The Supreme Court of South Carolina

In the Matter of Amy Hackney Blackwell, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 18, 1997, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated December 13, 2004, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Amy Hackney Blackwell shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

January 21, 2005

The Supreme Court of South Carolina

In the Matter of Robert Bentley Lyon, Jr., Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 12, 1977, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated December 21, 2004, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Robert Bentley Lyon, Jr. shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

January 21, 2005

The Supreme Court of South Carolina

In the Matter of Laura Elizabeth Patrick, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 21, 1994, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to Chief Justice Jean Hoefer Toal, dated December 22, 2004, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Laura Elizabeth Patrick shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

January 21, 2005

The Supreme Court of South Carolina

In the Matter of Melissa Ann Chester (admitted as Melissa Ann Douglas-Gershowitz), Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on June 3, 1997, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court, dated December 15, 2004, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Melissa Ann Chester shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

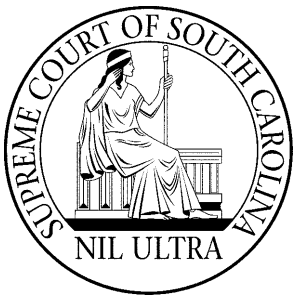
s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

January 21, 2005



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 4

January 24, 2005

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

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Robert L. Gailliard, Respondent.

Opinion No. 25927
Submitted December 22, 2004 – Filed January 24, 2005

INDEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Barbara M. Seymour, Senior Assistant Disciplinary Counsel, both of Columbia, for The Office of Disciplinary Counsel.

Coming B. Gibbs, Jr., of Charleston, for respondent.

PER CURIAM: This attorney disciplinary matter is before the Court on an Agreement for Discipline by Consent entered into by respondent and the Office of Disciplinary Counsel (ODC) pursuant to Rule 21, RLDE, Rule 413, SCACR, and on a Petition for Rule to Show Cause pursuant to Rule 5(b)(6), RLDE, Rule 413, SCACR.

AGREEMENT FOR DISCIPLINE BY CONSENT

In the Agreement for Discipline by Consent, respondent admits misconduct and consents to a public reprimand, definite suspension of no more than two years, or an indefinite suspension as provided by Rule 7(b), RLDE, Rule 413, SCACR. We accept the

agreement and indefinitely suspend respondent from the practice of law in this state. The facts, as set forth in the agreement, are as follows.

FACTS

On August 25, 2004, respondent was convicted of assault and battery of a high an aggravated nature and sentenced to four years imprisonment, suspended upon service of three years probation and submission to anger management and additional counseling as needed. The assault and battery occurred when respondent struck his teenage son with his truck.

LAW

In the Agreement for Discipline by Consent, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers), Rule 7(a)(4) (it is ground for discipline for lawyer to be convicted of crime of moral turpitude or serious crime), Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or to engage in conduct demonstrating an unfitness to practice law), and Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate the oath of office taken upon admission to practice law in this state). Respondent further admits that by his misconduct he has violated the following provision of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects).

PETITION FOR RULE TO SHOW CAUSE

On October, 27, 2004, respondent was placed on interim suspension for the same conduct which is the basis of the Agreement

for Discipline by Consent. See Rule 17, RLDE, Rule 413, SCACR. ODC has filed a Petition for Rule to Show Cause alleging that, by attempting to obtain the release of a client from jail, respondent practiced law while suspended from the practice of law.

CONCLUSION

We accept the Agreement for Discipline by Consent and indefinitely suspend respondent from the practice of law. Respondent shall not seek to be reinstated to the practice of law until he has completed his probation. Although we decline to issue a Rule to Show Cause, we remind respondent that he is prohibited from participating in any activity which constitutes the practice of law while he is suspended.

Within fifteen days of the date of this opinion, respondent shall surrender his certificate of admission to practice law in this state to the Clerk of Court and shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

INDEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Denisona J. Crisp, Appellant.

Appeal From Anderson County
John W. Kittredge, Circuit Court Judge

Opinion No. 25928
Heard November 30, 2004 – Filed January 24, 2005

REVERSED

Jeffrey P. Bloom, of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General William Edgar Salter, III, all of Columbia, and Solicitor Druanne D. White, of Anderson, for Respondent.

JUSTICE BURNETT: Denisona J. Crisp (Appellant) pled guilty in a capital murder case and was sentenced to death. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant, then age 20, pled guilty in April 2001 to murder, assault and battery with intent to kill (ABWIK), and two counts of possession of a firearm or knife during the commission of a violent crime. The murder victim was Jealoni Blackwell; the assault victim was Thomas Gambrell. Appellant was sentenced by Judge James W. Johnson, Jr., to life in prison for murder, twenty years consecutive for ABWIK, and five years concurrent on each weapon charge.

Following the plea hearing, the State officially served notice of the intent to seek the death penalty in connection with the murder of Clarence Watson. The State asserted the prior conviction of murder and physical torture as statutory grounds for the death penalty. See S.C. Code Ann. § 16-3-20(C)(a)(1)(h) and (C)(a)(2) (2003).

Appellant pled guilty in June 2001 to murdering Watson and possession of a firearm or knife during the commission of a violent crime. Following a three-day, non-jury sentencing hearing before Judge John W. Kittredge in October 2001, Appellant was sentenced to death.

STANDARD OF REVIEW

In criminal cases, we sit to review errors of law only and we are bound by factual findings of the trial court unless an abuse of discretion is shown. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001); State v. Cutter, 261 S.C. 140, 147, 199 S.E.2d 61, 65 (1973). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); State v. Manning, 329 S.C. 1, 7, 495 S.E.2d 191, 194 (1997).

ISSUES

I. Did the trial judge err during the plea colloquy by informing Appellant his best hope for a life sentence at a jury trial might ultimately depend on lying jurors "who will testify under oath that they are for the death penalty when they're not, simply because they can serve on a jury to let someone go"?

II. In light of the United States Supreme Court's decision in Ring v. Arizona, is the statutory provision allowing a judge, sitting alone, to sentence to death a defendant who pleads guilty a violation of a defendant's Sixth Amendment right to a jury trial?

III. Did the trial judge lack subject matter jurisdiction to sentence Appellant to death because the murder indictment did not identify any statutory circumstances of aggravation necessary to expose Appellant to a punishment greater than life in prison?

I. JUDGE'S COMMENTS REGARDING DECEPTIVE JURORS

The following exchange occurred as the trial judge questioned Appellant about the waiver of his right to a jury trial during the June 2001 hearing in which Appellant pled guilty to Watson's murder:

> THE COURT: Let me tell you something else for you to be aware of as a practical matter in waiving your right to a jury trial. There are jurors who will be brought in who will testify under oath that they are for the death penalty when they're not simply because they can serve on a jury to let someone go. Do you understand that?
>
> [APPELLANT]: I don't understand that, Your Honor.

THE COURT: Do you understand what I'm telling you?

[APPELLANT]: I understand what you're saying.

THE COURT: I'm telling you it's a fact of life. I've had it happen. Jurors will come in and lie and tell me that they're open-minded and would, if the circumstances warrant, vote to impose the death penalty and not be willing to do so simply as an area to express their agenda of being against the death penalty. Do you understand that?

[APPELLANT]: Yes, sir.

THE COURT: And you could get such a juror. And we may not be able to detect on the front end who's telling the truth and who's not. And it only takes one juror for you to receive life in prison. Now, having explained that to you and the reality of that situation and that potential, do you still want to plead guilty in front of me?

[APPELLANT]: Yes, sir.

Appellant contends the judge, through his extraneous comments, injected his personal opinion about the potential exercise of a constitutional right into the proceeding. Such comments exceed the scope of the judge's authority, regardless of whether his opinion is based on his experience and best judgment. Appellant argues the "ultimate decision to waive a jury trial was [made] subject to the judge's assertion that his best hope at trial might come down to lying jurors who would deliberately subvert his trial for their own purposes."

Appellant argues the comments prevented him from making a knowing and voluntary waiver of his right to a jury trial, and the comments constitute prejudicial error. Appellant relies on State v. Gunter, 286 S.C. 556, 335 S.E.2d 542 (1985); State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986), overruled on other grounds by State v.

Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Cooper, 291 S.C. 332, 353 S.E.2d 441 (1986), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); and Butler v. State, 302 S.C. 466, 397 S.E.2d 87 (1990).

We recently addressed this same issue on virtually identical facts in State v. Owens, Op. No. 25916 (S.C. Sup. Ct. filed December 20, 2004) (Shearouse Adv. Sh. No. 49 at 51). In that case, the trial judge sentenced Owens to death after making essentially the same comments describing potentially deceptive jurors during a resentencing proceeding as those made by the judge in this case. We concluded the "comments were improper and contrary to South Carolina law. Although the trial court must strive to ensure that a criminal defendant's waiver of the right of a jury trial is knowing and voluntary, the court should never inject its personal opinion into that decision. The comments here impermissibly did so." We reversed and granted the defendant a new sentencing proceeding. Owens at 54; see also Gunter, supra (reversing jury verdict of guilty where defendant testified after trial judge repeatedly told him the jury would hold it against him if he exercised his Fifth Amendment right not to testify, although judge also advised defendant he would instruct the jury it could not hold against him his decision not to testify); Pierce, 289 S.C. at 434, 346 S.E.2d at 710 (reversing jury verdict of guilty where trial judge made same comments regarding defendant's constitutional right not to testify as in Gunter, although defendant nonetheless declined to testify); Cooper, 291 S.C. at 336, 353 S.E.2d at 443 (reversing jury verdict of guilty where trial judge made same comments regarding defendant's constitutional right not to testify as in Gunter, although defendant nonetheless declined to testify); Butler v. State, 302 S.C. 466, 397 S.E.2d 87 (1990) (granting writ of habeas corpus based on identical comments; Court stated it had rejected in Pierce and Cooper the suggestion these types of comments could ever constitute harmless error and concluded the comments by the judge were erroneous, improper and contrary to South Carolina law).

The defendant in Owens expressed his belief at the sentencing proceeding that the opposite of the situation described by

the judge also could happen, i.e., a death-prone juror might lie to get on the jury in order to sentence him to death. Appellant expressed no such concerns during his guilty plea. Nevertheless, we adhere to our precedent and conclude such comments by a trial judge during a guilty plea proceeding are fundamentally erroneous and constitute prejudicial error. We reverse Appellant's guilty plea.

II. SENTENCING BY JUDGE ONLY AFTER RING V. ARIZONA

Appellant argues the provision of S.C. Code Ann. § 16-3-20(B) (2003), which eliminates the possibility of sentencing by a jury when a defendant pleads guilty in a capital case, is unconstitutional in light of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In Appellant's view, Ring interprets the Sixth Amendment to require a jury – not a judge acting alone – determine the aggravating factors in a capital proceeding even when the defendant pleads guilty.

At the June 2001 plea hearing, the trial judge questioned Appellant at length about the various constitutional rights he would waive by pleading guilty. The trial judge specifically and repeatedly informed Appellant that he would waive the right to a jury trial in not only the guilt phase, but also in the sentencing phase; that the jury's verdict recommending death would have to be unanimous, and the refusal of one juror to agree to the death penalty would result in a sentence of life imprisonment. The trial judge told Appellant that admittedly guilty defendants in capital cases often stand trial simply to obtain a jury trial in the sentencing phase. In addition, Appellant's attorneys stated they had explained the same concepts to Appellant.

We recently addressed this issue in State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004). In that case, we stated that

> Appellant asserts Ring v. Arizona renders unconstitutional the requirement in S.C. Code Ann. § 16-3-20(B) (2003) that the sentencing proceeding be held before the judge when a defendant pleads guilty to murder. We disagree.

> The capital-sentencing procedure invalidated in Ring does not exist in South Carolina. Arizona's statute required the judge to factually determine whether there existed an aggravating circumstance supporting the death penalty regardless whether the judge or a jury had determined guilt. . . . In South Carolina, conversely, a defendant convicted by a jury can be sentenced to death only if the jury also finds an aggravating circumstance and recommends the death penalty. . . .
>
> In any event, Ring did not involve jury-trial waivers and is not implicated when a defendant pleads guilty. Other courts have also reached this conclusion. . . .
>
> Appellant was informed that by pleading guilty he waived his right to a jury trial on both guilt and sentencing. He does not argue his waiver was made involuntarily, unknowingly, or unintelligently. . . . Appellant was not deprived of his right to a jury trial.

Downs, 361 S.C. at ___, 604 S.E.2d at 380 (citations omitted). We also rejected a challenge to the constitutionality of Section 16-3-20(B) for the same reasons in State v. Wood, Op. No. 25907 (S.C. Sup. Ct. filed December 6, 2004) (Shearouse Adv. Sh. No. 47 at 39, 46-47) (citing Downs, supra).

We granted Appellant's motion to argue against the precedent of Downs. At oral argument, Appellant contended his case is factually distinguishable from Downs because, unlike the defendant in that case, Appellant sought a life sentence; he exhibited remorse for his crimes; and he offered a reason for his actions based on his statements to police that he murdered Blackwell and Watson, and tried to murder Gambrell, because he believed they were drug dealers who intended to harm his family.

We do not find persuasive Appellant's effort to distinguish his case from Downs. The constitutionality of Section 16-3-20(B) does

not rest on a defendant's desire for a particular outcome, his sense of remorse, or his rationale for committing a particular crime. Instead, it rests, inter alia, on whether the statute comports with the right to a jury trial as established by this Court and the United States Supreme Court in interpreting the state and federal constitutions. See U.S. Const. amend VI; S.C. Const. art. I, § 14. Accordingly, we adhere to our opinion in Downs and reject Appellant's arguments for the reasons expressed in that case. Section 16-3-20(B) is not unconstitutional in light of Ring, supra, and a capital defendant may be sentenced only by a judge pursuant to that statute after knowingly and voluntarily waiving his right to a jury trial.

III. SUFFICIENCY OF INDICTMENT AFTER RING V. ARIZONA

Appellant contends the circuit court lacked subject matter jurisdiction in his case because the indictment did not identify any aggravating factor which exposed him to the death penalty. Appellant relies primarily on Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Jones v. U.S., 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999); and Ring, supra. Under those cases, Appellant argues, aggravating circumstances necessary to impose the death penalty are considered elements of the crime of murder in a capital case. A jury must find the presence of aggravating circumstances beyond a reasonable doubt before the death penalty may be imposed. Concomitantly, Appellant contends, the defendant is entitled to an indictment which gives him pretrial notice of which aggravating circumstances the State intends to rely on at sentencing.

We recently addressed this issue in Downs, 361 S.C. 141, 604 S.E.2d 377. In that case, we stated that

> [t]he [United States Supreme] Court expressly noted in both Apprendi and Ring that the cases did not involve challenges to state indictments. More important, the Fourteenth Amendment has not been construed to incorporate the Fifth Amendment's Presentment or

> Indictment Clause. State law governs indictments for state-law crimes.
>
> Under South Carolina law, aggravating circumstances need not be alleged in an indictment for murder. The aggravating circumstances listed in S.C. Code Ann. § 16-3-20(C)(a) (2003) are sentencing factors, not elements of murder. The circuit court had subject matter jurisdiction to sentence Appellant to death.

Downs, 361 S.C. at ___, 604 S.E.2d at 380-81 (citations omitted).

Appellant argues his case is factually distinguishable from Downs, as previously explained. We do not find persuasive Appellant's effort to distinguish his case from Downs. We also note the State, as required by statute, timely notified Appellant of its intention to seek the death penalty and identified the aggravating circumstances and related evidence the State intended to use at trial. See S.C. Code Ann. §§ 16-3-20(B) and 16-3-26 (2003). Accordingly, we adhere to our opinion in Downs and reject Appellant's arguments for the reasons expressed in that case. The circuit court had jurisdiction in Appellant's case.

In light of our disposition of this case, it is not necessary to address Appellant's argument that the circuit court erred by neglecting to obtain an explicit waiver of Appellant's right to testify at the sentencing hearing. See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 428 S.E.2d 886 (1993) (appellate court need not address remaining issue when resolution of prior issue is dispositive); State v. Hill, 360 S.C. 13, 18 n.2, 598 S.E.2d 732, 734 n.2 (Ct. App. 2004) (stating same principle).

CONCLUSION

We reverse Appellant's guilty plea for the reasons expressed in Issue I and remand this case to the circuit court for further proceedings consistent with this opinion.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Curtis Shell, Petitioner,

v.

Richland County School District One, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 25929
Heard January 6, 2005 – Filed January 24, 2005

REVERSED

W. Allen Nickles, III, Carl L. Solomon, and Dona L. Guffey, all of Gergel, Nickles & Solomon, PA, of Columbia, for Petitioner.

Andrea E. White, Charles J. Boykin, and Karen E. Lear, all of Duff Turner White & Boykin, LLC, of Columbia, for Respondent.

JUSTICE PLEICONES: Respondent terminated petitioner's (Shell's) teaching contract, finding him unfit to teach.[1] The circuit court reversed this decision, holding it was not supported by substantial evidence. On appeal, the Court of Appeals reversed the circuit court and reinstated the termination. Shell v. Richland County School Dist. One, Op. No. 2003-UP-503 (S.C. Ct. App. filed August 27, 2003). We granted Shell's petition for writ of certiorari, and now reverse the Court of Appeals.

FACTS

In 1988, Shell was arrested for possession of crack cocaine. The crack was found in a car in which Shell was a passenger; the drugs were wrapped in one of Shell's personal checks. The 1988 charge was subsequently dismissed by the solicitor.

In 2000, Shell was again arrested, this time for attempted possession of crack cocaine. In this incident, Shell remained in his car in a well-known drug area while his passenger "went to visit a friend." After the passenger purchased crack, but before he returned to Shell's car, he and Shell were arrested as part of a sting operation. The 2000 charge was dropped after the passenger pled guilty.

Following Shell's second arrest, respondent placed him on administrative leave to further investigate "the allegations of attempting to possess crack cocaine" and "to consider if sufficient grounds exist for termination." Several months later, respondent's superintendent sent Shell a letter stating that Shell's teaching contract was being terminated pursuant to S.C. Code Ann. § 59-25-430. This letter referenced the earlier letter that suspended Shell, which had stated the suspension would continue "pending the conclusion of the district's investigation into your arrest for possession of crack cocaine. This type of behavior along with similar behavior in the past…brings into question your fitness for teaching."

[1] See S.C. Code Ann. § 59-25-430 (1990).

Shell requested a hearing before respondent's Board of Commissioners to contest the superintendent's termination decision. At the hearing, the superintendent testified that the decision to terminate Shell's teaching contract was based solely on Shell's unfitness, that is, his arrests under suspicious circumstances. The superintendent testified he did not consider the negative publicity attendant to Shell's 2000 arrest in making his decision. Further, respondent's attorney stipulated at the hearing that Shell's performance in the classroom was not an issue.[2] Following an evidentiary hearing, respondent's Board of Commissioners upheld the superintendent's firing decision, finding:

> …[S]ubstantial and compelling evidence that justifies the immediate termination of Mr. Shell's employment with Richland County School District One based on Mr. Shell's evident unfitness as manifested by his conduct. Conduct which, after a reasonable time for improvement, 12 years, shows an evident failure to improve. The Board determined that the evidence established sufficient and just cause for this action.

Shell appealed to the circuit court. Respondent's attorney conceded that it had no evidence that Shell was involved in the illegal use, possession or sale of drugs. The circuit court held that being arrested but not convicted for two criminal charges, twelve years apart, did not constitute substantial evidence that Shell was unfit to teach and reversed the termination decision.

On appeal, the Court of Appeals reviewed the entire record, and found substantial evidence of Shell's unfitness. In addition to Shell's conduct in being twice arrested on drug charges, the Court of Appeals cited to evidence in the record of what it characterized as Shell's dishonesty, and to testimony that the publicity surrounding Shell's 2000 arrest and the negative response it engendered among the school's teachers, parents, and children led Shell's principal to conclude it was not in the students' best interests to be taught by Shell. The Court of Appeals concluded the record contained substantial

[2] This attorney does not represent respondent on certiorari.

evidence that Shell was unfit to teach, and reinstated the termination. Shell v. Rich. Cty. School Dist. One, *supra*. We granted Shell's petition for a writ of certiorari to review this decision.

ISSUE

Did the Court of Appeals err in finding substantial evidence in the record to support Shell's termination?

ANALYSIS

Shell contends, and we agree, that appellate review of a teacher's termination must be confined to the ground(s) stated in the order terminating his employment. See e.g., Laws v. Richland County School Dist. No. 1, 270 S.C. 492, 243 S.E.2d 192 (1978) (scope of review of cases brought pursuant to Teacher Employment and Dismissal Act limited to whether grounds given for termination are supported by supported evidence). The Court of Appeals erred in scouring the record and making its own independent evidentiary findings to support the termination.

We agree with the circuit court that the mere fact of two drug arrests, twelve years apart, neither of which resulted in formal charges, is insufficient to support a finding of unfitness to teach, especially when the school district does not contend Shell ever used, possessed, or sold illegal drugs.

CONCLUSION

We reverse the decision of the Court of Appeals. Shell is entitled to return to his employment, to an award of back pay, and to reinstatement of benefits from the date of his suspension without pay.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Theodore Gordon, Respondent,

v.

Phillips Utilities, Inc., Appellant.

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

Opinion No. 25930
Heard November 18, 2004 – Filed January 24, 2005

AFFIRMED

Kenneth Ray Raynor, of Templeton & Raynor, P.A., of Charlotte, for Appellant.

Kenneth M. Suggs, of Suggs & Kelly Lawyers, P.A., of Columbia, and Larry Dale Dove, of L. Dale Dove, L.L.C., of Rock Hill, for Respondent.

JUSTICE WALLER: This is a negligence case in which the trial court granted partial summary judgment to the respondent on the appellant's claim of a set-off in the amount of workers' compensation benefits which the respondent received from his employer. We affirm.

FACTS

The respondent Theodore Gordon (Gordon) was injured while working for Seven Star Construction Company (Seven Star). Gordon and his crew were preparing to tie into an underground water line that had been previously installed and inspected by appellant Phillips Utilities, Inc. (Phillips). A steel cap weighing over fifty pounds exploded striking Gordon's leg and shattering his knee. Gordon received workers' compensation benefits from Seven Star. Gordon then filed this negligence action against Phillips. Phillips sought a set-off in the amount of the workers' compensation benefits which Gordon had received from Seven Star.

Before trial, the trial judge granted Gordon partial summary judgment on Phillips' claim of a set-off. The case proceeded to trial and the jury found Gordon was 25% negligent and Phillips was 75% negligent. The jury also found Gordon had actual damages of $149,670.13 and $30,000 in punitive damages. The trial judge reduced the actual damages by 25% to $112,252.59, but he did not reduce the punitive damages of $30,000.

ISSUE

> Did the trial judge err in granting Gordon partial summary judgment precluding Phillips from asserting a right to a set-off pursuant to S.C. Code Ann. § 42-1-580 (Supp. 2003)**?**

DISCUSSION

Phillips sought a set-off pursuant to § 42-1-580 which provides:

> When the facts are such at the time of the injury that a third person would have the right, upon payment of any recovery against him, to enforce contribution or indemnity from the employer, any recovery by the employee against the third person shall be reduced by the

> amount of such contribution of indemnity and the third person's right to enforce such contribution against the employer shall thereupon be satisfied.

The trial judge in a written order found that this section was inapplicable and granted Gordon partial summary judgment on Phillips' claim for set-off in the amount of workers' compensation benefits paid to Gordon by his employer, which was approximately $87,000. The trial judge reasoned that Gordon's employer, Seven Star, could not be liable to Gordon in tort because the workers' compensation laws exclude all other rights and remedies and thus Phillips did not have any right of contribution from Seven Star. Phillips contends the trial court erred.

There have only been a few published cases discussing § 42-1-580 and none resolve the issue currently before the Court. The primary purpose in construing a statute is to ascertain legislative intent. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). Furthermore, the legislature intends to accomplish something by its choice of words, and would not do a futile thing. State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964).

In arguing that this section allows a set-off at trial, Phillips contends that after the 1988 enactment of the Contribution Among Joint Tortfeasers Act, § 15-38-20, et al. (Act), a third party would have a right of contribution from a negligent employer. It contends the Act gives teeth to § 42-1-580.

The Act, however, does not help Phillips because there is no right to contribution available to it under the Act. Pursuant to the Act, when two or more persons are jointly or severally liable in tort for the same injury to person, there is a right of contribution among them. S.C. Code Ann. § 15-38-20(A) (Supp. 2003). As Seven Star, pursuant to the Workers'

Compensation laws, could not be liable to Gordon in tort, there can be no right of contribution under the Act for Phillips.

Further, Phillips contends by enacting § 42-1-580, the General Assembly intended to provide a remedy for a third party when an employer was negligent and contributed to the injury. We disagree.

Applying this section to the current situation creates numerous problems and concerns and requires the Court to read language into the statute to effectuate such an intent. Citing a law review article, Phillips contends a third party is to allege the right of set-off as an affirmative defense and then offer proof at trial of the employer's negligence. See Kelly M. Braithwaite & John A. Massalon, *Right Without a Remedy: Setoff Under the South Carolina Workers' Compensation Act*, 7 S.C. Law Rev. 40 (1995). The article states that because the employer is not a party, the plaintiff is to defend the claim of employer negligence. However, if the third party does not prove the employer was negligent, a successful plaintiff will have to satisfy the subrogation lien for the amount of the workers' compensation benefits paid to him. On the other hand, if the third party proves the employer was negligent, a successful plaintiff's award will be reduced by a set-off equal to the amount of the workers' compensation lien. Either way, the plaintiff's award will be reduced by the amount of workers' compensation he has received from the employer. The plaintiff has nothing to lose or gain by defending the third party's claim against the employer. The employer, on the other hand, stands to lose its claim of subrogation without being given the opportunity to defend the third party's claims of negligence. This cannot be what the legislature intended.

Accordingly, based on the foregoing, we find this section inapplicable in a trial brought by the employee against a third party. The third-party defendant and the employer are not joint tortfeasers. Furthermore, as stated above, it is unfair to the absent employer and would only add confusion during a trial. Lastly, this section does not address how the employer's negligence is to be determined. Therefore, we hold the trial judge did not err in finding § 42-1-580 inapplicable and granting Gordon summary judgment on Phillips' claim of a set-off pursuant to § 42-1-580.

AFFIRMED.

MOORE, A.C.J., BURNETT, J., and Acting Justices R. Markley Dennis, Jr., and Reginald I. Lloyd, concur.

The Supreme Court of South Carolina

In the Matter of Dennis C. Gilchrist, Petitioner.

ORDER

On July 15, 2002, petitioner was definitely suspended from the practice of law for eighteen months. In the Matter of Gilchrist, 350 S.C. 452, 567 S.E.2d 250 (2002). He has now filed a petition for reinstatement pursuant to Rule 33, RLDE, Rule 413, SCACR. The Committee on Character and Fitness recommends that the petition be granted. We agree and hereby reinstate petitioner to the practice of law in this state subject to the following conditions:

1. Petitioner shall sign a two year contract with Lawyers Helping Lawyers. In the contract, petitioner shall agree to abstain from all alcohol and illegal drug use and shall agree to be supervised by a mentor designated by Lawyers Helping Lawyers. Petitioner shall meet with the mentor as often as the mentor shall require, but not less than every ninety (90) days. The mentor shall submit a report to the Office of Disciplinary Counsel (ODC) after each meeting with petitioner. The reports shall address petitioner's progress and recovery. Petitioner shall reimburse the mentor for any costs incurred by the mentor in monitoring petitioner. In the event petitioner fails to cooperate with the mentor or make satisfactory progress, ODC shall immediately notify this Court.

2. For the next two years, ODC shall have the authority to require petitioner to submit to hair and urine drug tests. The tests shall be performed by a laboratory approved by ODC and the cost of any tests shall be borne by petitioner. The results of these tests shall be provided to ODC. ODC shall immediately report any test results which indicate the use of alcohol or illegal drugs or petitioner's refusal to submit to the tests to this Court.

3. For the next two years, petitioner shall continue to be treated by a psychiatrist or other medical doctor for bi-polar disorder. Petitioner shall follow all recommended treatment for the disorder. Petitioner shall ensure that his psychiatrist or other medical doctor file quarterly reports concerning his treatment and progress with ODC for the two year period. In the event the quarterly reports are not filed or petitioner fails to make satisfactory progress with his treatment, ODC shall immediately notify this Court.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
January 20, 2005

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

White's Mill Colony, Inc., Appellant/Respondent,

v.

Arthur Williams, Leonard Boseman, Jr., and Jerry Rouse, Respondents,

and

Leodel Mitchell, Jimmie Johnson, Leon Kelly, Lillian Davis and Richard Weeks, Respondents/Appellants.

Appeal From Sumter County
Walter G. Newman, Special Referee

Opinion No. 3923
Heard October 12, 2004 – Filed January 18, 2005

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Kenneth R. Young, Jr., of Sumter, for Appellant/Respondent.

Arthur Williams and Jerry Rouse, both of Sumter, and Leonard Boseman, of Prince George, for Respondents.

A.P. Weissenstein, Jr., and James David Weeks, both of Sumter, for Respondents/Appellants.

KITTREDGE, J.: In this appeal, we are asked to determine whether an owner of subaqueous land is entitled to exclusive use of a non-navigable body of water created by the owner's predecessor in title as against other, abutting property owners. Addressing this and other questions below, the special referee enjoined abutting landowners from making any use of the privately owned body of water. We affirm this ruling to the extent White's Mill Colony, Inc. (the "Colony") owns the subaqueous land, but vacate that portion of the judgment related to damages and remand the matter for determination of the precise property boundaries and, concomitantly, reconsideration of the damage awards.

FACTS AND PROCEDURAL HISTORY

The parties are neighboring property owners whose land surrounds a pond. The core issue in this case is the question of who among these landowners has the right to access and use the pond. On one side of the pond is the Colony, which claims its members have the right to exclusive use of the pond. On the other side of the pond are several individual property owners whose land abuts the pond (the "abutting landowners"). They claim they too have a right to access and use the pond. Briefly outlined below are the relevant facts concerning the pond, how the parties came into ownership of the land surrounding the pond and the pond bed, and the order of the special referee from which the present appeal arises.

The Pond

At the center of this dispute is an eighty-eight acre body of water in Sumter County known as "White's Mill Pond." The pond is man made—created sometime in the late nineteenth century when a dam was constructed at the point where two streams converged, forming a third,

larger stream. Neither the pond nor any of the incoming or outgoing streams are listed on maps of navigable waters prepared by the South Carolina Department of Health and Environmental Control. Testimony was presented from various witnesses describing the pond and the character of the surrounding area. From this evidence, it appears the pond is an essentially isolated body of water.

Title to the Pond and the Present Dispute

Prior to 1950, title to the pond, including the pond bed, had been vested in the predecessors in title to the parties in this case. In 1955, the Colony obtained title to the land located to the north and east of the pond. The Colony also obtained title to the entirety of, or at least a substantial portion of, the bed of the pond itself. Land along the south and west sides of the pond subsequently came into the possession of the defendants in this case: Arthur Williams, Leonard Boseman, Jr., Jerry Rouse, Leodel Mitchell, Jimmie Johnson, Leon Kelly, Lillian Davis, and Richard Weeks. None of the deeds to these landowners granted any right of access to the pond. However, there is testimony suggesting some of the abutting landowners also have title to parts of the pond bed.

The Colony filed suit against the abutting landowners alleging some of them used White's Mill Pond in a variety of ways, including fishing, boating, dredging soil, removing trees from along the side of the pond, and building docks into the pond. The abutting landowners counterclaimed, alleging their use and enjoyment of their property had been disturbed by the Colony. The matter was referred to a special referee for a determination of the parties' respective rights.

The Special Referee's Order

In his order, the special referee determined the case turned on two key issues: first, whether White's Mill Pond is a navigable watercourse under South Carolina law giving rise to a <u>public</u> right of access to the pond; and, second, whether the abutting landowners held any <u>private</u> right to access and use the pond arising from their putative status as riparian or

littoral owners. The special referee found neither right existed.[1] The abutting landowners were therefore enjoined from boating or fishing on

[1] The special referee also found as fact that "[t]he water in White's Mill Pond belongs to the State of South Carolina as do the fish contained therein." This finding is wholly incongruous with the express holding that the pond is not a navigable watercourse under South Carolina law to which the general public would enjoy a right of access. Though this finding is not explicitly appealed by either party, we conclude it would be inappropriate to bind the resolution of this matter based on this finding under the "law of the case" doctrine. See Charleston Lumber Co., Inc. v. Miller Housing Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (stating an unappealed ruling is the law of the case).

In construing a judge's order, we must do so in light of the judge's intent as discerned from the order as a whole. See Weil v. Weil, 299 S.C. 84, 90, 382 S.E.2d 471, 474 (Ct. App. 1989) (holding that "[t]he determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all the parts of the judgment itself. Hence, in construing a judgment, it should be examined and considered in its entirety"). Adhering to this principle, this court has refused to hold parties bound by language in a lower court order that we found was not necessary to the decision of the issues presented. Id. at 89, 382 S.E.2d at 473. (refusing to apply the "doctrine of the law of the case" to language found to be "mere dicta, an expression or statement by the court on a matter not necessarily involved in the case nor necessary to a decision thereof").

Viewing the special referee's order as a whole, therefore, the finding that the water and fish of White's Mill Pond belong to the state stands as a non-sequitur in the otherwise coherent analysis. At the outset of his order, the special referee stated that the case turned on two issues—"whether White's Mill Pond is a navigable watercourse" and "whether the [abutting landowners] have riparian rights." The special referee's subsequent discussion of the applicable law only addresses these issues. No legal principle is cited or discussed in the order which supports a finding that the water and fish in the pond belong to the state. Indeed, when questioned by this court at oral argument, counsel for both parties were unable to explain how this finding related to the special referee's explicit determinations. We are left with no choice, therefore, but to view this

White's Mill Pond, dredging or interfering with the pond's bed, cutting any timber from the bed of the pond, or building any structures on the bed of the pond, unless the structures were over property owned by the abutting landowners. Additionally, the special referee awarded damages against the various landowners in amounts ranging from $500 to $5,500.

It is important to note, however, that the referee did not make a determination as to the property lines. Despite contradictory evidence regarding the precise location of the line between the pond bed and the abutting landowners' property, the referee found that such determination was not necessary to address the questions presented.

The abutting landowners now appeal the special referee's findings that the pond is not a publicly accessible navigable waterway and that they have no right to access the pond as riparian or littoral owners. The Colony and several of the abutting property owners also appeal the special referee's award of damages.

STANDARD OF REVIEW

"When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." Key Corporate Capital, Inc. v. County of Beaufort, 360 S.C. 513, 516, 602 S.E.2d 104, 106 (Ct. App. 2004) (quoting Kiriakides v. Atlas Food Sys. & Servs., Inc., 338 S.C. 572, 580, 527 S.E.2d 371, 375 (Ct. App. 2000)). In actions at equity, this court can find facts in accordance with its view of the preponderance of the evidence. Id.; West v. Newberry Elec. Co-op., 357 S.C. 537, 542, 593 S.E.2d 500, 502 (Ct. App. 2004). In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law. Id.; Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C., 353 S.C. 327, 334, 577 S.E.2d 468, 472 (Ct. App. 2003).

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isolated language as an anomaly that is most probably the product of a labyrinthine factual and legal landscape rather than view it as a finding necessary to the referee's decision.

LAW/ANALYSIS

In the discussion below, we address separately the three issues that determine this appeal: (I) whether White's Mill Pond is a navigable watercourse under South Carolina law; (II) whether the abutting landowners possess any riparian or littoral rights to access and use the pond; and (III) whether the special referee's award of damages was proper.

I. Navigable Waters

The right of public access to navigable waters is guaranteed by our state constitution: "All navigable waters shall forever remain public highways free to the citizens of the State. . . ." S.C. Const. art. XIV, § 4. South Carolina Code section 49-1-10 (1986) similarly provides that "[a]ll streams which have been rendered or can be rendered capable of being navigated by rafts of lumber or timber by the removal of accidental obstructions and all navigable watercourses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free. . . ." In upholding this constitutional and statutory mandate, our courts look to whether the waterway in question has the capacity to support "valuable floatage." If the waterway can support such use, it is deemed navigable and thus open to the public.

"Valuable floatage" is not determined by resort to generic guidelines as to what specific size or class of vessel or object can achieve buoyancy in the waterway. Rather, the term is defined broadly to include any "legitimate and beneficial public use." Medlock v. South Carolina Coastal Council, 289 S.C. 445, 450, 346 S.E.2d 716, 719 (1986). Such public use includes all varieties of commercial traffic, ranging from passage of the largest freighter to the floating of raw timber downstream to mill. See id. at 449, 346 S.E.2d at 719. Recreational uses are no less important—boating, hunting, and fishing have been found to fall within the ambit of valuable floatage. See Hughes v. Nelson, 303 S.C. 102, 105, 399 S.E.2d 24, 25 (Ct. App. 1990). In this vein, considerations such as whether the waterway is natural or man-made or whether it is impassable by any vessel at certain times of year have been found to have no bearing

on the question of navigability. See State v. Head, 330 S.C. 79, 90-91, 498 S.E.2d 389, 394-95 (Ct. App. 1997). The focus remains strictly on capacity, irrespective of actual use.

Of course, not every body of water is "navigable." The concept of navigability encompasses more than the capacity to support valuable floatage in a single, secluded spot. Rather, to be properly categorized as navigable, the watercourse in question must also be connected to other navigable bodies of water such that it forms a means of transportation or conveyance beyond an isolated locality. This requirement of a navigable connection to a broader system of waterways has been at the heart of the navigability concept since its earliest application in this jurisdiction and others.

Beginning with the early cases addressing the public right to navigable waters in our state's jurisprudence, the express policy underlying that right was to protect, above all, the free flow of commerce. See, e.g., State v. Columbia Water Power Co., 82 S.C. 181, 186, 63 S.E. 884, 887 (1909) (noting that "water is navigable when in its ordinary state it forms by itself or its connection with other waters a continued highway over which commerce is or may be carried"). Rivers and streams were essential means for conveying goods and raw materials from place to place. If private landowners had been able to prevent passage over their stream and river beds, the flow of commerce would have been seriously hindered, if not made impossible. Implicit, therefore, in this early concept of navigability is the requirement that the status of a body of water as navigable hinged upon its utility as a mode of transport for people and goods.

Though the definition of navigability has expanded to include recreational uses in addition to commercial ones, the need to demonstrate a connection beyond an isolated locus to other navigable waters remains. Otherwise, we confront the untenable result that any backyard pond would necessarily be navigable. Indeed, it would be difficult to imagine any body of water of noticeable size that would not be navigable and therefore subject to public use and enjoyment.

This common-sense approach to navigability is supported in our state's law. First, we note the proclamation of section 49-1-10 that all navigable streams shall remain forever free as "common highways" for all to use. This important language leaves little doubt that the nub of the purpose behind leaving our navigable waterways open is to ensure citizens can move freely about the state without interference and without fear of being unavoidably subject to trespass actions by traveling on our waterways.

We also find support for this view in our case law. In a seminal case setting forth the modern test for navigability, Heyward v. Farmers' Mining Co., our supreme court emphasized the primary policy objective that navigable waters remain open to ensure ease of travel, whether for commerce or recreation:

> It is not every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable; but, in order to have this character, it must be navigable for some purpose useful to trade or agriculture. But this language is applied to the capacity of the stream, and is not intended to be a strict enumeration of the uses to which it must be actually applied in order to give it that character. Navigable streams are highways; and a traveler for pleasure is as fully entitled to protection in using a public way, whether by land or water, as a traveler for business.

42 S.C. 138, 155, 19 S.E. 963, 972 (1894).

More recently, in State v. Head, 330 S.C. 79, 498 S.E.2d 389 (Ct. App. 1997), the court examined whether a 246 acre lake was navigable. In that criminal trespass action, the court considered whether a fisherman was entitled to access the lake. The State argued the lake was not navigable because it was sealed off from any other navigable waters. Id. at 91, 498 S.E.2d at 395. We rejected that argument under the specific facts of the case because the lake in question was separated from other

navigable waters by a dam, an obstruction our courts have held does not render a waterway non-navigable. Id. at 90-91, 498 S.E.2d at 394-95 (citing State ex rel. Guste v. Two O'Clock Bayou Land Co., 365 So.2d 1174 (La. App. 1978); 65 C.J.S. Navigable Waters § 5(3) (1966)). In our analysis, however, we recognized and distinguished from the facts of Head the rule that a small inland lake having no navigable outlet is not navigable. Id. at 91 fn. 3, 498 S.E.2d at 395 fn. 3.

Indeed, other jurisdictions have declined to extend the reach of navigability to isolated inland lakes and ponds. For example, in Lakeside Park Co. v. Forsmark, 153 A.2d 486 (Pa. 1959), the Pennsylvania Supreme Court addressed whether a nearly 150 acre lake with no outlet was navigable. Applying a standard for determining navigability similar to our own, the court found the lake was not navigable, opining:

> We think that the concept of navigability should not be limited alone by lake or river, or by commercial use, or by the size of water or its capacity to float a boat. Rather it should depend upon whether water is used or usable as a broad highroad for commerce and the transport in quantity of goods and people, which is the rule naturally applicable to rivers and to large lakes, or whether with all of the mentioned factors counted in the water remains a local focus of attraction, which is the rule sensibly applicable to shallow streams and to small lakes and ponds. The basic difference is that between a trade-route and a point of interest. The first is a public use and the second private.

Id. at 489; see also, e.g., Adirondack League Club, Inc. v. Sierra Club, 706 N.E.2d 1192, 1195 (N.Y. 1998) (holding that "the central premise of the common-law rule remains the same—in order to be navigable-in-fact, a river must provide practical utility to the public as a means for transportation. Thus, while the purpose or type of use remains important,

of paramount concern is the capacity of the river for transport, whether for trade or travel.").

After thoroughly canvassing the record before us, we find no evidence to suggest White's Mill Pond serves any useful purpose for transport or travel—whether for commerce or recreation—beyond the immediate perimeter of its banks. The testimony of Richard Wheeler, a South Carolina Department of Natural Resources officer, indicates the streams flowing into and out of the pond are not capable of supporting valuable floatage. Furthermore, this testimony is bolstered by that of a member of the Colony who testified he had personally walked up and down the incoming and outgoing streams and they were non-navigable. Therefore, we conclude the special referee correctly determined White's Mill Pond is not a navigable waterway under South Carolina law. Accordingly, the pond is not subject to a general right of the public to access its waters.

II. Riparian or Littoral Rights

Having found there is no right of the general public to access White's Mill Pond as a navigable watercourse, we must next decide whether the abutting landowners have any independent riparian or littoral property rights to access the pond. These landowners claim they have such rights to access and make reasonable use of the pond. The Colony, on the other hand, claims its purported ownership of the entire bed of the pond entitles it to exclusive control over the use of the pond's surface waters.

Under the common law, owners of land along rivers, streams, lakes and other bodies of water possess a property right incident to their ownership of the bank and bed of a watercourse that is distinct from those rights that may be enjoyed by the public at large. In general, these special rights allow abutting landowners to make "reasonable use" of the body of water for any lawful purpose, whether for commerce or recreation. Lowe v. Ottaray Mills, 93 S.C. 420, 428, 77 S.E. 135, 136 (1913). These rights are subject to the limitation that the use may not interfere with the like rights of those above, below, or on the opposite shore. See Mason v.

Apalache Mills, 81 S.C. 554, 559, 62 S.E. 399, 401 (1908). With regard to these rights, there is a distinction in classification that our courts have indicated a desire to strictly observe: owners of land along rivers and streams are said to hold "riparian" rights, while owners of land abutting oceans, seas, or lakes, are said to hold "littoral" rights.[2] Because White's Mill Pond falls into the latter category, our discussion will address whether the abutting landowners possess any "littoral" rights.

Though our state has recognized the general right of access enjoyed by littoral property owners, the question presented in this case regarding who may control the surface waters of a private, man-made, non-navigable pond, when the pond bed is owned entirely by an adjoining landowner has not been addressed by our courts. See generally, Lowcountry Open Land Trust v. State, 347 S.C. 96, 109, 552 S.E.2d 778, 785 (Ct. App. 2001) (opining that "[t]he extent of littoral rights in this jurisdiction is an unanswered question"). Therefore, we first resort to the law of other states to understand whether littoral rights obtain in these circumstances.

Canvassing the case law in this area, it appears two views have emerged on this issue: one is generally termed the "common law rule," while the other is known as the "civil law rule."

Under the common law rule, "the owners of the fee in land underlying the surface waters of a man-made, nonnavigable lake are entitled to the exclusive control of that portion of the lake lying over the land as to which they own the fee." Wehby v. Turpin, 710 So.2d 1243, 1247 (Ala. 1998). Consequently, owners of all or part of a pond or lake

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[2] See Lowcountry Open Land Trust v. State, 347 S.C. 96, 108, 552 S.E.2d 778, 785 (Ct. App. 2001) (noting that "[Riparian] is sometimes used as relating to the shore of the sea or other tidal water, or of a lake or other considerable body of water not having the character of a watercourse. But this is not accurate. The proper word to be employed in such connections is 'littoral.'") (quoting Black's Law Dictionary 1327 (6th ed. 1990)).

bed have the right to exclude others from accessing or using the surface waters above their property.

A seminal case, cited repeatedly across jurisdictions as a thoughtful application of the common law rule, is Anderson v. Bell, 433 So. 2d 1202 (Fla. 1983). The facts of Anderson are similar to the circumstances surrounding the present dispute over White's Mill Pond. In that case, the plaintiff, Anderson, purchased a tract of land traversed by a small, non-navigable creek. He later excavated the low-lying areas of the property and constructed an earthen dam. This damming resulted in the creation of a "substantial" lake that partially flooded several adjoining parcels. Two of the neighboring property owners whose land had been flooded, Lewis and Watson, sued Anderson for the damage caused to their property. A settlement agreement was reached whereby Lewis and Watson conveyed to Anderson a flowage easement that allowed Anderson the right and privilege to flood their land. The easement, however, expressly reserved to Lewis and Watson the title and beneficial use of their land. Lewis and Watson later sold their property to Bell. Anderson brought action to enjoin Bell from fishing and boating upon the surface waters above the bottom land owned by Anderson. Id. at 1202-1203. The Florida Supreme Court found Bell could be excluded from the surface waters above Anderson's property, holding:

> the owner of property that lies adjacent to or beneath a man-made, non-navigable water body is not entitled to the beneficial use of the surface waters of the entire water body by sole virtue of the fact that he/she owns contiguous lands. . . . this is the established rule in other jurisdictions as well as the common law.

Id. at 1204 (emphasis in original). The Anderson court opined that its decision to follow the common law rule was rooted in the recognition that "a lake developer's expectations in his investment" must be preserved:

> Because the construction of a man-made water body often involves the expenditure of

> substantial sums of money and the expense is not, as a rule, divided proportionately among the various abutting owners, the individual making the expenditure is justified in expecting that superior privileges will inure to him in return for his investment.

Id. at 1205. The court therefore concluded that:

> [W]e believe a contrary rule may serve to dissuade Florida homeowners and investors from making improvements that not only increase property values but also aesthetically improve adjacent lands, since they would run the risk of losing some of their property rights to other people merely because the water body touches another's property. In the event that the water happens to take a course that would result in the flowage over public lands, the entire water body would become accessible to numerous piscators, bathers and boaters, thereby destroying the property owners' investment benefits.

Id. at 1205-1206. The common law rule has been adopted by numerous other state appellate courts, including courts in Alabama, Indiana, Georgia, Mississippi, Virginia, and New Jersey, and which is acknowledged in at least two states as the majority rule. See, e.g., Wehby v. Turpin, 710 So.2d 1243, 1249 (Ala. 1998) (deciding that "[w]e are bound to follow the majority common law rule . . . and hold that the owners of land extending beneath artificial or man-made lakes, not navigable as a matter of law, have surface-water rights only in the surface waters above their land") (emphasis added); Berger Farms, Inc. v. Estes, 662 N.E.2d 654, 656 (Ind. Ct. App. 1996) (holding that "[i]t is well established that the owner of land, upon which there is located a nonnavigable lake, owns and has the right to control the surface of the lake"); Lanier v. Ocean Pond Fishing Club, Inc., 322 S.E.2d 494, 496 (Ga.

1984) (holding that "Georgia follows the common law rule . . . that the owner of a bed of a nonnavigable lake has the exclusive right to the use of the surface of the waters above and may exclude other bed owners and fence off his portion"); Black v. Williams, 417 So. 2d 911, 912 (1982) (following "the majority rule . . . that owners of the fee in the land beneath [an artificial or man-made] lake, in the absence of some statute or covenant or agreement to the contrary, have exclusive control over the water over their respective portions") (emphasis added); Wickouski v. Swift, 124 S.E.2d 892, 895 (Va. 1962) (holding that "control of the water above the land is an incident to the ownership of the land," entitling property owners to "exclusive control and use of the waters above their portion of the bed of the pond"); Baker v. Normanoch Assn., Inc., 136 A.2d 645 (N.J. 1957) (holding that "[t]he rule in [New Jersey] is that the general public [has] no rights to the recreational use of a private lake, such rights being exclusive in the owner of the bed . . . ."). Some treatises have also referenced the common law rule as the predominant view. See, e.g, 78 Am. Jur. 2d Waters § 37 (2002) (commenting that "the general rule is that riparian rights do not ordinarily attach to artificial water bodies or streams. . . . The owner of property that lies adjacent to or beneath a manmade, nonnavigable water body is not entitled to the beneficial use of the surface waters of the entire water body by the sole virtue of the fact that he or she owns contiguous lands."); C.C. Marvel, Annotation, Rights of Fishing, Boating, Bathing, or the Like in Inland Lakes, 57 A.L.R.2d 569 (Supp. 2003) (noting that "[i]t has been held or recognized that there are no riparian rights of fishing, boating, bathing, or the like, as the case may be, in a lake the bed of which is owned by one other than the riparian owner").

Under the "civil law rule" adopted by other jurisdictions, an owner of land contiguous to a lake or pond is, purely by virtue of littoral rights, entitled to the reasonable use and enjoyment of the entire body of water—whether navigable or not. See Johnson v. Seifert, 100 N.W.2d 689, 696-97 (Minn. 1960) (expressly rejecting the common law rule and holding that an "abutting or riparian owner of a lake . . . has a right to make such use of the lake over its entire surface, in common with all other abutting owners . . . regardless of the navigable or public character of the lake and regardless of the ownership of the bed thereof"). States applying the civil

law rule emphasize the importance of promoting the beneficial use and enjoyment of lakes and ponds as a recreational resource. See, e.g., id. at 695 (opining that "states which like Minnesota have extensive waters of recreational or commercial value hold that an abutting or riparian owner has a right of reasonable use of the entire overlying water, and no distinction is made between navigable and nonnavigable, meandered or unmeandered, or public or private lakes").

A recent application of the civil law rule may be found in Ace Equipment Sales, Inc. v. Buccino, 848 A.2d 474 (Conn. App. 2004). The material facts of Ace Equipment largely mirror those of the present case. At the center of that case was a twenty acre non-navigable, man-made pond surrounded by several parcels of property held by various owners. The pond bed was owned entirely by one of the abutting property owners, who sought to exclude the other adjoining landowners from any access to the pond waters. Id. at 476-77. The court concluded that "owners of subaqueous land under a pond or lake may not prevent the use, by abutting owners, who control the existence of the pond itself, for recreational purposes of the surface water above the bed of a pond that they own." Id. at 480.[3]

Based on our review of these cases, we follow the common law rule as set out above. First, we note that, as a general rule, South Carolina law in the area of water rights generally hews closely to the common law. See, e.g., Lowcountry Open Land Trust, 347 S.C. at 110, 552 S.E.2d at 785-86 (adopting common law rule regarding the ability of riparian owners to wharf over navigable waters); Horry County v. Woodward, 282 S.C. 366, 369-70, 318 S.E.2d 584, 586 (Ct. App. 1984) (recognizing "the general common law rule that accretions by a natural alluvial action to riparian or littoral lands become the property of the riparian or littoral owner whose lands are added to"); McCullough v. Wall, 38 S.C.L. (4 Rich.) 68, 86 (1850) (adopting and applying the common law rule that the owner of the soil over which a non-navigable stream or river flows has the exclusive

[3] But see Ace Equip. Sales, 848 A.2d at 482-85 (Schaller, J., dissenting) (One member of the appellate panel forcefully argued in dissent that the common law rule should be followed in Connecticut).

right of fishing unless some other person can show a grant or prescription in "derogation of the right naturally attached to the ownership of the soil"); see also S.C. Code Ann. § 14-1-50 (1976) (providing that "[a]ll, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section"). Therefore, we think that, when confronted with a decision whether to follow a common law approach or follow a civil law rule, our courts—absent any other considerations—would generally follow the common law rule.

Second, we think the underlying policy of protecting the financial investments and expectations of individuals who make capital improvements to their property—a policy compellingly articulated in Anderson v. Bell and other cases adopting the common law rule—is in accord with the general jurisprudence of our state.[4] Property owners should be able make improvements to their real property without fear that their investment will be diminished should they create a body of water that touches upon the property line of a neighboring landowner. Of course, neighboring property owners are not foreclosed from gaining access to an abutting non-navigable, man-made body of water. Any such abutting property owner is free to bargain with the owner of the pond or lake for the conveyance of an easement or some other right of access to its waters.

For these reasons, we apply the common law rule to the present case. Therefore, to the extent the Colony is the fee simple owner of the

[4] A prominent example of an area of property law where the courts give substantial consideration to a property owners' financial investment in their property is in the field of the government's power of eminent domain. When analyzing whether the government has effected a compensable taking of private land for public use, a key factor the court must consider is the property owner's "reasonable investment-backed expectations." McQueen v. South Carolina Coastal Council, 354 S.C. 142, 148, 580 S.E.2d 116, 119 (2003).

pond bed, it has the exclusive right to the use of the surface waters above its property and may exclude all others from access to those waters.

III. Land Boundaries and Damages

The special referee declined to adjudicate the unsettled boundaries between the parties. There is at least some contradiction in the boundaries advanced between the Colony and the abutting landowners. In light of our determination that a mere abutting landowner does not have any right to use the pond, it is necessary to determine if they are simply abutting landowners or if they hold title to land that is covered by portions of the pond. If they hold title to portions of the bed of the pond, then those landowners have the right to use those portions of the pond immediately above their titled property. Similarly, they have the right to exclude others from those portions of the lake. See generally South Carolina Elec. & Gas v. Hix, 306 S.C. 173, 410 S.E.2d 582 (1991). They also have the right to cut down trees and brush over the land to which they have title. If, however, they do not have title to the land, the Colony can maintain its suit for trespass. See Spigener v. Cooner, 42 S.C.L. (8 Rich.) 301, 304-305 (1855)

Settlement of the boundaries between the various parties is not only necessary to delineate the respective rights of the landowners to use of the pond, but it is also essential for the establishment of damages. In declining to set the precise boundaries between the parties, the referee opted instead to utilize the term "overlap property." Such a vague description leaves unanswered the rights, if any, of the abutting property owners to use the pond and further renders the damage awards effectively unreviewable. We are compelled therefore to vacate the damage awards.

We remand to the trial court to determine the precise property lines of the owners of property abutting the pond. The trial court shall reconsider the matter of damages in light of the true boundary lines. Damages, if any, should be ascertained on the existing record.[5]

[5] We recognize that additional evidence may be required, as deemed appropriate by the trial court, to clarify if an alleged trespass was

CONCLUSION

We find: (1) White's Mill Pond is not a publicly accessible navigable watercourse under South Carolina law; (2) the abutting landowners do not possess any littoral right of access to the pond; and (3) the question of damages cannot be determined absent a determination of the precise property boundaries. The order of the special referee is therefore affirmed in part, vacated in part and the case is remanded for a determination of boundaries and damages.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

HEARN, C.J., and HUFF, J., concur.

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committed upon property owned by the Colony. The taking of additional evidence is for clarification purposes only, not the expansion of the Colony's damage claims.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Elisha B. Tallent, d/b/a Elisha's California Hair, Respondent,

v.

South Carolina Department of Transportation, Appellant.

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

Opinion No. 3924
Heard December 13, 2004 – Filed January 24, 2005

AFFIRMED

Beacham O. Brooker, Jr., of Columbia, for Appellant.

Robert C. Childs, III, of Greenville, for Respondent.

HEARN, C.J.: The South Carolina Department of Transportation (SCDOT) appeals the circuit court's determination that its actions constituted an actionable taking of Elisha Tallent's property. We affirm.

FACTS

Elisha Tallent purchased commercial property located at 1801 Old Easley Bridge Road in Greenville, and opened a hair salon and tanning facility known as Elisha's California Hair. Tallent erected a second structure on the property where she operated a consignment shop. Prior to the construction undertaken by SCDOT, Tallent's property had immediate access to Highway 123 via Old Easley Bridge Road.

SCDOT began construction of a controlled-access highway interchange on White Horse Road and the intersection between White Horse Road and Old Easley Bridge Road. During construction, SCDOT erected a fence along Old Easley Bridge Road, removed the traffic light from the intersection, and closed the road to through traffic. As a result, the access points linking Highway 123 and Old Easley Bridge Road were closed, severing Tallent's access to Highway 123 via Old Easley Bridge Road. Tallent's only remaining access to Highway 123 was by means of a series of secondary roads.

Tallent sued SCDOT under a theory of inverse condemnation alleging a taking of access rights by the actions of SCDOT. The circuit court ordered the proceedings bifurcated with the issue of a taking to be tried by the master-in-equity. At the conclusion of the proceedings, the master found the actions of SCDOT constituted a compensable taking. SCDOT timely appealed.

STANDARD OF REVIEW

A proceeding to determine whether Tallent was deprived of a property right entitling her to just compensation is an equitable action. See Hardin v. South Carolina Dep't of Transp., 359 S.C. 244, 249, 597 S.E.2d

814, 816 (Ct. App. 2004) (cert. pending) (concluding that an inverse condemnation proceeding to determine whether a taking has occurred is equitable in nature).[1] "On appeal from an action in equity, the appellate court has authority to find facts in accordance with its own view of the preponderance of the evidence." See id.

ISSUES

I. Whether section 57-5-1050 of the South Carolina Code (1991) precludes compensation for SCDOT's taking of a landowner's access rights?

II. Does the fact Tallent's property does not abut the affected section of Highway 123 preclude a determination that the actions of SCDOT constituted an actionable taking?

III. Did the master properly find Tallent had suffered a special injury?

LAW/ANALYSIS

I. Section 57-5-1050 of the South Carolina Code

SCDOT argues the enactment of section 57-5-1050 of the South Carolina Code (1991) alleviates SCDOT's necessity to compensate Tallent for an actionable taking of her property. We find this argument has not been properly preserved for our review.

A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not. Kiawah Prop. Owners Group v. Public Serv.

[1] But see Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach, 337 S.C. 380, 388, 523 S.E.2d 193, 197-98 ("An action brought by a property owner against a municipality for the taking of the owner's property without just compensation is an action at law."). In an action at law, we must affirm the master's factual findings unless there is no evidence reasonably supporting them. Id.

Comm'n, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004); see also MailSource, LLC v. M.A. Bailey & Assoc., 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003) ("A party cannot raise issue for first time in Rule 59(e), SCRCP motion which could have been raised at trial.").

The first time SCDOT argued the enactment of section 57-5-1050 alleviates DOT's necessity to compensate Tallent for an actionable taking of her property was in its motion for reconsideration under Rules 52 and 59, SCRCP. In the motion, SCDOT asserted section 57-5-1050 in the nature of a defense, which would abrogate the requirement to pay compensation for any actionable taking of Tallent's property. However, section 57-5-1050 was never raised as a defense at trial. Therefore, because SCDOT failed to do so, the issue is not preserved. See, e.g., Kiawah Prop. Owners Group, 359 S.C. at 113, 597 S.E.2d at 149.

II. Non-abutting property

SCDOT argues the master erred in finding an actionable taking occurred. Specifically, SCDOT alleges its actions do not constitute an actionable taking of Tallent's property because her property does not abut any street to which access was affected by SCDOT construction project. We disagree.

In order to find an inverse condemnation, the landowner must demonstrate: (1) an affirmative, positive, aggressive act on the part of a governmental agency, (2) resulting in a taking, (3) for a public use, (4) with some degree of permanence. See Gray v. South Carolina Dep't of Highways and Public Transp., 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct. App. 1992). The only element in dispute here is that of a taking.

An actual physical taking is not necessary to entitle a property owner to just compensation under the constitutional prohibition against taking private property for public use without just compensation to the property owner. Gasque v. Town of Conway, 194 S.C. 15, 8 S.E.2d 871, 873 (1940), *overruled on other grounds by* McCall by Andrews v. Batson, 285 S.C. 243, 247, 329 S.E.2d 741, 743 (1985) (overruling Gasque to the extent it

held that an action may not be maintained against the State without its consent). In Gasque, the supreme court held:

> The Constitution of this State (Art. 1, Sec. 17) provides that 'private property shall not be taken . . . for public use without just compensation being first made therefor.' In construing this provision of the Constitution, we have held, along with many other courts, that an actual physical taking of property is not necessary to entitle its owner to compensation. A man's property may be taken, within the meaning of this provision, although his title and possession remain undisturbed. To deprive him of the ordinary beneficial use and enjoyment of his property is, in law, equivalent to the taking of it, and is as much a 'taking' as though the property itself were actually appropriated.
>
> Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal. Anything which destroys one or more of these elements of property to that extent destroys the property itself. It must be conceded that the substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated, and ownership is rendered a barren right.
>
> The constitutional prohibition against taking private property for public use without just compensation must have been intended to protect all the essential elements of ownership which make property valuable, including, of course, the right of user, and the right of enjoyment.

194 S.C. at 21, 8 S.E.2d at 873 (citations omitted).

Moreover, South Carolina courts have directly addressed the rights of a non-abutting landowner. In City of Rock Hill v. Cothran, 209 S.C. 357, 40 S.E.2d 239 (1946), the supreme court established the rights of a landowner to recover damages for impairment of access when the landowner's property does not immediately abut the part of the street closed. The Cothran court held:

> The test is, not whether the property abuts, but whether there is a special injury, and the first practical question which presents itself is whether one whose property does not abut immediately on the part of the street vacated . . . is so specially injured as to be entitled to recover compensation on the ground that his access is cut off in one direction, but not in the opposite direction.

209 S.C. at 368, 40 S.E.2d at 243-44. See also Hardin v. South Carolina Dep't of Transp., 359 S.C. 244, 251, 597 S.E.2d 814, 817 (Ct. App. 2004) (restating the Cothran test for recovery is not whether the land abuts the affected road but rather has the landowner suffered a special injury); Gray, 311 S.C. at 152, 427 S.E.2d at 903-04 ("Under the Cothran decision, the lack of a physical entry upon Gray's leasehold is not dispositive of the 'taking' issue. The critical question was whether the closing of the intersection affected the value of Gray's property in some special way not common to the other property in the area.").

In the present action, Tallent's property does not abut any part of the affected Highway 123; however, her property abuts Old Easley Bridge Road, a portion of which was closed as a result of SCDOT construction project. Old Easley Bridge Road provided Tallent immediate access to Highway 123, which was terminated by the construction of SCDOT. Therefore, under the Cothran test, we reject SCDOT's contention there can be no actionable taking because Tallent's property does not abut the affected Highway 123. Rather, to determine whether an actionable taking occurred,

we must resolve whether Tallent suffered a special injury, as a non-abutting landowner, due to the construction by SCDOT.

III. Special Injury

SCDOT argues Tallent did not demonstrate a special injury entitling her to compensation. We disagree.

The Cothran court defined what constitutes a special injury in South Carolina:

> It is well settled that an owner is not entitled to recover damages unless he has sustained an injury different in kind and not merely in degree from that suffered by the public at large. If it appears that there is a special injury, the owner may recover damages notwithstanding his property does not abut, as in this case, on the part of the street vacated, because this amounts to a "taking".

Cothran, 209 S.C. at 368, 40 S.E.2d at 243 (citations omitted). "An injury for which damages must be paid is injury to the property itself. The property itself must suffer some diminution in substance, or be rendered intrinsically less valuable by reason of public use." Gray, 311 S.C. at 151, 427 S.E.2d at 903 (citation omitted). The fact that access to property is not cut off in either direction by the actions of a governmental agency does not affect the issue of taking, provided special injury is shown, but is to be considered in determining damages. See Cothran, 209 S.C. at 370, 40 S.E.2d at 244.

Tallent presented two witnesses, a licensed real-estate broker and an expert in the appraisal of commercial real estate to establish special injury. The testimony established the damages suffered by Tallent as a result of SCDOT construction and removal of access to Highway 123 were different in kind from those suffered by the public at large. Both the expert appraiser and realtor testified the access closure affected Tallent's property differently from other commercial properties because she lost "walk-in" business. The expert

appraiser also testified that her business losses differed from those in the area because the other entities were "destination" businesses, such that people will seek them out regardless of the lack of immediate access from Highway 123. Both witnesses also testified that while the surrounding residential area benefited from the actions of SCDOT, the value of Tallent's commercial property had been adversely affected. The realtor further testified that there had been no interest in the property due to the current lack of access to Highway 123.

Tallent's witnesses demonstrated that she suffered special injury different in kind and not merely degree sufficient to satisfy the Cothran test. Specifically, the public at large lost mere access to Highway 123 by means of Old Easley Bridge Road, while Tallent was deprived of both access and property value. Therefore, we find Tallent entitled to just compensation for the actionable taking of her property and the decision of the master is hereby

AFFIRMED.

GOOLSBY and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Michael T. Governor, Respondent.

Appeal From Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 3925
Heard December 8, 2004 – Filed January 24, 2005

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia, and Solicitor Ralph E. Hoisington of Charleston, for Appellant.

Assistant Appellate Defender Robert M. Pachak, of Columbia, for Respondent.

STILWELL, J.: The State appeals the trial court's suppression of seized drugs the State intended to admit in this drug prosecution. We reverse.

BACKGROUND

On Friday, June 7, 2002, South Carolina Highway Patrol Troopers Anthony Bokern and Marty Housand arrested Michael Governor for open container and trafficking crack cocaine. Governor was a passenger in a vehicle stopped for a window tint violation. While Housand dealt with the driver, who was driving under suspension, Bokern attempted to secure the scene. When Bokern began placing Governor under arrest for an open container violation, Governor reached for his back pocket to pull out a bag. Bokern seized the brown paper bag from Governor's pocket, glanced inside to make certain there was no weapon, and handed it to Housand.

The bag contained multiple clear plastic baggies. Housand weighed and field-tested the contents and obtained a positive result for crack cocaine. Housand did not have a BEST evidence bag with him at the time of the arrest so he placed the drugs in an unsealed evidence bag in the trunk of his patrol car.[1] The drugs remained there over the weekend. On the following Monday morning when he returned to work, Housand placed the drugs in a BEST evidence bag. On Wednesday when he was visiting a fellow officer at a hospital in Columbia, he gave the drugs to the evidence custodian. The custodian's supervisor had set up a separate room in the hospital for the custodian to accept evidence while the officers were visiting their fellow patrolman in the hospital. The custodian transported the drugs to SLED that same day.

Governor was indicted for possession of cocaine with intent to distribute and possession of crack cocaine with intent to distribute. The trial court held a suppression hearing regarding the drug evidence seized by the police. The trial court suppressed the evidence "based on [the officers'] failure to comply with their own guidelines." This appeal followed.

DISCUSSION

[1] All controlled substances sent to SLED for analysis must be in a BEST evidence bag.

The State claims the trial court erred in suppressing evidence of seized drugs because it established a sufficient chain of custody for the drugs. We agree.

A party offering fungible items, such as drugs, as evidence must establish a chain of custody as far as practicable. State v. Joseph, 328 S.C. 352, 364, 491 S.E.2d 275, 281 (Ct. App. 1997). Where the substance passed through several hands, the evidence must not leave to conjecture who had it and what was done with it between the seizure and the analysis. "While the proof of chain of custody need not negate all possibility of tampering, it must establish a complete chain of evidence as far as practicable." Id. In applying this rule, our courts have found evidence inadmissible "only where there is a missing link in the chain of possession because the identity of those who handled the [evidence] was not established at least as far as practicable." State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). By contrast, where the identity of those who handled the evidence is established, "evidence regarding its care goes only to the weight of the specimen as credible evidence" and not to its admissibility. Id.; see also State v. Taylor, 360 S.C. 18, 25, 598 S.E.2d 735, 738 (Ct. App. 2004) (en banc) (holding where the identity of each person in the chain handling evidence is established and the manner of handling is reasonably demonstrated, suppression of the evidence is abuse of discretion, absent proof of tampering, bad faith, or ill motive).

In State v. Smith, 326 S.C. 39, 40, 482 S.E.2d 777, 778 (1997), a police officer took a seized vial of blood home with him and placed it in his refrigerator. He did not submit the vial to SLED until two days later. At trial, each person who handled the blood samples testified. Id. at 41, 482 S.E.2d at 779. Because there was no evidence the sample was tampered with in any manner and the police officer testified the sample was in the same condition when he submitted it to SLED as when he received it, our supreme court held the storage of the blood sample in the police officer's home went to the weight of the evidence, not its admissibility. Id. at 41-42, 482 S.E.2d at 779.

In this case, the State produced evidence of each person in the chain of custody and the manner in which the drugs were handled. Bokern testified he handed the drugs to Housand who then weighed and field-tested them. Housand then placed them inside his trunk, where they remained until Monday morning. Housand testified no one else had keys to his patrol car, and no one else drove the vehicle that weekend. Furthermore, he did not "alter or mess with the substance in anyway." Additionally, Housand testified that on the day of the hearing the drugs were in substantially the same condition as they were the day of the arrest. Lastly, Dayle Blackmon, the evidence custodian, testified Housand gave her the drugs at the hospital on Wednesday, June 12, 2002, and she delivered them to SLED.

The trial court did not find any missing link in the custodial chain or proof of tampering, bad faith, or ill motive. Instead, the court suppressed the evidence based on the officers' failure to comply with the Department of Public Safety's policy directives on evidence. The directives require "[a]ll property/evidence [to] be submitted to the evidence custodian by the end of the shift or as soon as possible thereafter." In Section IX, the directives also require "[a]ll controlled substances . . . [to] be transported for analysis within 72 hours of the seizure." Furthermore, the "[e]vidence/property shall not be stored in the patrol vehicle except when being transported from the scene to the place of storage . . . . [and] shall not remain with the officer for a prolonged period of time."

Obviously, Housand did not comply with these department directives. However, although this failure was the proper subject of cross-examination of the witness for credibility, it was not a proper basis for suppression. Because the State presented a complete chain of custody, the trial court abused its discretion in suppressing the drug evidence. State v. Foster, 354 S.C. 614, 620-21, 582 S.E.2d 426, 429 (2003) (holding rulings regarding the admissibility of evidence are within the trial court's discretion and will not be reversed absent an abuse of that discretion).

REVERSED.

ANDERSON and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Brenco, A General Partnership, Appellant,

v.

South Carolina Department of Transportation, Respondent.

Appeal From Horry County
J. Stanton Cross, Jr., Master In Equity

Opinion No. 3926
Heard October 12, 2004 – Filed January 24, 2005

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Howell V. Bellamy, Jr. and Douglas M. Zayicek, both of Myrtle Beach, for Appellant.

John B. McCutcheon, Jr., Mary Ruth M. Baxter, and Arrigo P. Carotti, all of Conway, for Respondent.

STILWELL, J.: Brenco brought this action against the South Carolina Department of Transportation (SCDOT), seeking deed rescission and claiming inverse condemnation. The trial court refused to rescind the deed and found Brenco failed to prove damages related to the inverse condemnation. We affirm in part, reverse in part, and remand.

BACKGROUND

Brenco owns property located along Highway 501 in Horry County. The property was formerly the site of a Brendle's store, which closed in 1997. In 1998, SCDOT purchased 6,689 square feet of Brenco's parking lot in order to build a frontage road. The negotiations and deed referenced aspects of SCDOT's August 18, 1993 road plans for development of the frontage road including the creation of "controlled access facilities" as needed.

After initially alerting them of the project, SCDOT's appraiser, Clyde Ratchford, met with Brenco representatives at the property and provided them with a plan sheet. Although Ratchford admitted the plans could be confusing, the plan sheet showed the property's direct access to Highway 501 would be eliminated and, after construction, access would be to the frontage road. The plan sheet provided to Brenco also was narrow in scope and did not show the plans related to the nearby intersection of George Bishop Parkway and Highway 501, an original alternate means of accessing Brenco's property from the highway. According to Ratchford, the plans indicated the grade of the road, and thus the property's visibility from the highway, would remain unchanged.

The appraisal valued the property taken at $34,700. A diagram attached as an exhibit to the appraisal showed only the property and the portion being taken for the frontage road. It did have an indication of the existing access point, which originally led to Highway 501, but did not specifically show any proposed change. However, language in the appraisal information indicated access would be to the frontage road. Brenco accepted the appraisal and agreed to sell the 6,689 square feet for $34,700.

The final project was completed pursuant to updated 2000 plans instead of the 1993 plans. Rather than being left at grade, Highway 501 was elevated, rendering Brenco's property less visible from the highway.

Brenco then brought this action to rescind the deed on the ground of negligent misrepresentation or unilateral or mutual mistake. Additionally, Brenco sought damages for inverse condemnation.

At trial, Brenco representatives maintained they knew nothing of their loss of access directly onto Highway 501. They asserted they were led to believe they would retain access across the frontage road. However, at least one representative admitted no one asked about access to and from Highway 501 onto the property. Additionally, Brenco questioned whether SCDOT knew about the change in grade or the possibility of such a change and failed to alert Brenco during the 1998 negotiations.

Ratchford indicated he never told Brenco representatives they would retain access to Highway 501. He maintained he showed them the portion of the plan sheet covering their property, which showed the elimination of direct access and provided access to their property only onto the frontage road. In addition, SCDOT offered testimony that although grade studies were being conducted, they learned the project would require elevating the road only after concluding the Brenco transaction.

Brenco offered testimony of two experts regarding the condition and value of the property. Engineer Steve Powell testified the highest and best use for the property was dramatically and negatively impacted as a result of the change in grade of the road and the elimination of direct access. Appraiser Jim Jayroe testified the property would no longer be usable for retail space, but would instead be classified as light industrial. He testified the negative change in value of the property from before the original taking (the 1998 deed) until after the completion of the project was approximately $1.5 million. However, when asked for a figure of the monetary damage between the 1993 plans and the 2000 plans, he responded: "I don't know."

A second appraiser for SCDOT, Woodrow Willard, testified there was no change in the property's value after Brenco deeded the frontage. He testified any change in grade of the road—the only change he found subsequent to the signing of the deed—was offset by improved access to the property through the use of the frontage road.

In its first order, the trial court refused to rescind the deed, citing Brenco's failure to prove any of its alleged grounds. As to mistake, the court concluded although Brenco representatives may have had an incorrect impression of what access the property would have to Highway 501 after the conveyance, the documents they received from SCDOT established the property would no longer enjoy direct access to the highway. The court also found SCDOT was not then aware the highway's grade would change and thus there was no basis to rescind the deed for negligent misrepresentation.

The court did not dispose of the inverse condemnation action in its first order. Instead, the court sent a letter to counsel indicating it was struggling with the issue of damages and requested a conference on the issue. At the conference, the court considered taking additional testimony regarding damages, and counsel for both parties agreed the court could reopen the record to receive additional testimony. Brenco later moved to reopen the case to offer additional evidence of damages. In a memorandum in support of the motion, Brenco's counsel noted the trial court mentioned during the damages conference that it wanted to hear specific testimony as to the changes between the August 18, 1993 plans and the 2000 implemented plans.

The court later issued an order in which it concluded Brenco failed to establish any damages necessary to prove an inverse condemnation as a result of the deviation from the 1993 to the 2000 plans. The court found Brenco's evidence of monetary damages related solely to the inverse condemnation deficient. Consequently, the court found the only evidence on damages resulting from the change in grade was from SCDOT's appraiser who opined that any damage resulting therefrom was offset by improved access. The court also declined to reopen the case for additional testimony on the issue. Brenco filed motions for reconsideration of both of the court's orders, which were denied after hearings.

DISCUSSION

I. Deed Rescission

Brenco argues the trial court erred in refusing to rescind the deed. We disagree.

An action to set aside a deed is a matter in equity. See Bullard v. Crawley, 294 S.C. 276, 278, 363 S.E.2d 897, 898 (1987). On appeal in an equity action, we may find facts in accordance with our own view of the evidence, but are not required to disregard the trial court's findings. Pinckney v. Warren, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). Moreover, our scope of review does not relieve the appellant of its burden to demonstrate the court's findings were in error. Id. at 387-88, 544 S.E.2d at 623.

A. Mistake

We find no basis for rescinding the deed on the ground of unilateral or mutual mistake.

To rescind an instrument on the ground of mistake, the evidence must be clear and convincing. Truck South, Inc. v. Patel, 339 S.C. 40, 49, 528 S.E.2d 424, 429 (2000). To rescind an instrument on the ground of unilateral mistake, the mistake must be accompanied (1) by proof it was induced by fraud, deceit, misrepresentation, concealment, or imposition of the opposing party and without negligence on the part of the party seeking rescission, or (2) by very strong and extraordinary circumstances which would make it a great wrong to enforce the agreement. Id.

A contract may be rescinded on the ground of mutual mistake where the parties have made a common mistake of fact causing each to do what neither intended. Young v. Cooler, 347 S.C. 362, 366, 555 S.E.2d 410, 412-13 (Ct. App. 2001).

At trial, Brenco maintained two primary grounds for mistake: (1) the loss of direct access to Highway 501 from the property and (2) the change in the grade of the road. They asserted they were led to believe they would retain access across the frontage road directly onto Highway 501. However, at least one representative admitted no one asked about access to and from Highway 501 onto the property. The deed, which references the 1993 plans, specifies the consideration paid to Brenco was for the "6,689 square feet of land, and all improvements thereon, if any, including rights of access as may be needed for controlled access facilities." (Emphasis added.) Although they argue SCDOT's representative covertly put this language into the deed, they do not deny they had an opportunity to review the deed. Additionally, SCDOT's appraiser testified he showed Brenco representatives the plan sheets, which detailed where the property would access the frontage road and that its direct access to Highway 501 was being eliminated.

Brenco presented no evidence of fraud or misrepresentation by SCDOT with regard to the access. Their argument was that representatives were under a different impression regarding the access. "An erroneous impression taken up from the suggestion of the party's own mind does not relieve him from the contract." Richardson's Rests., Inc. v. Nat'l Bank of South Carolina, 304 S.C. 289, 297, 403 S.E.2d 669, 673 (Ct. App. 1991). Accordingly, there is no ground for rescission based upon unilateral mistake.

Brenco also failed to establish any mutual mistake regarding the access the property would have to Highway 501 under the 1993 plans. As to direct access, SCDOT offered significant proof it intended to allow access only to the frontage road and not to Highway 501.[1] As to access by way of the intersection of Highway 501 and George Bishop Parkway, Brenco asserts

[1] Brenco contends the trial court erred in finding the parol evidence rule barred its representative's testimony regarding their belief surrounding the access of the property to Highway 501. We agree, but even considering the testimony, we find Brenco failed to prove the deed should be rescinded due to unilateral or mutual mistake. See S. Realty & Constr. Co. v. Bryan, 290 S.C. 302, 309, 350 S.E.2d 194, 198 (Ct. App. 1986) (holding parol evidence is admissible to show mistake).

both its representatives and Ratchford, acting as a SCDOT representative, mistakenly believed the intersection would be unchanged under the 1993 plans. They cite to a passage in Ratchford's deposition in which Brenco's counsel asked whether under the 1993 plans a westbound traveler on Highway 501 would have been able to reach Brenco's property by turning right onto George Bishop Parkway and then left onto the frontage road. Although Ratchford answered in the affirmative, no follow-up questions were asked to determine if the intersection would remain unchanged. At trial, Ratchford explained that under the 1993 plan the intersection of Highway 501 with George Bishop Parkway was closed, but an exit ramp from the highway terminated at George Bishop Parkway and the frontage road. Thus, his deposition testimony was correct as far as it went. Two questions that were neither asked nor answered were whether eastbound travelers would have been able to exit directly from Highway 501 onto George Bishop Parkway, and whether any traveler would have been able to exit Brenco's property directly onto Highway 501 in either direction.

As to the elevation, Brenco asserted SCDOT knew about the change in grade but failed to alert them during the initial negotiations. SCDOT offered testimony that although grade studies were being conducted, it was not until after the signing of the deed that they learned the project would require raising the grade of the road. All evidence in the record indicates that when the deed was signed, both parties believed and intended the highway would remain at grade. Also, Brenco has failed to demonstrate how they were intentionally misled by SCDOT. That elevation studies were being conducted does not demonstrate SCDOT knew the grade would be altered. There is no evidence SCDOT intentionally withheld knowledge the grade would be raised due to construction concerns.

B. Negligent Misrepresentation

We also find no basis for Brenco's allegation SCDOT negligently misrepresented the property's loss of direct access to the highway or the highway's grade change.

To prove negligent misrepresentation, Brenco was required to show SCDOT made a false representation to Brenco, had a pecuniary interest in making the representation, owed Brenco a duty of care to communicate truthful information to Brenco, and breached that duty of care. Additionally, Brenco was required to establish it justifiably relied on the representation and suffered a pecuniary loss as a proximate result. Sauner v. Pub. Serv. Auth. of South Carolina, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003).

As discussed above, all documentation provided to Brenco indicates access would be restricted and would not be directly to Highway 501. Additionally, the record shows SCDOT did not intend to raise the grade of the road to its resulting height when it purchased the property from Brenco. Because Brenco failed to prove SCDOT made any false representation regarding either the property's access to Highway 501 or the grade of the highway, the trial court properly refused to rescind the deed under a theory of negligent misrepresentation.

II. Inverse Condemnation

Brenco argues the trial court erred in bifurcating the case and refusing to reopen the record to accept additional damages. Alternatively, it argues the court erred in failing to award damages for inverse condemnation. Under the peculiar facts of this case, we hold the court should have allowed additional evidence of damages to the property caused by the changes made to the road project not reflected in the deed from Brenco to SCDOT or the 1993 project plans.[2]

The decision whether to reopen a record for additional evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion. Wright v. Strickland, 306 S.C. 187, 188, 410 S.E.2d 596, 597 (Ct. App. 1991). In Wright, this court affirmed a trial

[2] In addition to increasing the grade of the highway, SCDOT's third exhibit shows an exit ramp was moved from the 1993 plans to the 2000 plans. Brenco asserts this negatively affects the ability of westbound travelers to recognize the property in time to take the appropriate exit.

court's refusal to reopen a record where counsel for the party seeking to reopen did not proffer any testimony or make any showing the evidence would make any difference to the outcome of the case. This court reasoned the trial court properly declined the party's attempt at a "fishing expedition." Id.

In this case, Brenco submitted evidence the changes from the 1993 plans to the final completed project caused substantial pecuniary damage to their property. However, at trial Brenco also alleged it was unaware that because of the conveyance of frontage to SCDOT and the 1993 plans, the property would lose direct access to the highway and that a nearby intersection providing alternate access to the highway would be closed. Because of these additional allegations—directed at setting aside the deed—Brenco's expert calculated damages based on the property's before and after value.

The trial court expressed concern about the issue of damages in the inverse condemnation action in a letter announcing its ruling on the deed rescission claim. It was only after this letter and the resulting damages conference that Brenco realized it needed to establish damages in a different fashion. As a result, counsel asked to reopen the case. However, the court later announced both its refusal to reopen the case and its ruling on inverse condemnation in a single letter requesting SCDOT draft an appropriate order. In the letter, the court stated it was "truly uncomfortable" with its rulings and did not know when a case had given the court "so much concern as this one." Unlike the party in Wright, Brenco attempted at the reconsideration hearing to proffer evidence the trial court found it had failed to establish at trial. Even at this hearing, the trial court openly struggled with the issue of damages and seriously considered allowing the testimony. Under these peculiar circumstances, where the evidence of what was contemplated at each stage of the road project was so complex and the inverse condemnation calculations were contingent on the outcome of another theory of the case, we believe the trial court abused its discretion in not reopening the record for additional evidence of damages. Thus we remand the case to the trial court for additional testimony limited to the damages, if any, caused by the changes

in the project as envisioned by the August 18 1993 plan and as referenced in the deed from Brenco to SCDOT, and the final project as built.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

BEATTY and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carolina Marine Handling, Inc., Plaintiff,

v.

