OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 49
November 16, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Quincy Jovan Allen, Appellant.

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

Opinion No. 26743
Heard September 15, 2009 – Filed November 16, 2009

AFFIRMED

Acting Chief Appellate Defender Robert M. Dudek, and Appellate Defender Katherine H. Hudgins, both of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor Warren B. Giese, of Columbia, for Respondent.

JUSTICE WALLER: Appellant, Quincy Jovan Allen, pleaded guilty to two counts of murder, one count of assault and battery with intent to kill (ABIK), one count of arson in the second degree, two counts of arson in the

third degree, and one count of pointing and presenting a firearm. After a sentencing hearing conducted by the trial judge,[1] Allen was sentenced to death for the murders, twenty years for ABIK, twenty-five years for arson in the second degree, ten years for each count of third degree arson, and five years for pointing and presenting a firearm. He appeals the trial court's imposition of a death sentence.

FACTS

At approximately 3:00 a.m. on July 7, 2002, Quincy Allen approached a homeless man, fifty-one year old James White, who was lying on a swinging bench in Finlay Park in downtown Columbia. Allen ordered White to stand up, and proceeded to shoot him in the shoulder. When White fell back to the bench, Allen ordered him to stand up and shot him again. According to Allen's subsequent statement to police, he had just gotten the shot-gun and he used White as a practice victim because he did not know how to shoot the gun. White survived the assault.

A few days later, on July 10, 2002, Allen met a prostitute named Dale Hall on Two Notch Road in Columbia; he took her to an isolated dead end cul-de-sac near I-77 where he shot her three times with a 12 gauge shotgun, placing the shotgun in her mouth as she pleaded for her life. After shooting her, Allen left to purchase a can of gasoline, and came back to douse Hall's body and set her on fire. He then went back to work at his job at the Texas Roadhouse Grill restaurant on Two Notch Road.

Several weeks later, on August 8, 2002, while working at the restaurant, Allen got into an argument with two sisters, Taneal and Tiffany Todd; he threatened Tiffany, who was then 12 weeks pregnant, that he was going to slap her so hard her baby would have a mark on it. Tiffany's boyfriend Brian Marquis came to the restaurant, accompanied by his friend Jedediah Harr. After a confrontation, Allen fired his shotgun into Harr's car, attempting to shoot Marquis; however, Allen missed Marquis and instead hit Harr in the right side of the head. As the car rolled downhill, Marquis

[1] S.C. Code Ann. 16-3-20(b) requires, in a capital trial, that "[i]f trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge."

jumped out and ran into a nearby convenience store, where he was hidden in the cooler by an employee. Allen left the convenience store, and went and set fire to the front porch of Marquis' home. A few hours later Allen set fire to the car of Sarah Barnes, another Texas Roadhouse employee. Harr died of the shotgun blast to his head.

The following day, Allen set fire to the car of another man, Don Bundrick, whom he apparently did not know. Later that evening, August 9, 2002, Allen went to a strip club, Platinum Plus, in Columbia, where he pointed his shotgun at a patron. Allen left South Carolina and proceeded to New York City. On his way back, while in North Carolina, Allen shot and killed two men at a convenience store in Surrey County.[2] Allen then went to Texas, where he was apprehended by law enforcement on August 14th.

Allen gave statements to police outlining the details of his crimes. He told police he began killing people because an inmate in federal prison, where Allen spent time for stealing a vehicle, had told him he could get him a job as a mafia hit man. Allen got tired of waiting and embarked on his own killing spree. Allen told police he would have killed more people if he had had a handgun, but his prior record prohibited him from obtaining a handgun.

ISSUES

1. Did the sentencing court commit reversible error in commenting on the deterrent effect a sentence of death might have on abusive mothers?

2. Did the sentencing court commit reversible error in failing to designate a finding of a specific statutory aggravating circumstance?

3. Did the sentencing court err in failing to find S.C. Code Ann. 16-3-20(b) unconstitutional as violating the Eighth and Fourteenth Amendments?

[2] