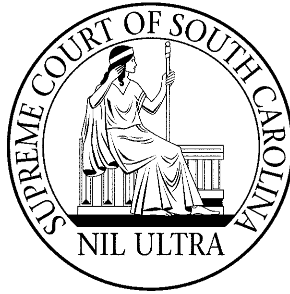

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 43
November 24, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

ATC South, Inc., Appellant,

v.

Charleston County, Leon Stavrinakis, in his capacity as Chairman of Charleston County Council, and Charles T. Wallace, Timothy E. Scott, Curtis Inabinet, Henry Darby, Teddy Pryor, Curtis Bostic and Ed Fava, in their capacities as the duly elected council or governing body of the County of Charleston, SCANA Communications, Inc. and South Carolina Electric & Gas Company, Respondents.

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

Opinion No. 26563
Heard September 18, 2008 – Filed November 17, 2008

AFFIRMED

Ellison D. Smith, IV, and Stan Barnett, both of Smith, Bundy, Bybee & Barnett, of Mt. Pleasant, for Appellant.

Gary C. Pennington and Jessica Clancy Crowson, both of Pennington Law Firm, of Columbia, for Respondents SCANA Communications and South Carolina Electric & Gas and Joseph Dawson, III, Bernard E. Ferrara, Jr., Austin A. Bruner, and Bernice M. Jenkins, all of North Charleston, for Respondents Charleston County et al.

JUSTICE KITTREDGE: This challenge to the rezoning of property in Charleston County, South Carolina, is foreclosed by Appellant's lack of standing.

South Carolina Electric and Gas Company (SCE&G) owns a seven-acre tract of land on Edisto Island in Charleston County. SCANA Communications, Inc. (SCI) and SCE&G are affiliated corporations. SCI is in the business of constructing communications towers (cell-phone towers) to lease to wireless telecommunications companies. SCE&G leased a portion of its Edisto Island tract to SCI for the purpose of constructing a cell-phone tower. Because the then existing zoning did not permit cell-phone towers, SCE&G sought rezoning to a classification that would permit a cell-phone tower. The property was rezoned pursuant to proper procedures. ATC South, Inc. (ATC) challenged the rezoning by filing a declaratory judgment action in circuit court. ATC and SCI are competitors in the cell-phone tower business. ATC owns a tract of land (with a cell-phone tower) approximately one mile from SCE&G's property. Pursuant to cross-summary judgment motions, the circuit court dismissed the case, finding that ATC's status as a mere competitor did not confer standing to challenge the rezoning by the Charleston County Council. We agree and affirm.[1]

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[1] This appeal is before us pursuant to Rule 204 (b) certification.

I.

SCI and SCE&G (hereinafter collectively "SCE&G") submitted an application to Charleston County Council to rezone property it owned from Agricultural-Residential (AGR) to Planned Development for utilities (PD) in order to expand the existing electrical substation and to build a cell-phone tower. The AGR zoning did not allow cell-phone towers, but the requested PD zoning would permit cell-phone towers.

The County Planning Commission ultimately recommended approval of the rezoning application to the County Council. Following public hearings and the appropriate number of "readings," County Council unanimously approved the rezoning request.

ATC appeals from its unsuccessful challenge in circuit court, contending the rezoning of SCE&G's property was improper. We are obligated before reaching the merits of the rezoning question to determine whether ATC has standing to press its complaint. We conclude ATC does not have standing and that ends our inquiry.

II.

Standing may be acquired: (1) by statute; (2) through the rubric of "constitutional standing;" or (3) under the "public importance" exception.

A. Statutory Standing

Section 6-29-760(C) (2004) of the South Carolina Code provides "[a]n owner of adjoining land or his representative has standing to bring an action contesting the ordinance or amendment; however, this subsection does not create any new substantive right in any party." Because ATC is a nonadjoining landowner, it may not assert statutory standing. ATC so concedes. *Cf. St. Andrews Public Serv. Dist. v. City Council of Charleston*, 349 S.C. 602, 605, 564 S.E.2d 647, 648 (2002) (overruling precedent and holding that a non-statutory party lacks standing to challenge a "void" annexation of property).

B. Constitutional Standing

The principle of standing under the United States Constitution is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Supreme Court has provided a three-part test to establish standing:

> First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560-61 (internal citations omitted). *See also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006).

We need go no further than the initial requirement of a concrete and particularized injury. "[A] private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom." *Evins v. Richland County Historic Pres. Comm'n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000) (citing *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985)). ATC's only concrete and particularized injury is that of a competitor of SCE&G in the cell-phone tower business. The thrust of ATC's argument in the circuit court centered on its status as a cell-phone tower competitor with SCE&G. As ATC's answers to interrogatories reflect:

> The harm to [ATC], already inherent, is magnified by the fact that it is *[a] competitor of Defendants [SCE&G]* in the field of supply of communications tower facilities. Any favored

> treatment by a regulatory/zoning authority to one competitor, in this case Defendants [SCE&G], harms other competitors by lessening the favored competitor's costs of doing business. In other words, one competitor is freed from regulatory restraints, and this action inevitably harms other competitors.

(emphasis added).

This Court rejected a competitor's assertion that standing exists when alleged damages flow from increased or perceived unfair competition. *Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 86, 644 S.E.2d 58, 60-61 (2007); 4 *Rathkopf's The Law of Zoning and Planning* § 63.34 (4th ed. 2005) ("[G]enerally, persons whose only complaint is that the rezoning or grant of special permit or variance would create competition with them in the conduct of their business have been held not to have standing to litigate the validity of the zoning action."). Further, "a person whose sole interest for objecting to a zoning board's action is to prevent competition with his or her business is not a person aggrieved, and therefore does not have standing to challenge a zoning decision in court." 83 Am. Jur. 2d *Zoning and Planning* § 926 (2003).

This approach, which denies standing to a mere competitor, is the prevailing law throughout the country. *See Westborough Mall, Inc. v. City of Cape Girardeau, Mo.*, 693 F.2d 733, 747 (8th Cir. 1982) (applying Missouri law, the court held "[c]ompetitive disadvantage alone does not give rise to standing"); *Earth Movers of Fairbanks, Inc. v. Fairbanks N. Star Borough*, 865 P.2d 741, 745 (Alaska 1993) ("[W]e thus adopt the majority rule and deny standing to a business competitor whose only alleged injury results from competition."); *Swain v. Winnebago County*, 250 N.E.2d 439, 444 (Ill. App. Ct. 1969) ("Neither the fact that parties may suffer reduced incomes or be put out of business by more vigorous or appealing competition, nor the fact that properties on which such businesses are operated would thus depreciate in value, give rise to a standing to sue."); *E. Serv. Ctrs., Inc. v. Cloverland Farms Dairy, Inc.*, 744 A.2d 63, 67 (Md. Ct. Spec. App. 2000) ("[A] person whose sole reason for appealing a decision from the Zoning Board is to prevent competition with his established business does not have standing.");

Cummings v. City Council of Gloucester, 551 N.E.2d 46, 50 (Mass. App. Ct. 1990) ("[A party] might well fear . . . an increase in business competition, such fear, by itself, would not cause it to be 'aggrieved.'"); *City of Eureka v. Litz*, 658 S.W.2d 519, 523 (Mo. Ct. App. 1983) ("Plaintiffs' general competitive interest therefore, will not establish standing."); *Copple v. City of Lincoln*, 315 N.W.2d 628, 630 (Neb. 1982) ("An increase in business competition is not sufficient to confer standing to challenge a change of zone."); *Nautilus of Exeter, Inc. v. Town of Exeter*, 656 A.2d 407, 408 (N.H. 1995) ("[T]he only adverse impact that may be felt by the plaintiffs as a result of the ZBA's decision is that of increased competition with their businesses. This type of harm alone is insufficient to entitle the plaintiffs to standing to appeal the ZBA's decision . . . ."); *Rockland Hospitality Assocs., LLC v. Paris*, 756 N.Y.S.2d 585, 586-87 (N.Y. App. Div. 2003) ("The only potential injury suggested in the record is an increase in business competition, which is insufficient to confer standing on a party."); *Nernberg v. City of Pittsburgh*, 620 A.2d 692, 696 (Pa. Commw. Ct. 1993) ("The zoning ordinance is not part of a regulatory scheme to protect against competitive injury, and thus competition is not the kind of direct injury which gives rise to standing in a zoning case.").

We conclude that where, as here, the potential injury or prejudice is only an increase in business competition, such injury or prejudice is insufficient to confer standing. We join the majority of jurisdictions in holding that a competitor challenging legislative or executive action solely to protect its own economic interests lacks standing.

ATC further relies on its status as a taxpayer to acquire standing. The injury to ATC, however, as a taxpayer is common to all property owners in Charleston County. This feature of commonality defeats the constitutional requirement of a concrete and particularized injury. As the United States Supreme Court observed, a taxpayer lacks standing when he "suffers in some indefinite way in common with people generally." *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923). We reject ATC's claim of taxpayer standing under constitutional standing principles.

C. The "Public Importance" Exception

This Court has long recognized the "public importance" exception to the general standing requirements. "[S]tanding is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." *Davis v. Richland County Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007) (citation omitted); *see also Baird v. Charleston County*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999) (holding standing existed to challenge an alleged *ultra vires* act of issuing tax-exempt hospital bonds because the act affected profound public interests: public health and public welfare). In cases which fall within the ambit of important public interest, standing will be conferred "without requiring the plaintiff to show he has an interest greater than other potential plaintiffs." *Davis*, 372 S.C. at 500, 642 S.E.2d at 741 (citations omitted).

Whether an issue of public importance exists necessitates a cautious balancing of the competing interests presented, as this Court explained:

> An appropriate balance between the competing policy concerns underlying the issue of standing must be realized. Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.

Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004).

The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of "future guidance" that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance. *Baird*, 333 S.C. at 531, 511 S.E.2d at 75 ("[A] court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.") (citations

omitted); *Sloan v. Sanford*, 357 S.C. at 434, 593 S.E.2d at 472 ("[U]nder certain circumstances, standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.") (citations omitted). Yet the very nature of the public importance exception to general standing requirements resists a formulaic approach, as each case must turn on "the competing policy concerns" as we expressed in *Sloan v. Sanford*.[2]

Turning to the case at hand, ATC claims that the matter of zoning is important to the public. Of course zoning is a matter of public importance, but the same may be said of most legislative and executive actions. For a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance. There is nothing *public* about ATC's concern with a competing cell-phone tower. Here, a local government followed proper procedure and rezoned a single piece of property for a narrow purpose and the only complaint comes from a nonadjoining landowner which just happens to be a competitor. ATC's efforts to cloak its zoning challenge as a matter of "public importance" for the purpose of acquiring standing finds no traction in this record.

III.

ATC presents to the Court as a disgruntled competitor, nothing more. Because ATC's challenge to the rezoning of SCE&G's property by the Charleston County Council does not implicate a matter of public importance

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[2] For examples where this Court has conferred standing under the public importance exception, see *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004), which held standing existed to challenge the sitting Governor's holding of a commission in the Air Force Reserve; *Evins v. Richland County Historic Pres. Comm'n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000), which conferred standing to allege a preservation society exceeded its authority by conveying property; *Baird v. Charleston County*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999), which provided standing to argue a county exceeded its authority by issuing hospital bonds.

requiring court resolution for future guidance, ATC's complaint is dismissed for lack of standing. The judgment of the circuit court is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Marcus D. Robinson, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal from Greenville County
D. Garrison Hill, Circuit Court Judge

Opinion No. 26564
Submitted September 18, 2008 – Filed November 24, 2008

REVERSED

Deputy Chief Attorney Wanda H. Carter, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Petitioner.

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

CHIEF JUSTICE TOAL: In this case, we granted certiorari to review the post-conviction relief (PCR) court's denial of Petitioner Marcus D. Robinson's request for relief. Petitioner argues that the PCR court erred in ruling that he was not prejudiced by plea counsel's failure to challenge the use of a prior uncounseled magistrate court's conviction to enhance the sentence on his present conviction. We find that the prior uncounseled conviction was improperly used to enhance Petitioner's sentence and remand the case for resentencing.

FACTS

On September 16, 2003, Petitioner was indicted on one count of trafficking crack cocaine. At the plea hearing, the State and the plea judge noted that Petitioner had a prior conviction for possession of marijuana from 2000. The plea judge informed Petitioner that, consistent with a second offense, the minimum sentence he could receive would be seven years and the maximum would be thirty years. Plea counsel did not object to the trafficking offense being treated as a second offense and Petitioner was sentenced to twenty years.

Petitioner filed an application for PCR, alleging that his guilty plea was involuntary and unknowing and that plea counsel was ineffective in failing to challenge the use of the prior conviction as a sentence enhancer. Specifically, Petitioner testified that he pled guilty without an attorney in magistrate court to marijuana possession in 2000 and was sentenced to public service. Petitioner was subsequently arrested and served jail time after failing to complete the public service. Petitioner testified that he believed he was pleading guilty to trafficking, first offense, rather than trafficking, second offense. However, Petitioner testified that he wanted to plead guilty.

The PCR court denied relief and found that, although plea counsel should have challenged the use of the 2000 uncounseled conviction, the use of that conviction did not prejudice Petitioner because he was sentenced to twenty years, less than the maximum sentence for a first offense.

Petitioner appealed and raises the following issue for review:

> Did the PCR court err in ruling that Petitioner was not prejudiced by plea counsel's error in failing to challenge the use of his prior uncounseled magistrate court's conviction to enhance sentencing on the present conviction?

STANDARD OF REVIEW

The burden of proof is on the applicant in post-conviction proceedings to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

LAW/ANALYSIS

Petitioner argues the PCR court erred in denying relief on the grounds that Petitioner failed to show prejudice because he was sentenced within the range of available sentences for a first offense of trafficking. We agree.

A defendant's prior uncounseled misdemeanor conviction may only be used to enhance his sentence for a subsequent conviction if the defendant was not actually imprisoned as a result of the prior conviction. *Nichols v. United States*, 511 U.S. 738, 749 (1994); *Glaze v. State*, 366 S.C. 271, 274-5, 621 S.E.2d 655, 657 (2005).

We hold that plea counsel was deficient in failing to challenge the prior conviction. Petitioner did not have counsel at the magistrate hearing and although he was originally sentenced to public service only, he subsequently served time in jail as a result of the conviction. Therefore, this prior conviction could not be used for enhancement purposes. Moreover, the PCR court erred in its prejudice analysis by finding that Petitioner suffered no prejudice because his sentence was less than the maximum for a first offense

of trafficking. *See Thompson v. State*, 340 S.C. 112, 116, 531 S.E.2d 294, 297 (2000) (holding that whether a defendant is sentenced within the sentencing range is irrelevant in showing the absence of prejudice).

Although the plea judge erroneously used Petitioner's prior conviction as an enhancer, in our view, the proper relief in this case is for Petitioner to be resentenced. Petitioner failed to show that his plea was involuntary. At the PCR hearing, Petitioner specifically testified that he had always wanted to plead guilty and that he did not want to go to trial. *See Thompson*, 340 S.C. at 116, 531 S.E.2d at 297 (recognizing that a defendant may only attack the voluntary nature of a plea by showing that but for plea counsel's error, he would not have pled guilty but would have insisted on going to trial).

Moreover, the United States Supreme Court and this Court have remanded for resentencing in cases similar to the instant case. For example, in *United States v. Tucker*, 404 U.S. 443 (1972), the United States Supreme Court concluded that a defendant should be resentenced where the trial judge considered the defendant's prior unconstitutional convictions in determining the sentence. Because the sentence was not determined based on the "informed discretion of a trial judge, but . . . upon misinformation of constitutional magnitude," the court remanded the case for resentencing. *Id.* at 447. This Court addressed a similar issue in *State v. Rich*, 269 S.C. 701, 239 S.E.2d 731 (1977), where there was evidence that the trial judge had considered the defendant's prior convictions in sentencing, although the rap sheet he examined did not contain the dispositions of each charge. *Id.* at 702, 239 S.E.2d at 732. The Court remanded the case for resentencing to avoid the possibility of a sentence enhanced on the basis of unconstitutional prior convictions. *Id.* at 705, 239 S.E.2d at 733.

Accordingly, we find that the use of Petitioner's prior uncounseled conviction in enhancing his sentence was unconstitutional and therefore we reverse the PCR court's order denying relief and instruct the PCR court to remand the case for resentencing. *See Roscoe v. State*, 345 S.C. 16, 22, 546 S.E.2d 417, 420 (2001) (affirming the PCR court's order of remand for resentencing where the defendant was sentenced in excess of the maximum penalty).

CONCLUSION

For the foregoing reasons, we hold that the PCR court erred in denying relief.

REVERSED.

WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Earl Bennett, Maurice Jerome Simmons, Conrad N. Hallums, Kenneth S. Majors, Wallace Grant, James Cobbs, Paul Medlin, Joshua Charles Cook, Joshua Collins, Christopher Taybron, John Thomasson, Respondents,

v.

State of South Carolina, Petitioner.

IN THE ORIGINAL JURISDICTION

Opinion No. 26565
Submitted October 14, 2008 – Filed November 24, 2008

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Deputy Attorney General Robert D. Cook, and Assistant Deputy Attorney General Salley W. Elliott, all of Columbia, for Petitioner.

Jason D. Kirincich, of Lugoff, for Respondent Earl Bennett; and Maurice Jerome Simmons, Conrad N. Hallums, Kenneth S. Majors, Wallace Grant, James Cobbs, Paul Medlin, Joshua Charles Cook, Joshua Collins, Christopher Taybron, and John Thomasson, pro se Respondents, all of Columbia.

PER CURIAM: This matter is before the Court pursuant to the State's petition to hear it in our original jurisdiction and for expedited consideration. Because the State's petition presents an issue of public interest, we exercise our authority to review this matter in our original jurisdiction. S.C. Const. art. V, § 5; Rule 229, SCACR; Key v. Currie, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991). We dispense with further briefing and answer the question presented.

Earl Bennett and other inmates filed separate habeas corpus petitions in the circuit court, alleging their continued incarceration for violations of the Community Supervision Program (CSP)[1] is unconstitutional. Pursuant to this Court's decision in State v. McGrier, 378 S.C. 320, 663 S.E.2d 15 (2008), the inmates claim they are entitled to immediate release from incarceration because they have fully served their original sentences. In response, the State has filed individual returns to the habeas petitions in the circuit court, arguing the holding in McGrier should not be given retroactive application.

In our view, McGrier's retroactivity is patently clear; however, we take this opportunity to remove any doubts. We now hold that our decision in McGrier is to be applied retroactively. See Pinckney v. Warren, 344 S.C. 382, 391, 544 S.E.2d 620, 625 (2001) (recognizing that retroactivity may be extended when justice requires and innocent persons will be adversely affected).

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

[1] S.C. Code Ann. § 24-21-560 (2007) (providing that inmates who meet statutory prerequisites may be released to community supervision program operated by the Department of Probation, Parole, and Pardon Services).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cindy Barrett Garnett,	Plaintiff,
v.	
WRP Enterprises, Inc. & Revmax, Inc. d/b/a Thrifty Car Rental and Philadelphia Indemnity Insurance Company,	Defendants,
Of whom Philadelphia Insurance Company is the,	Petitioner,
and WRP Enterprises, Inc. & Revmax, Inc. d/b/a Thrifty Car Rental are the,	Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Sumter County
Clifton Newman, Circuit Court Judge

Opinion No. 26566
Heard October 9, 2008 – Filed November 24, 2008

REVERSED

James Edward Bradley, of Moore, Taylor & Thomas, of West Columbia, South Carolina and Mark E. Dreyer, of Conner and Winters, of Tulsa, Oklahoma for Petitioner.

William P. Davis, of Baker, Ravenel & Bender, of Columbia, for Respondents WRP Enterprises, Inc. and Revmax, Inc. d/b/a Thrifty Car Rental.

PER CURIAM: In this insurance coverage dispute, we granted certiorari to review the Court of Appeals decision in *Garnett v. WRP Enterprises, Inc.*, 368 S.C. 549, 630 S.E.2d 44 (Ct. App. 2006). Petitioner Philadelphia Insurance Company argues the Court of Appeals erroneously held that Philadelphia Insurance Company was responsible for a supplemental policy referenced in a contract between Bierdie Williams and WRP Enterprises, and Thrifty Car Rental. We agree and reverse.

FACTUAL/PROCEDURAL BACKGROUND

Cindy Garnett was injured in a wreck involving Bierdie Williams, who was driving a car Williams rented in Georgia from WRP Enterprises and Thrifty Car Rental (hereinafter collectively "Thrifty"). When renting the car Williams purchased an additional million dollar insurance policy, which Thrifty admitted it was not authorized to sell. Garnett brought a declaratory judgment action against Thrifty and Philadelphia Insurance Company to determine what coverage the renter, Williams, had at the time of the accident.

Thrifty had contracted with Philadelphia for insurance on the vehicles it rented. This contract contained two levels of liability: (1) the minimum coverage that provided $15,000 per person and $30,000 per accident; and (2) a higher rate of coverage that provided $100,000 per person and $300,000 per accident. The circuit court granted Thrifty's motion for summary judgment and held that Philadelphia was contractually obligated to provide the

$100,000/$300,000 coverage. The Court of Appeals affirmed. Philadelphia petitioned for certiorari, which this Court granted.

LAW/ANALYSIS

Preliminarily we note that this dispute does not concern whether Williams is entitled to the higher coverage, for Thrifty conceded up to $1,000,000 worth of coverage is available to Williams, and hence Garnett. The dispute before us is limited to determining whether Thrifty may invoke its policy with Philadelphia to make Philadelphia the responsible insurer for $100,000 to $300,000 of the $1,000,000 policy. We also note that the unchallenged findings in the underlying proceedings render Georgia law as controlling. *See Dreher v. Dreher*, 370 S.C. 75, 78 n.1, 634 S.E.2d 646, 647 n.1 (2006) (holding an unchallenged ruling becomes law of the case). Therefore, the application of Georgia law is the law of the case.

We must examine the contracts between Williams and Thrifty *and* Philadelphia and Thrifty to determine if Philadelphia's higher rate of coverage was triggered. For the reasons set forth below, we conclude that the unambiguous terms of the respective policies precludes application of the Philadelphia policy.

"As is true with all contracts, unambiguous terms in an insurance policy require no construction, and their plain meaning will be given full effect, regardless of whether they might be of benefit to the insurer, or be of detriment to an insured." *Payne v. Twiggs County Sch. Dist.*, 496 S.E.2d 690, 691-92 (Ga. 1998). "While an ambiguous insurance contract will be liberally construed in favor of the insured, one which when construed reasonably and in its entirety, unambiguously and lawfully limits the insurer's liability, cannot be expanded beyond what is fairly within its plain terms." *Hawkins Iron & Metal Co., Inc. v. Continental Ins. Co.*, 196 S.E.2d 903, 904 (Ga. Ct. App. 1973); *see also* Ga. Code Ann. § 13-2-2 (Supp. 2007) (outlining Georgia's contract interpretation rules).

The contract between Thrifty and Philadelphia (hereinafter Philadelphia contract) delineated two separate coverage rates in the policy's schedule of coverages located in the Dual Interest Endorsement:

> When the Insured's *rental contract provides the renter with minimum state financial responsibility limits*, the following limits of liability are applicable to this policy:
>
> | | |
> |---|---|
> | Bodily Injury Liability | \$15,000.00 each person |
> | | \$30,000.00 each accident |
> | Property Damage Liability | \$10,000.00 each accident |
>
> When the *rental contract provided the renter with limits in excess* of the minimum state financial responsibility laws, the following limits of liability are applicable to this policy:
>
> | | |
> |---|---|
> | Bodily Injury Liability | \$100,000.00 each person |
> | | \$300,000.00 each accident |
> | Property Damage Liability | \$50,000.00 each accident |

(emphasis added).[1] Accordingly, coverage pursuant to the Philadelphia contract exists only when the rental contract provided the coverage. We must turn to the contract between Thrifty and Williams (hereinafter the rental contract) to determine if "the rental contract provided the renter with limits in excess of the minimum state financial responsibility laws."

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[1] Admittedly, Philadelphia referenced an affidavit in support of its contention that the \$100,000/\$300,000 policy limits were intended to apply to corporate rentals only; however, this affidavit is properly excluded by the parol evidence rule and this Court need not consider this information. *See* Ga. Code Ann. § 13-2-2(1) ("Parol evidence is inadmissible to add to, take from, or vary a written contract."). This is of no moment, for Thrifty concedes that it was not authorized to issue the higher policy coverage to the renter Williams.

The rental contract allowed the renter to purchase an optional, additional insurance policy. Section 10(A)2 of the rental contract provided the option to purchase a separate, supplemental liability insurance policy:

> SLI [supplemental liability insurance] provides Me with *a separate policy* providing excess coverage against such claims for the difference between the Primary Protection and a maximum combined single limit of $1,000,000 (U.S.) per occurrence for bodily injury, including death and property damage, for other than the Car while the Car is on rent to Me.

(emphasis added). Williams purchased this additional policy; thereby, Williams paid an additional premium to Thrifty to purchase the supplemental coverage through a *separate* policy.

Both these contracts, the rental contract and the Philadelphia contract, are unambiguous. *Smith v. Standard Oil Co.*, 180 S.E.2d 691, 692 (Ga. 1971) ("[The] parol evidence rule [states] that a valid written contract, which is complete, and the terms of which are not ambiguous, can not be contradicted, added to, altered, or varied by parol agreements."). We hold, through a plain reading of these contracts in concert with each other, Philadelphia's higher policy limits of $100,000/$300,000 are inapplicable to this case. For Philadelphia's higher policy limits to be triggered, the rental contract itself must provide the excess coverage. Here, the rental contract makes no such provision. Williams obtains excess coverage only through a separate, additional contract. In giving meaning to the clear terms of these contracts, we are not persuaded by the argument that the rental agreement "was the mechanism by which Thrifty became obligated to provide additional coverage." *Garnett v. WRP Enterprises, Inc.*, 368 S.C. 549, 556, 630 S.E.2d 44, 47 (Ct. App. 2006).

We find no merit in Thrifty's contention that an exclusive focus on the Philadelphia contract (to the exclusion of the rental contract) is appropriate and yields a different result. We must examine the terms of the Philadelphia contract to ascertain what Thrifty and Philadelphia agreed to. Thrifty and Philadelphia agreed in unmistakable terms that Philadelphia's coverage was

applicable only when the rental contract provided the coverage. Thus, the coverage question before us requires that we examine the Philadelphia contract *and* the rental contract. Because the rental contract provides that Williams purchased the excess coverage through a *separate* policy outside the rental contract, the excess limits are not provided by the Philadelphia contract.

CONCLUSION

The Court of Appeals erred in affirming the grant of summary judgment finding the Philadelphia contract provided the excess coverage to Williams. Reviewing these unambiguous contracts in concert with each other, we hold Philadelphia's higher coverage rate of $100,000/$300,000 was not implicated. Therefore, the judgment of the Court of Appeals and the trial court is

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Johnny McMillan, Jimmie Griner, and Hughsie Trowell, Respondents,

v.

South Carolina Department of Agriculture, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Hampton County
Luke N. Brown, Jr., Special Referee

Opinion No. 26567
Heard October 21, 2008 – Filed November 24, 2008

REVERSED

Andrew F. Lindemann and William H. Davidson, II, both of Davidson Morrison & Lindemann, of Columbia, for Petitioner.

John E. Parker and Ronnie L. Crosby, both of Peters, Murdaugh, Parker, Eltzroth & Detrick, of Hampton, for Respondents.

PER CURIAM: We granted certiorari to review a Court of Appeals decision which upheld an order of a special referee granting respondents a recovery from the Warehouse Receipts Guaranty Fund (the Fund) and awarding them attorneys fees.[1] McMillan v. S.C. Dep't of Agric., 364 S.C. 60, 611 S.E.2d 323 (Ct. App. 2005). Petitioner South Carolina Department of Agriculture (SCDA), the Fund's administrator, contends the Fund is not liable to respondents. We agree and reverse.

FACTS

Respondents, cotton farmers, brokered their cotton to Sea Island Trading Company (Sea Island). Their cotton was stored in the Hampton County Warehouse (HCW). Both HCW and Sea Island were owned by David Prosser. Respondents testified that they received a 52¢/lb advance from Sea Island on the cotton Sea Island was to broker for them. Pursuant to their brokerage agreements, they were to tell Sea Island when to sell the cotton, and depending on the price obtained on the sale date, Sea Island would either pay them additional money, or if the cotton sold for less than 52¢/lb, then they would owe Sea Island money.

At some point Sea Island sold respondents' cotton, apparently without their consent. While the cotton remained stored at HCW, and before respondents had received any additional funds from Sea Island, Sea Island, HCW, and Prosser filed bankruptcy. After the bankruptcies, respondents sought to recover from the Fund. SCDA denied the claim, and respondents brought this circuit court action against SCDA.

ISSUE

> Whether respondents are entitled to a recovery from the Fund?

[1] The Court of Appeals reversed that part of the special referee's order awarding respondents prejudgment interest, and respondents did not challenge that ruling by way of a petition for writ of certiorari.

ANALYSIS

Respondents have conceded that the Court of Appeals went too far in relying upon Prosser's role as a principal in both Sea Island and HCW to hold that the warehouse and the brokerage are "essentially the same entity." Moreover, they now agree that they cannot rely on that part of S.C. Code Ann. § 39-22-200 (Supp. 2007), which requires an affidavit under certain circumstances not present here. At oral argument, respondents admitted that they are not relying on any misconduct on the part of HCW, but rather on the fact the cotton they farmed[2] was located in HCW when the warehouse declared bankruptcy. In so doing, they rely on S.C. Code Ann. § 39-22-15, which provides:

> For purposes of this chapter, "loss" means any monetary loss over and beyond the amount protected by a warehouseman's bond sustained as a result of storing a commodity in a state-licensed warehouse including, but not limited to, any monetary loss over and beyond the amount protected by a warehouseman's bond sustained as a result of the warehouseman's bankruptcy, embezzlement, or fraud.

Here, respondents did not suffer "any monetary loss…as a result of storing a commodity in [HCW]," nor did they sustain any monetary loss "as a result of [HCW's] bankruptcy…." Respondents' loss was the result of Sea Island's wrongful disposition of the cotton they had produced, and its inability to pay them additional sums as a result of its bankruptcy. Respondents did not suffer a warehouse loss within the meaning of § 39-22-

[2] It is apparent from this record that Sea Island sold the vast majority of the cotton to other brokers before its bankruptcy. Although respondents contest Sea Island's right to sell the cotton, they have not alleged that the buyers were not bona fide purchasers for value.

15, and therefore were not entitled to receive money from the Fund under § 39-22-150 (Supp. 2007).

CONCLUSION

The decision of the Court of Appeals upholding the special referee's order awarding respondents a recovery from the Fund and attorneys fees is

REVERSED.

TOAL, C.J., WALLER, PLEICONES, KITTREDGE, JJ., and Acting Justice Lee S. Alford, concur.

The Supreme Court of South Carolina

In the Matter of William Gary White, III, Respondent.

ORDER

Respondent was suspended on May 12, 2008, for a period of six months. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina
November 17, 2008

The Supreme Court of South Carolina

In the Matter of William E. Walsh, Respondent.

ORDER

By order dated November 5, 2008, respondent was placed on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and Stanley T. Case, Esquire, was appointed attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Mr. Case advises that respondent has a partner who is capable of conducting his law office affairs and, therefore, he believes it is not necessary for him to continue with his appointment. See Rule 31(a), RLDE. The Commission on Lawyer Conduct agrees.

Stanley T. Case, Esquire, is hereby relieved from his appointment as attorney to protect respondent's clients' interests. Respondent shall remain on interim suspension pursuant to this Court's November 5, 2008 order.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

November 18, 2008

The Supreme Court of South Carolina

RE: Rule 25 of the South Carolina Rules of Civil Procedure (SCRCP)

ORDER

Since the adoption of the South Carolina Rules of Civil Procedure, Rule 25(c), SCRCP, has included a reference to Rule 25(b)(1). This reference is a scrivener's error since Rule 25 does not contain a subsection (b)(1). Further, it is clear from the rule, the notes to the rule and the equivalent federal rule at the time that the reference was intended to be to Rule 25(a)(1).

Accordingly, Rule 25(c), SCRCP, is amended to replace the phrase "Rule 25(b)(1)" with the phrase "Rule 25(a)(1)." This change shall be effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Pleicones, J., not participating.

Columbia, South Carolina

November 20, 2008

The Supreme Court of South Carolina

In re: Amendments to the South Carolina Appellate Court Rules

ORDER

The Chief Justice's Commission on the Profession has proposed amending Rule 403, South Carolina Appellate Court Rules, to allow a law student to obtain one Rule 403 trial experience by participating in a judicial observation and experience program approved by the Commission on the Profession. The law student must have completed at least one year of law school prior to participating in the judicial experience and observation program. Additionally, the student must participate in the program for a minimum of two weeks.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Rule 403, South Carolina Appellate Court Rules, as set forth below. The amendment is effective immediately.

RULE 403
TRIAL EXPERIENCES

. . .

(b) Trial Experiences Defined. A trial experience is defined as the:

(1) actual participation in an entire contested testimonial-type trial or hearing if the attorney is accompanied by an attorney whose trial experiences have been approved under this rule or who is exempt from this rule, and the other attorney is present throughout the hearing or trial;

(2) observation of an entire contested testimonial-type trial or hearing; or

(3) participation in a judicial observation and experience program approved by the Chief Justice's Commission on the Profession, provided the student participates in the program for a minimum of two weeks.

. . .

(d) When Trial Experiences May be Completed.

(1) Rule 403(b)(1) and (2) trial experiences may be completed any time after the completion of one-half (½) of the credit hours needed for law school graduation.

(2) Rule 403(b)(3) trial experiences, involving participation in a judicial observation and experience program approved by the Chief Justice's Commission on the Profession, may be completed after a law student has completed one year of law school. The supervising judge may sign the certificate giving credit for the trial experience upon completion of the program.

. . . .

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Pleicones, J., not participating.

Columbia, South Carolina
November 21, 2008

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Samantha Gauld,	**Appellant,**

v.

O'Shaugnessy Realty Company d/b/a Prudential Carolina Real Estate, Chip Allen, Julie Lynch, and Raymond Harris,	**Defendants,**
Of whom O'Shaugnessy Realty Company d/b/a Prudential Carolina Real Estate, Chip Allen, and Julie Lynch are the,	**Respondents.**

Appeal from Dorchester County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 4455
Submitted November 5, 2008 – Filed November 14, 2008

AFFIRMED

R. Clenten Campbell, of Walterboro and Jonathan F. Krell and Alan Toporek, both of Charleston, for Appellant.

Michael Scarafile, of North Charleston and Michael Scardato, of Charleston, for Respondents.

ANDERSON, J.: Samantha Gauld (Gauld) appeals the summary judgment granted in favor of Respondents on her claims for breach of contract, breach of contract with a fraudulent act, breach of fiduciary duty, negligence, negligent misrepresentation, and violation of the South Carolina Unfair Trade Practices Act. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

In this case arising from Samantha Gauld's purchase of 102 Lucretia Lane in Summerville, she alleged breach of contract, breach of contract accompanied by a fraudulent act, breach of fiduciary duty, negligence, violation of the South Carolina Unfair Trade Practices Act, and negligent misrepresentation against her real estate agent, Julie Lynch (Lynch); the agent of the seller, Chip Allen (Allen); and the employer for both, O'Shaugnessy Realty Company d/b/a Prudential Carolina Real Estate (Prudential).

At the hearing for the defendants' motion for summary judgment, Gauld agreed to dismiss the breach of contract claim against Allen. The circuit court expounded in its order, "there is no admissible or credible evidence as to the existence or amount of any alleged damage and, as such, summary judgment is appropriate as to all Defendants and all causes of action."

Over a fifteen year period preceding this action, Gauld purchased, refurbished and resold numerous homes across the country. In fall of 2002, while living in Maine, Gauld became interested in the Charleston market. After deciding Charleston was beyond her budget, her search expanded to

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

include the Summerville area. Ideally, she sought a historic property suitable as a bed and breakfast. If real estate with these characteristics could not be found, Gauld had a "Plan B" which entailed "a short term investment that I expected to make a big profit on in a very short period of time while we continued to look for a historic property."

Gauld made trips from Maine to South Carolina in 2002, 2003, and 2004, and she enlisted the services of Lynch, a real estate agent with Prudential's Mount Pleasant office. Gauld and her husband routinely reviewed realty websites and discovered 102 Lucretia Lane in the Tea Farm subdivision. The owner had relocated out of state and hired Allen, an agent with Prudential's Summerville office, to sell the home.

Gauld offered to buy the residence "as is" for $400,000, but made the deal contingent upon her satisfaction with a home inspection and an appraisal at or above the purchase price. After the home inspection and an appraisal valuing the home at $420,000, Gauld accepted the property "as is" and closed in May 2004. She and her husband moved in and made substantial repairs. Gauld testified that, within a week of closing, she was approached by a landscaper asking to cut her lawn. Through their conversation, she became aware of the proposed extension of Phase III of the Berlin G. Myers Parkway along the Sawmill Branch, three hundred feet behind the home. According to Allen's deposition, Phase III has been discussed over the last thirty-five years with citizens and environmental attorneys resisting its construction. Phases I and II were completed years ago. Approximately six months after the closing on 102 Lucretia Lane, a Dorchester County tax referendum passed providing potential funds for road projects. In Allen's estimation, this event made the construction of the road a "probability."

Multiple appraisals were conducted on 102 Lucretia Lane valuing it at $570,000 in April 2005, $605,000 in May 2005, and $650,000 in January 2006. On January 4, 2005, Gauld put the property up for sale with an asking price of $650,000, which she later increased to $660,000. In June 2005, the house was advertised at $660,000, and a listing in the record, dated July 7, 2006, features a price of $787,500. When asked why she listed the home at more than its appraisal, Gauld explained:

A: Again, I'm not a realtor, but usually when you're selling real estate, you don't put the price you want. You add a little on top. No one is ever going to offer you what you're asking, that I'm aware of. Secondly, there was some personal property conveyed, and that value was not reflected in here. I, also, in following the local comps, was aware that land right in Tea Farm was selling for - - like, a cluster lot was selling for 200,000, and my opinion, my lot, a portion of the price was low in here. I'm not an expert, but to me it seemed a little low on the golf course. I have great views. That's just my personal opinion. That means nothing. I'm not an appraiser.

Although Gauld's deposition is difficult to follow, it indicates she received offers of $650,000, $629,500, and $665,000. Additionally, she averred to having been offered $630,000 in a cash deal. In her deposition, Gauld was asked about the home's worth:

Q: [Y]ou've listed it more than what it appraised for throughout the whole thing. You keep listing it at higher [than] the appraisal when you know that an appraisal is going to require it be reduced?

A: Maybe, maybe not. I don't know that.

Q: Have you examined—this property now as I understand it, in your estimation, what should it sell for?

A: Well, there's two answers to that question. There's what it should be worth without the parkway. And if I were to buy into the theory that not only does the parkway not negatively impact this property and yet it's actually a positive selling point, and if you look at the comps currently in Tea Farm, there's a property listed on East Johnson Street at $305 a square foot. There's a property that just sold right behind mine at 160 a square foot. And say I hypothetically accept that my property is not superior

> to that on East Johnson at 305 a square, yet I believe it's definitely superior to the property that just sold on East Shephard at 160 a square foot, if you cut that down the middle, my property without the parkway will be would over a million dollars, if you do the math. Now, because of the parkway, I would never get anywhere near that amount of money.

Jeffery Wyman, Gauld's expert witness, opined the house was worth a maximum of $650,000. Wyman was asked about the increase in property values in the neighborhood:

> Q: Okay. Do you have an idea of the average annual appreciation for Tea Farm and the Miler Country Club area for the last five years?
>
> A: I didn't do an appreciation study, per se. But if we look at sales and resales of houses—for example, the Gauld house, which is the subject of this, she purchased at 400,000 approximately two years ago and at least got an offer of 650 to 665. So you're talking about 50 percent over two years—45 percent. So it's probably in the neighborhood of any where from 15 to 20 percent average. But, again, the latest statistics I saw show the prices going down, people reducing prices to move property.

When shown the listing for Gauld's first attempt to sell the house, Wyman stated:

> A: This is 1-4-05. Okay, this is a listing, she's asking $660,000, which is about six months, more or less, after she purchased it. . . . She listed it in January for apparently $660,000.
>
> Q: And as far as you're—within six months of a sale and appraisal, a sale at 400,000 and an appraisal at 420, in your opinion, is that a realistic listing price?

A: Well, if we made the assumption that the 420 was the market value, my assumption, this would be rather substantial—to me, it would be overpriced at that point.

Q: And that's just based upon assuming that it was 420?

A: Right. Again, I didn't do an appraisal. I didn't go back and look at the market at that time.

Q: Are you aware of any improvements or changes that she made in the property?

A: She—when I interviewed her, she said that she made, I believe $50,000 worth of repairs, to include the pool and—I don't remember all of them, but she made—she alluded to me that she made approximately $50,000 worth of repairs.

Q: Even with the 50,000, and if there are repairs on there, is that still high?

A: Again, I'm not trying to evade your question, but I don't know what all the repairs were. I don't know what the state of the house was when she bought it. Obviously she felt it was worth 400,000, and some appraiser felt like it was worth 420. Now, you can do a lot of cosmetic work for $50,000. And cosmetic work, a lot of times people buy the sizzle. They buy the—but I don't know that it would get to this level.

Q: This 660, you don't think that—

A: Right, it would be a stretch.

Wyman was not asked to appraise other property along the proposed parkway nor conduct appraisals considering noise impact or the value of the 102 Lucretia Lane with or without the parkway in place:

> Q: [M]y question was, you were not asked to give a valuation [of what the property was worth with the road or without the road]?
>
> A: No, I didn't quantify any amount. I'm not sure you could. By making that answer, I'm not saying that there isn't a law of diminution in value. I'm just not sure how you quantify it. We like to have comparative sales, but usually on high-end properties like that, you've got noise attenuation devices such as sound walls and things like that.

Allen answered questions concerning his method of valuing homes. At his deposition, Allen was asked whether he currently had any homes listed at a price he considered to be in excess of ten percent of their actual worth. In this context, a discussion arose concerning 106 E. Johnston, the Tea Farm home with the higher square footage price Gauld cited in deriving her valuation of her home. The property had a current list price of $1.1 million, but in Allen's opinion is was likely worth $950,000.

He explained 106 E. Johnston was built in the 1950s, featured a pool, pool house, an additional 1000 feet of unfinished space, a two-acre lot, exceptional landscaping with two-hundred year old live oaks, and was completely remodeled in 1994 by three professional interior designers. Allen called 106 E. Johnston "a very unique property," "an extraordinary property," and "probably one of the three top houses in the whole Summerville area." He based his estimated value of $950,000 in part on historic properties in Summerville because he believed the home was "more in that category than a typical subdivision house, which most of the houses in the Tea Farm are . . . ."

Later in the deposition, Allen was asked his opinion of a fair listing price for 102 Lucretia Lane. He replied:

> A: I would say that—it's hard to tell without looking at it, and I haven't seen—I understand that she's done some improvements to it. But not having seen what the

improvements are, I can give you a range, but you know, I would—I would say a range might be between five and a quarter and six, somewhere in that range.

Q: Okay. If you'll give me second, I'll pull out my calculator. I just want to get a general idea. That apparently will take forever. Hang one second here.

My client's house is roughly 4600 square feet; does that sound about right?

. . .

A: Or 45.

Q: Yeah, 45. On the high end of 600,000, and I know that I'm not—I mean, obviously you're just giving me some ball park numbers—that's about $133.00 a square foot—

A: Uh-huh.

Q: —for that property. Are the sales inside Tea Farm subdivision, is that what the comparable properties are doing, 133 a square foot?

A: I haven't seen a look at an analysis recently so I don't know what they are. It's—

Q: Does that sound low, or does that sound high?

A: It sounds about right. Sounds about right to me.

Q: The property that we discussed earlier on Johnston Street, what did you say that square footage was?

A: Finished and heated square footage, it's 4000 because if you count the poolhouse, which is heated, cooled, and it's got a bathroom, so a full bath.

Q: Okay. And if we use the ten percent less number of 950,000, that's $237.00 a square foot.

A: Yeah. I'm telling you that is out of the box. That is an out of the box listing, and you just cannot compare an out-of-the-box listing with something that is more in the box, and 102 Lucretia's in the box. If you'd take a look at the house, 300 Elizabeth, 6000 square feet, just sold for $650,000.00, which is less that 110 a square foot. So, I mean, some—some things are just out of the box and—if you look at East Johnston and put that up there, you're talking an apple and an orange or maybe an apple and a grapefruit.

Q: Do homes on Lucretia Lane, to your knowledge, again, do they sell for more than 133 a square foot? I mean, have there been some comparable sales back there? I know you haven't recently, but you know the market pretty good.

A: Yeah. As far as whether they have sold for over 133 a square foot?

Q: Yes, sir.

A: I'm not real sure. I don't think—I don't really think they have been sold for over 133 a square foot on Lucretia. I could check my records for you.

Despite Allen's insistence that 106 E. Johnston was in a different class than the 4500 square foot 102 Lucretia Lane, Gauld entered into the record a document titled "Fair Market Analysis of 102 Lucretia Lane" that relied in part on the list price of the $1.1 million home. Specifically, in her calculation, Gauld first used the $158.63 per square foot selling price of a nearby home and multiplied this number by 4500 to get $713,835. She then

multiplied the $305 per square foot list price of 106 E. Johnson by 4500 to get $1,372,500. By adding $713,835 to $1,372,500, she produced a sum of $2,086,335 which she divided by 4500. This division produced the number 231.81 which she multiplied by 4500 to derive $1,043,145. Gauld's analysis thus concludes with "a Fair Market Value of $1,043,145 for 102 Lucretia Lane **according to Chip Allen**." (emphasis added). Gauld contends she has suffered diminution in value of $393,145, the difference between her expert's $650,000 appraisal and her "Fair Market Appraisal" of $1,043,145.

STANDARD OF REVIEW

"On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to appellant, the non-moving party below." Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 395, 596 S.E.2d 42, 45 (2004) (citing Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E2d 447 (1976)); Koon v. Fares, 379 S.C. 150, __, 666 S.E.2d 230, 233 (2008); Catawba Indian Tribe v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007); Platt v. CSX Transp., Inc., 379 S.C. 249, __, 665 S.E.2d 631, 634 (Ct. App. 2008). The appellate court will apply the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Connor Holdings, LLC v. Cousins, 373 S.C. 81, 84, 644 S.E.2d 58, 60 (2007); Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006); Bradley v. Doe, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007), cert. granted, June 12, 2008; see also Higgins v. Med. Univ. of S.C., 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997) (a trial judge considering a motion for summary judgment must consider all documents and evidence within the record, including pleadings, depositions, answers to interrogatories, admissions on file, and affidavits).

"If triable issues exist, those issues must go to the jury." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005); Mulherin-Howell v. Cobb, 362 S.C. 588, 608 S.E.2d 587 (Ct. App. 2005). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most

favorable to the non-moving party. Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485 (2005); Med. Univ. of S.C. v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Hackworth v. Greenville County, 371 S.C. 99, 637 S.E.2d 320 (Ct. App. 2006); Rife v. Hitachi Constr. Mach. Co., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005).

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." Hooper v. Ebenezer Senior Svcs. & Rehabilitation Ctr., 377 S.C. 217, 226-27, 659 S.E.2d 213, 217 (Ct. App. 2008) (citing Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003)); Moore v. Weinberg, 373 S.C. 209, 217, 644 S.E.2d 740, 744 (Ct. App. 2007); Bennett v. Investors Title Ins. Co., 370 S.C. 578, 589, 635 S.E.2d 649, 654 (Ct. App. 2006). Summary judgment is a drastic remedy and should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. Hooper, 377 S.C. at 277, 659 S.E.2d at 217; Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004). Summary judgment is inappropriate where further inquiry into the facts of the case is necessary to clarify the application of law. Gadson v. Hembree, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005); Wogan, 366 S.C. at 591, 623 S.E.2d at 112; Montgomery v. CSX Transp., Inc., 362 S.C. 529, 542, 608 S.E.2d 440, 447 (Ct. App. 2004).

"The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." Wogan v. Kunze, 366 S.C. 583, 591, 623 S.E.2d 107, 112 (Ct. App. 2005) (citing McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004)); see also Singleton v. Sherer, 377 S.C. 185, 197, 659 S.E.2d 196, 203 (Ct. App. 2008). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." Moore, 373 S.C. at 217, 644 S.E.2d at 744; Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). The nonmoving party must present specific facts showing a genuine issue for trial. SSI Med. Srvcs., Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d

789, 792 (1990); Moore, 373 S.C. at 217, 644 S.E.2d at 744; Rife, 363 S.C. at 214, 609 S.E.2d at 568.

" 'The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial.' " Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 579, 556 S.E.2d 732, 736 (Ct. App. 2001) (citing Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, and Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999)); Baughman v. AT&T, 306 S.C. 101, 410 S.E.2d 537 (1991). "A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Id.

LAW/ANALYSIS

As a general rule, the evidence should allow the court or jury to determine the amount of damages with reasonable certainty or accuracy. Whisenant v. James Island Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981); Piggy Park Enters. v. Schofield, 251 S.C. 385, 391-92, 162 S.E.2d 705, 708 (1968). "Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." Piggy Park, 251 S.C. at 391, 162 S.E.2d at 708; Baughman, 306 S.C. at 117, 410 S.E.2d at 546; Gray v. Southern Facilities, Inc., 256 S.C. 558, 570-71, 183 S.E.2d 438, 444 (1971).

> While proof, with mathematical certainty, of the amount of loss or damage is not required, in order for damages to be recoverable the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess, or speculation.

Baughman, 306 S.C. at 116, 410 S.E.2d at 546; see also Whisenant, 277 S.C. at 13, 281 S.E.2d at 796; Armstrong v. Collins, 366 S.C. 204, 225-26, 621 S.E.2d 368, 379 (Ct. App. 2005); Proctor v. Dep't of Health & Envt'l Control, 368 S.C. 279, 317, 628 S.E.2d 496, 516 (Ct. App. 2006). " '[I]t had

been held sufficient if a reasonable basis of computation is afforded, even though the result may be only approximate, or to adduce evidence which is the best the case is susceptible of under the circumstances and which will permit a reasonably close estimate of the loss.' " Proctor, 368 S.C. at 317, 628 S.E.2d at 517 (quoting 25A C.J.S. Damages §162(2)).

"As a general principle, a landowner who is familiar with her property and its value, is allowed to give her estimate as to the value of the land and damage thereto, even though she is not an expert." Bowers v. Bowers, 349 S.C. 85, 92, 561 S.E.2d 610, 614 (Ct. App. 2002) (citing Seaboard Coast Line R.R. v. Harrelson, 262 S.C. 43, 202 S.E.2d 4 (1974)); see also Waites v. S.C. Windstorm & Hail Underwriting Assoc., 279 S.C. 362, 366, 307 S.E.2d 223, 225 (1983); Lewis v. S.C. State Hwy. Dep't, 278 S.C. 170, 173, 293 S.E.2d 4, 5 (1982); Whisenant at id.; S.C. State Highway Dep't v. Wilson, 254 S.C. 360, 175 S.E.2d 391 (1970); Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997); Cooper v. Cooper, 289 S.C. 377, 346 S.E.2d 326 (Ct. App. 1986).

In Rogers v. Rogers, 280 S.C. 205, 311 S.E.2d 743 (Ct. App. 1984), this court ruled a property owner was competent to estimate his property's value as a matter of law. Id. at 209, 311 S.E.2d 746. However:

> Where it appears that the owner does not know the value of property, there is a division in the authorities. Some courts hold that his opinion as to value is not admissible, while others have concluded that such lack of knowledge goes to the weight, but not to the competency, of his testimony.
>
> Any exception to the general rule of admissibility should be, and apparently has been, applied only in extreme cases. Unless the landowner's want of qualification is so complete that his testimony is entirely worthless, it is for the jury to assess the value of his opinion.

Harrelson, 262 S.C. at 46, 202 S.E.2d at 5 (citations omitted); Mali v. Odom, 295 S.C. 78, 83, 367 S.E.2d 166, 169 (Ct. App. 1988).

"Bald allegations of diminution in property value are insufficient to create a genuine issue of fact regarding damages absent any competent evidence showing the existence, amount, or causation of damages." Clark v. Greenville County, 313 S.C. 205, 208, 437 S.E.2d 117, 118 (1993) (citing Baughman, 306 S.C. 101, 410 S.E.2d 537). In Baughman, property owners alleged, inter alia, their property was damaged by pollution from a refinery. The plaintiffs simply asserted in their answers and depositions that pollution had caused diminution in their property values. In agreeing the evidence amounted to "bald allegations," our supreme court averred:

> There is a total absence of any competent evidence showing the existence or the amount of damage to property, or that any such damage was proximately caused by the acts of [respondents]. Accordingly, we affirm trial court's grant of partial summary judgment on Plaintiffs' claims for property damages.

Id. at 117, 410 S.E.2d at 546.

In an appeal from a Family Court decision, this court refused the wife's valuation of a marital home that she admitted was " 'a guesstimate based on just some conversation I had with Prudential Company. But, they would not, again, give me a firm answer.' " Bowers, 349 S.C. at 92, 561 S.E.2d at 614. Her value was determined to be based not on her personal knowledge regarding the home's true value but was "bottomed and premised entirely upon the unsupported and unsubstantiated advice of an unknown third party." Id. at 93, 561 S.E.2d at 614. Consequently, the wife's valuation was speculative and not supported by evidence.

In contrariety, a property owner's opinion of his commercial property was within the bounds of proper testimony when it was based on comparable land. Hawkins v. Greenwood Development Corp., 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997). Hawkins initiated an action for breach of contract after an intersection that was to be located on his land was rendered impossible by road formation. He testified land at the corners of a nearby major intersection sold for $450,000 per acre, thus the land on each corner of the proposed intersection on his property would be worth $2,000,000. Id. at 597, 493 S.E.2d at 881. Unlike Gauld, Hawkins "based his opinion on the

damages sustained to his property on his knowledge of **similar** nearby parcels." Id. at 599, 493 S.E.2d at 882 (emphasis added). See also Hill v. City of Hanahan, 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984) (in inverse condemnation case, a property owner's testimony that she was knowledgeable about real property values in her neighborhood and believed her property to be worth $75,000 was admissible evidence).

Given Gauld's involvement with 102 Lucretia Lane and her experience in real estate, she is familiar with her property and competent to testify to its value. Nevertheless, she has offered a computation of diminution in value that is completely devoid of any rational basis. Although she argues she has "not pulled a random number out of the sky," she inexplicably anchored her proposed damages in part on the list price of dissimilar property raised by Allen in a context unrelated to either 102 Lucretia Lane or the parkway.

Gauld admitted both property values she relied upon to calculate diminution in value are based on homes which are not comparable to her own. Her reasoning that, because she considers 102 Lucretia Lane to be superior to one property and inferior to another, one can calculate her home's value without the parkway simply by manipulating the numbers and "split[ing] it down the middle" is absurdly speculative if not disingenuous. Despite her expert's admonition that he did not appraise the home considering the impact of the Phase III extension, Gauld insinuates his appraisal of $650,000 represented the home's value as affected by the prospective road. With her misplaced reliance on the sale and list prices of non-comparable properties, Gauld's attempt to avoid the appearance of making a "bald allegation" fails.

Viewing the evidence in a light most favorable to Gauld, all appraisals and offers received on 102 Lucretia Lane indicate the property appreciated after its purchase and refurbishing. There being nothing to take Gauld's diminution of value calculation out of the realm of pure conjecture, we hold the circuit court properly concluded there was no competent, admissible evidence of the existence or amount of damages, an element common to all her claims. Accordingly, we need not address Gauld's remaining issues on appeal. See Wilson v. Moseley, 327 S.C. 144, 147, 488 S.E.2d 862, 864 (1997) (holding when an appellate court affirms the circuit court's grant of

summary judgment on a dispositive ground, the appellate court need not address the remaining issues on appeal); Fuller-Ahrens P'ship v. S.C. Dep't of Highways & Pub. Transp., 311 S.C. 177, 182, 427 S.E.2d 920, 923 (Ct. App. 1993) (declining to discuss the circuit court's grant of summary judgment on additional grounds, including res judicata, where summary judgment was being affirmed for other reasons and on different grounds); Ringer v. Graham, 286 S.C. 14, 20, 331 S.E.2d 373, 377 (Ct. App. 1985) (determining discussion of remaining issues was unnecessary after reversing a directed verdict).

CONCLUSION

The circuit court's grant of summary judgment on all Gauld's claims is

AFFIRMED.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Donna F. Brailsford, Individually and as Personal Representative and Trustee under the Will of William M. Brailsford, Deceased, and Kelly T. Brailsford, an Incapacitated Person by her Guardian ad Litem, Plaintiffs,

Of Whom Donna F. Brailsford, Individually and as Personal Representative and Trustee under the Will of William M. Brailsford, Deceased is the Appellant,

v.

John F. Brailsford, Jr., Individually and as Personal Representative and Trustee, and Marjorie B. Nickel, and Elizabeth B. Davis, as Trustees, Respondents.

Appeal From Orangeburg County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 4456
Heard September 16, 2008 – Filed November 14, 2008

AFFIRMED AS MODIFIED

Adele Jeffords Pope, of Columbia, for Appellant.

Henry W. Brown, of Columbia, for Respondents.

Pope D. Johnson, III, of Columbia, for Guardian Ad Litem.

THOMAS, J.: Donna Brailsford (Donna), in her individual and representative capacities, appeals the trial court's Order Granting Summary Judgment and Dismissing Causes of Action, arguing (1) her cause of action on behalf of the estate of William M. Brailsford (William) for fraud survived William's death; and (2) in the alternative, the trial judge lacked authority to issue the Order after engaging in allegedly inappropriate ex parte communication with opposing counsel. Donna also appeals the denial of her motion to alter or amend, alleging the trial judge was without jurisdiction to issue the order after having orally recused himself. We affirm as modified.

FACTS

This appeal is from the Orangeburg County Court of Common Pleas and involves the trusts and estates of Marjorie Brailsford (Mother) and John F. Brailsford (Father). During their lives, Mother and Father created a trust, from which upon their deaths the proceeds were to be distributed to each of their five children: John Jr., William, Marjorie Nickel, Elizabeth Davis, and Florence Brailsford[1]. The amount to be distributed to each child was to be adjusted to allow for any gifts given to the respective child during the lives of Mother and Father. Both Mother and Father died in 2000. William died in

[1] Florence is incompetent suffering from cerebral palsy and blindness.

2001, survived by his widow, Donna, and an incompetent daughter, Kelly Brailsford.

John Jr., served as the personal representative of the estates of both Mother and Father. He also served as a co-trustee of the trust, along with Marjorie and Elizabeth, as well as co-guardian of the incompetent Florence.

This action was commenced by Donna, personally and in her capacity as Personal Representative of William's estate alleging ten causes of action, including an action entitled "fraud." Subsequently, Kelly was joined as a plaintiff; however, she does not join in this appeal. Initially Donna and Kelly were represented jointly by attorneys Adele Pope and Pope Johnson. However, on December 29, 2004, the trial court issued an order relieving each from joint representation and ordering Johnson to represent only Kelly and Pope to represent only Donna.

In her complaint, Donna alleges various instances of fraudulent conduct that, among other things, affected the amount of distributions made by the trust to William's estate.[2] Among these causes of action was one for fraud arising from a transaction in 1989, in which John, Jr., acquired William's 49% interest in the family owned business by allegedly concealing from him a tort claim the company had. By becoming 100% owner, John Jr. became the sole recipient of an $8 Million settlement.

Defendant moved the court for summary judgment, and on December 1, 2004, a hearing was held on this motion, at which Attorney Johnson appeared on behalf of all plaintiffs. During the hearing the trial judge orally granted summary judgment and dismissed Donna's "fraud" cause of action and other causes of action that alleged fraud or deceit against William, "whether called fraud or something else." On February 22, 2005, the trial

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[2] These causes of action included (1) Breach of Fiduciary Duty, (2) Removal of Personal Representative and Trustee, (3) Fraud, (4) Distribution of Trust (5) Accounting, (6) Constructive Trust, (7) Return of Property, (8) Conversion, (9) Tortious Interference with Expected Inheritance, and (10) Return of Ill Gotten Gain.

judge issued a written Order Granting Summary Judgment and Dismissing Causes of Action, as to fraudulent facts and circumstances relating to William Brailsford before his death, stating as follows:

> (1) the Plaintiff's third cause of action premised on Fraud is dismissed with prejudice as to all Plaintiffs to the extent this cause of action is based on facts relating to William Brailsford prior to his death. (2) As to all other causes of action, any portion thereof that is premised upon or supported by allegations or evidence generally constituting fraud and deceit, and relating to William Brailsford, are dismissed with prejudice. (3) This Order does not constitute a bar to any evidence or cause of action pertaining to facts and circumstances not meeting the general definition of fraud and deceit and unrelated to William Brailsford. [3]

In the interim, between the oral granting of summary judgment and entry of the written order, counsel for Donna alleged the trial judge engaged in inappropriate ex parte communication with opposing counsel. Based on this belief, on February 24, 2005, Donna's attorney filed a Motion to Recuse, alleging the judge to be, inter alia, biased and incapable of rendering an impartial opinion.

Subsequently on March 1, 2005, Donna filed a Motion to Alter or Amend the Judgment of the court as to the granting of summary judgment. On March 7, 2005, a hearing was held on Donna's Motion to Recuse. During the hearing the trial judge denied the accusations set forth in the motion but nonetheless stated he was recusing himself from the case.

On March 9, the trial judge issued a written denial of Donna's Motion to Alter or Amend and the next day, March 10, issued a written Order of Recusal, recusing himself from the case.

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[3] The Order did not specify which causes of action, if any, were being dismissed. Furthermore, Respondents conceded in oral argument that the Order is limited only to Donna's third cause of action for fraud.

Donna now appeals the granting of summary judgment and also alleges that it was improper for the trial judge to rule on her Motion to Alter or Amend.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this Court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a triable issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

LAW/ANALYSIS

I. Survivability of a fraud cause of action

Donna first argues that section 62-1-106 of the South Carolina Probate Code operates as a survival statute, which would allow a fraud claim to survive the death of William Brailsford. This argument was not preserved for appeal.

Generally "[a] party cannot use a motion…to alter or amend a judgment to present an issue that could have been raised prior to judgment but was not." Tallent v. South Carolina Dep't of Transp., 363 S.C. 160, 165, 609 S.E.2d 544, 546 (Ct. App. 2005); see also MailSource, LLC v. M.A. Bailey & Assocs. Inc., 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003) ("A party cannot raise an issue for the first time in a Rule 59(e), SCRCP motion which could have been raised at trial."). In the case sub judice, the argument concerning section 62-1-106 was never presented to the trial court before the filing of the Motion to Alter or Amend; therefore, it is not preserved for appeal and we decline to address it.

Donna next argues that it was error for the trial court to dismiss her "fraud" cause of action and other causes of action that were based on acts against William before his death. We disagree, but herein modify the trial court's order.

Statutory law in South Carolina provides "[c]auses of action for and in respect to…any and all injuries to the person or to personal property shall survive both to and against the personal or real representative…of a deceased person…any law or rule to the contrary not withstanding." S.C. Code Ann. § 15-5-90 (1976). South Carolina, however, has long recognized several exceptions to the survivability of a claim, including an exception for fraud. See Mattison v. Palmetto State Life Ins. Co., 197 S.C. 256, 15 S.E.2d 117 (1941) (actions for fraud or deceit are excepted from the survivability statute); Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 564-65, 564 S.E.2d 94, 97 (2002); Pamplico Bank & Trust Co. v. Prosser, 295 S.C. 621, 625, 193 S.E.2d 539, 540 (1972); Brewer v. Graydon, 233 S.C. 124, 124, 103 S.E.2d 767, 769 (1958).

In the case at hand, Donna pleads a cause of action for fraud as well as various other causes of action. Applying this State's longstanding exception to the survivability statute for fraud, as set forth in Mattison and reiterated in Ferguson, her third cause of action for fraud cannot survive William's death. We therefore hold that the trial judge properly dismissed her cause of action for fraud.

As it relates to the other causes of action, the trial judge found "all other causes of action [and] any portion thereof that is premised upon or supported by allegations or evidence generally constituting fraud and deceit, and relating to William Brailsford, are dismissed with prejudice." The trial court order made no specific ruling on which, if any, causes of actions were dismissed.[4]

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[4] We note that the survivability statue was enacted in South Carolina to alleviate the "harshness and injustice of the common-law rule that a personal right of action dies with the person." Page v. Lewis, 203 S.C. 190, 190, 26 S.E.2d 569, 570 (1943). The effect of the survivability statute is to "add to,

The fraud exception to survivability is not limited only to a cause of action titled "fraud." Ferguson, 394 S.C. at 564-65, 564 S.E.2d at 97. In Ferguson, our supreme court recognized that although Ferguson's cause of action arose under the "Dealer Act,"[5] the essence of the Defendant's alleged conduct amounted to misleading Mr. Ferguson, and concealing overcharges by either intentional deception or gross negligence. Id. The court held that because such actions fit within the ambit of fraudulent or deceptive conduct, it was insignificant what "label" the Plaintiff gave to such conduct. Id. at 565, 564 S.E.2d at 97.

Accordingly, insomuch as any of Donna's causes of action are essentially a cause of action for fraud simply disguised under a different title, such actions do not survive William's death. We, however, do not read Ferguson to go so far as to deny the admission of evidence of fraudulent conduct to support an otherwise surviving claim. Although Respondents concede that the Order speaks only to Donna's third cause of action for fraud, to the extent the Order may be interpreted to suggest that causes of

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but . . . not diminish the classes of causes of action which survive at common law." Id. Accordingly, those actions that would survive at common law are not affected by the statute. See id.

Generally, at common law, the maxim "[a]ctio personalis moritur cum persona," which denied survivability of an action ex delicto, was not applied to cases or causes of action within the jurisdiction of equity. Id.

In the case sub judice, Donna pleads, in addition to her legal causes of action, various causes of action falling under the jurisdiction of equity, including accounting and constructive trust. Respondent has conceded, and we agree, that the Order does not operate to bar causes of action in equity or other causes of action not otherwise barred by the laws of this State.

[5] South Carolina Regulation of Manufacturers, Distributors and Dealers Act. S.C. Code Ann. §§ 56-15-10 thru 56-15-130 (1976).

action which do survive William cannot be supported by *evidence* of the defendant's fraudulent and deceitful conduct, the Order is hereby modified.

II. The effect of the ex parte communication

Donna next argues that the trial judge should not have ruled on either the summary judgment motion or her motion to alter or amend after engaging in the allegedly inappropriate ex parte communication. We do not agree.[6]

The substance of this argument is that the ex parte communication created bias or prejudice on the part of the trial judge. In South Carolina, however, "[i]t is not enough for a party to allege bias; a party seeking disqualification of a judge must show some evidence of bias or prejudice." Doe v. Howe, 367 S.C. 432, 441, 626 S.E.2d 25, 28 (Ct. App. 2005) (citing Christensen v. Mikell, 324 S.C. 70, 74, 476 S.E.2d 692, 694 (1996) (internal quotations omitted)); see also Patel v. Patel, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004) ("Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal.").

Here Donna cannot demonstrate that the grant of summary judgment was affected by, or the product of, bias or prejudice. Although the ex parte communication occurred before the issuance of the final written order, any bias allegedly created by such communication had no effect on the order. This is evidenced by the fact that the written order was substantially the same as the oral order announced from the bench prior to the ex parte communication. Furthermore, because the denial of the motion to alter or amend was merely an affirmation of the proper denial of summary judgment, we also dismiss this argument as it relates to the denial of the Rule 59(e) motion.

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[6] Initially we note that Donna has failed to establish that the ex parte communication amounted to anything more than ex parte scheduling, which is specifically allowed under the Canons of Judicial Ethics. We also find it noteworthy that the trial judge denied the accusations of improper conduct no fewer than five times.

III. The effect of the oral grant of recusal

Finally, Donna argues it was error for the trial judge to rule on the motion to alter or amend after orally recusing himself from the case, i.e., the trial judge's pronouncements from the bench should have immediate, final, and binding effect. We disagree.

Under Rule 58 of the South Carolina Rules of Civil Procedure, "[e]very judgment shall be set forth in a separate document[,] [and such] judgment is effective *only when* so set forth and entered into the record." Rule 58 SCRCP. (emphasis added). The South Carolina Supreme Court has held that under Rule 58 "the written order is the trial judge's final order" and until entry of the written order the judge is free to change his mind. Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001); First Union Nat'l Bank v. Hitman, Inc., 306 S.C. 327, 411 S.E.2d 681 (Ct. App. 1991), aff'd, 308 S.C. 421, 418 S.E.2d 545 (1992). An oral order of the court is not final and binding until reduced to writing, signed by the judge, and delivered for recordation. Case v. Case, 243 S.C. 447, 134 S.E.2d 394 (1964).

More specifically, this Court has held that an oral order of recusal is not binding on the court; rather, the order is not effective until and unless so entered in writing. See Simpson v. Simpson, 377 S.C. 519, 524, 660 S.E.2d 274, 278 (Ct. App. 2008) (finding that when the trial judge orally granted a motion to recuse but later issued a written denial on the same motion, the oral order had no binding effect on the court).

Accordingly, in light of Rule 58, and Simpson, the trial judge's oral recusal in this case was not final and effective until reduced to writing and

entered of record with the clerk. Hence, because the denial of the motion to amend was entered prior to the written order of recusal, it was proper.[7]

Appellant urges this Court to adopt a rule requiring that when a trial judge is presented with a motion to recuse, he must first rule on that motion before addressing any other business between the litigants.[8] Because, however, the granting of summary judgment was proper and because the trial judge recused himself to avoid further animosity in the litigation rather than from any bona fide concerns about his impartiality, the denial of the motion to alter or amend did not inure to Donna's prejudice. Thus, while we think the better practice suggests disposition of any motion to recuse prior to the resolution of other pending matters, we do not find this case an appropriate one to consider the adoption of such a rule.[9]

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[7] We are sensitive to the fact that an oral recusal may have more significant effects on the litigants and the case as a whole, as compared to other oral orders. However, of paramount significance in the case at hand is that the trial judge found "absolutely no basis for [him] to recuse [himself]." Rather the recusal seemed to be one of courtesy to Donna's attorney, in an effort to avoid even the slightest appearance of impropriety. In the absence of a true basis for recusal affecting the denial of the motion to amend and in light of the summary judgment motion being properly granted, Donna was not prejudiced by the trial judge's decision to rule on the Rule 59(e) motion.

[8] Counsel for Donna brings to this Court's attention that both Georgia and Florida employ such a rule. Georgia has achieved this objective through statute in the Uniform Superior Court Rules. GA USCR 25.3 (1991). On the other hand Florida has developed a common law rule which achieves substantially the same purpose as the Georgia statute. Robbie v. Robbie, 726 So.2d 817, 821 (Fla. Dist. Ct. App. 1999); see Fuster-Escalona v. Witosky, 715 So.2d 1053, 1054 (Fla. Dist. Ct. App. 1998) (holding that the trial judge erred in ruling on a motion to dismiss while a motion for recusal was pending).

[9] Assuming, arguendo, this Court were to adopt the rule proposed by Donna and find that the rule was violated in this case, such an error would ultimately prove harmless. Having found the predicate summary judgment proper, to reverse the denial of the motion to amend would simply remand the issue

Accordingly, the trial judge did not err in granting summary judgment, nor was it error to deny the motion to alter or amend.

AFFIRMED AS MODIFIED.

SHORT and PIEPER, JJ., concur.

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only to be again denied based on our determination as to the summary judgment. Such an outcome is inefficient and illogical.