Warren Frank Lasch; Duane Grantham; Jack C. Sprott; Richard Lee Tapp, R. Keith Summey, Douglas McKay, III, Robert N. King, Don J. Hayes; W. Kurt Taylor; Gussie C. Greene; Stephen R. Ayer; Samuel L. Hart; A.C. Mitchum; Charlotte Gillespie; Dorothy K. Williams; Phoebe Miller; F. Browne Gregg; City of North Charleston; Charleston Naval Complex Redevelopment Authority; South Carolina State Budget and Control Board; S.C. State Ports Authority; Charleston Shipbuilders, Inc.; Charleston International Projects, Inc.; Charleston International Ports, LLC, Opportunity Research, Inc., Defendants,

Charleston Shipbuilders, Inc., Third-Party Plaintiff,

v.

Herbert R. “Jock” Stender,	Third-Party Defendant,
Of Whom: Charleston Shipbuilders, Inc. is	Appellant,
and Carolina Marine Handling, Inc. and Herbert R. “Jock” Stender are	Respondents.

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

Opinion No. 3927
Submitted November 1, 2004 – Filed January 24, 2005

AFFIRMED

David J. Parrish and Stephen P. Groves, Sr., both of Charleston, for Appellant.

M. Dawes Cooke, Jr. and John W. Fletcher, both of Charleston, for Respondents.

KITTREDGE, J.: In this breach of contract action involving a non-sealed instrument, the circuit court dismissed Appellant’s counterclaim and third party claim on the basis that the claims were barred by the general three-year statute of limitations. S.C. Code Ann. § 15-3-530(1) (Supp. 2003). Relying solely on the generic contract provision—“IN WITNESS WHEREOF, the parties have hereunto set their hands and seals”—Appellant seeks to invoke the twenty-year statute of limitations applicable to “sealed

instruments." S.C. Code Ann. § 15-3-520(b) (Supp. 2003). We concur with the circuit court and find the parties to the contract did not intend the contract to be under seal. The circuit court, therefore, properly applied the general three-year statute of limitations and dismissed Appellant's claims. We affirm.

FACTS

Carolina Shipbuilders, Inc. (CSI) leased property on the former Charleston Naval Base Shipyard in December 1996 from the Charleston Naval Complex Redevelopment Authority (RDA). CSI later subleased the property to Carolina Marine Handling, Inc. (CMH). Among other things, the lease contract required CMH to make monthly rent payments to CSI.

RDA terminated its lease with CSI in May 1999, alleging CMH failed to make all required rent payments. CMH brought the present action against CSI and others in May 2002. In November 2002, CSI answered and counterclaimed against CMH, alleging CMH breached its contract by failing to pay rent to RDA, resulting in RDA's termination of its lease with CSI. CSI also filed a third party complaint against Herbert R. Stedner, CMH's sole owner.

CMH and Stedner sought dismissal based on the general three-year statute of limitations. CSI countered with the argument that the lease contract was made under seal and was subject to the twenty-year statute of limitations. The circuit court found the contract was subject to the three-year statute of limitations and dismissed CSI's claims. This appeal followed.

DISCUSSION

I.

The lease provides in part: "IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this ____ day of December, 1996." The date of the contract's execution was written in the appropriate blank space,

and the parties signed the contract. In essence, CSI asserts this language, standing alone, evidences the parties' intent to seal the contract as provided by South Carolina Code section 15-3-520(b) of the South Carolina Code.[1] We disagree.

As a general rule, a three-year statute of limitations applies to contract actions in South Carolina. S.C. Code Ann. § 15-3-530(1) (Supp. 2003). Section 15-3-520 provides a twenty-year statute of limitations for certain actions. S.C. Code Ann. § 15-3-520 (Supp. 2003). It is the "sealed instrument" provision of section 15-3-520(b) on which CSI rests its hopes to avoid application of the standard statute of limitations. Section 19-1-160 provides:

> Whenever it shall appear from the attestation clause or from any other part of any instrument in writing that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto.

S.C. Code Ann. § 19-1-160 (1976).

The clear language of section 19-1-160 imposes a statutory rule of evidence and requires that the determination—of whether a non-sealed instrument should be considered a sealed instrument—be gleaned from the instrument. If it appears from a non-sealed instrument that the parties intended for the contract to be sealed, it will be deemed sealed. We recognize that a non-sealed instrument may include provisions and indicia that evidence an intent that the contract "be construed [as] a sealed instrument." Id. Two decisions of this court have found the requisite intent where no seal was placed on the contract.

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[1] CSI makes no argument that its counterclaim is timely under the three-year statute of limitations.

In Treadway v. Smith, 325 S.C. 367, 479 S.E.2d 849 (Ct. App. 1996), we considered whether a non-sealed separation agreement entered into by former spouses was intended to be a sealed instrument, and thus subject to the twenty-year statute of limitations.[2] The agreement included future, contingent obligations, especially as related to Smith's responsibility for a portion of the parties' children's educational expenses. The agreement further contained the standard attestation clause—"In WITNESS WHEREOF, the parties have hereunto set their respective Hands and Seals"—found in many contracts. Id. at 378, 479 S.E.2d at 855. Immediately following this standard language in conspicuous type, was:

> SIGNED SEALED AND DELIVERED IN THE PRESENCE OF
>
> [signatures of parties and witnesses]

Id. We concluded that the language manifested the parties' intent to create a sealed instrument.

We similarly construed a non-sealed instrument in South Carolina Department of Social Services v. Winyah Nursing Homes, Inc., 282 S.C. 556, 320 S.E.2d 464 (Ct. App. 1984). Following the standard language—"the parties hereto have set their hands and seals"—the contract noted "L.S." adjacent to the contracting parties' signatures. Id. at 561, 320 S.E.2d at 467. The inclusion of L.S. was a significant feature in Winyah Nursing Homes, for L.S. is an abbreviation for *Locus sigilli*, which means "the place of the seal; the place occupied by the seal of written instruments." L.S. usually appears

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[2] The separation agreement in Treadway retained its separate contractual character because it was executed prior to our supreme court's decision in Mosley v. Mosier, 279 S.C. 348, 306 S.E.2d 624 (1983). In Mosley, the court held that jurisdiction for all subsequent domestic matters, whether by decree or agreement, vested in the family court. Id. at 353, 306 S.E.2d at 627. Mosley further recognized that previously executed separation agreements which were incorporated, but not merged, into a divorce decree retained their separate contractual character. Id.

on documents in place of, and serves the same purpose as, a seal. Black's Law Dictionary, 948 (6th ed. 1990); see 68 Am. Jur. 2d Seals § 6 (2004) (Use of the notation "L.S." is generally held as applicable to replace a physical seal on a document). Accordingly, we found the parties intended the contract in Winyah Nursing Homes to be a sealed instrument.[3]

In the case before us, we find the parties did not intend to create a sealed instrument. The sophisticated parties to this lease arrangement could have easily manifested an intent to create a sealed instrument if they were so inclined. We recognize that CSI, by necessity of the posture of the case, must advance the argument that the standard attestation—"IN WITNESS WHEREOF, the parties have hereunto set their hands and seals,"[4] compels a finding that the parties intended to create a sealed instrument. We further recognize, however, that such generic language is common in non-sealed contracts of all types. Were we to construe this boilerplate attestation clause, *by itself*, as requiring a finding of intent to create a sealed instrument in an

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[3] Our supreme court addressed a similar issue in Cook v. Cooper, 59 S.C. 560, 38 S.E. 218 (1901), although for purposes unrelated to the applicable statute of limitations. In Cook, the validity of a deed was at stake, and appellants argued the "deed is void for the reason that it is not under seal." Id. at 560, 38 S.E.2d at 219. While the deed lacked a seal "upon its face," the following three features were present: (1) the deed provided an attestation, "In witness whereof I hereunto sed [sic] my hand and seal this…;" (2) immediately adjacent to the grantor's signature was the word "seal;" and (3) the deed concluded with "Signed, Sealed and Delivered in the presents [sic] of [names of witnesses]." Id. The supreme court relied in part on the predecessor to section 19-1-160 and found that a sealed instrument had been intended.

[4] The parties did not "set" their "seals" on the contract, and the contract does not otherwise evidence an intent to create a sealed instrument. Similarly, the parties executed a hold harmless agreement which contained the following attestation clause: "**WITNESS** the following signatures and seals." Only signatures followed, and again, the related hold harmless agreement contains no evidence the parties intended to create a sealed instrument.

otherwise non-sealed instrument, we would likely transform the twenty-year statute of limitations into the standard period of limitations for contract actions in this state. We adhere to our general three-year statute of limitations for most contract actions and acknowledge the availability of the twenty-year limitations period where the contract clearly evidences an intent to create a sealed instrument.[5]

"Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation. See Webb v. Greenwood County, 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956); City of Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 231, 599 S.E.2d 462, 464 (Ct. App. 2004). Significantly, "[s]tatutes of limitations provide potential defendants with certainty that after a set period of time, they will not be hailed [sic] into court to defend time-barred claims." In re Elkay Indus., Inc., 167 B.R. 404, 408 (D.S.C. 1994). "Moreover, limitations periods discourage plaintiffs from

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[5] We have previously rejected other efforts to escape the barring effect of the standard three-year statute of limitations for contact actions. For example, in Republic Contracting Corp. v. South Carolina Dep't of Highways & Pub. Trans., 332 S.C. 197, 503 S.E.2d 761 (Ct. App. 1998), appellant argued the presence of "sealed instruments because [one of the parties] placed its professional engineer seal and endorsement on the plans pursuant to statutory requirement." Id. at 205, 503 S.E. at 766. The suggestion that a statutorily mandated seal created a sealed instrument for statute of limitations purposes was dismissed, as we held that "[n]othing in the text of [the statute] leads to the inference that a purpose of the mandate for affixing a seal . . . is to extend the time in which an action can be brought . . . ." Id. at 205-06, 503 S.E.2d at 766 (citing Landmark Eng'g, Inc. v. Cooper, 222 Ga. App. 752, 476 S.E.2d 63 (1996)) (holding that a statute requiring the stamp of a registered surveyor on certain documents ensures only that the surveyor takes responsibility for the work but does not allow a plaintiff to bring an action within the limitations period prescribed for documents under seal).

sitting on their rights." Id. at 408-09. Statutes of limitations are, indeed, fundamental to our judicial system.

The result we reach today, we believe, harmonizes the intent of the Legislature with respect to the general three-year statute of limitations in section 15-3-530 with the ability of contracting parties to create sealed instruments pursuant to section 19-1-160 and thereby invoke the twenty-year limitations period in section 15-3-520(b).

II.

CSI alternatively argues that its claim against Stender remains viable notwithstanding the three-year limitations period. We affirm the dismissal of CSI's third party complaint against Stender pursuant to Rule 220(b)(2), SCACR, and the following authorities: Maher v. Tietex Corp., 331 S.C. 371, 376-77, 500 S.E.2d 204, 207 (Ct. App. 1998) ("The discovery rule determines the date of accrual for a breach of contract action[,]" and "[p]ursuant to the discovery rule, a breach of contract action accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence"); Rumpf v. Mass. Mut. Life Ins. Co., 357 S.C. 386, 394-95, 593 S.E.2d 183, 187 (Ct. App. 2004) (noting that the "exercise of reasonable diligence" means "that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist"); Republic Contracting Corp. v. South Carolina Dep't of Highways & Pub. Trans., 332 S.C. 197, 208, 503 S.E.2d 761, 767 (Ct. App. 1998) ("The statute of limitations begins to run when a plaintiff knows or should know of a potential claim against another party, not when the plaintiff develops a full-blown theory of recovery.").[6]

[6] The claim of CSI against Stender is one to pierce the corporate veil. We recognize that an attempt to pierce the corporate veil often occurs post-judgment, and the issue comes to us in somewhat of an unusual posture. Our summary disposition of this issue—the attempted application of the discovery

CONCLUSION

We find the presence of a standard attestation clause—such as, "IN WITNESS WHEREOF, the parties have hereunto set their hands and seals"—in an instrument which is neither sealed nor required to be sealed is insufficient, standing alone, to create a sealed instrument under section 19-1-160. We, therefore, find the parties to the December 1996, non-sealed contract did not intend to create a sealed instrument. Consequently, we find the claims of CSI barred by the general three-year statute of limitations under section 15-3-530. The circuit court's dismissal of CSI's claims against CMH and Stender is

AFFIRMED.

HUFF, and BEATTY, JJ., concur.

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rule to toll the commencement of the statute of limitations—is simply a response to the narrow issue as framed in the circuit court and on appeal.