Foster told her to divide the CD between the Appellants when it matured.

While the exact amount of funds spent on Foster's assisted care expenses is unclear, the Appellants do allege they used at least $6,800 to pay these expenses. We find this issue is not preserved for review.

At the summary judgment hearing, the Appellants argued they were fiduciaries responsible for protecting Foster's assets. However, they did not argue that the funds were used for Foster's assisted care expenses. Therefore, because the Appellants failed to raise this argument to the trial court, this issue is not preserved for review. S.C. Dept. of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (holding that in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge).

C. Competency

The Appellants argue the trial court erred in finding there was no genuine issue of material fact as to Foster's mental competency. We disagree.

The trial court found the Appellants failed to present competent evidence from a physician or otherwise to establish that Foster was mentally incompetent. The Appellants contend there was ample testimony that Foster suffered from dementia, was incapable of handling his own finances, showed signs of confusion and memory loss, and was not thinking rationally. Foster testified he had never been diagnosed with dementia and argues that the Appellants were unable to present any medical evidence to support their allegations. Because the Appellants failed to offer any evidence aside from Burbage's allegations that Foster was mentally incompetent, we find the trial court did not err in finding there was no genuine issue of material fact regarding Foster's mental competency. See Rule 56(c), SCRCP ("[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"). Accordingly, we affirm the grant of summary judgment as to this issue.

CONCLUSION

We find the trial court did not err in voiding the deed and finding the Appellants failed to create a genuine issue of material fact regarding Foster's mental competency. We do, however, find the trial court erred in awarding

Foster the $45,000 CD based on conflicting evidence presented during the summary judgment hearing. Furthermore, we find the Appellant's argument that the funds owed to Foster were used for his assisted care expenses is not preserved for review. Accordingly, the trial court's order is

AFFIRMED IN PART AND REVERSED IN PART.

SHORT and WILLIAMS, JJ., concur.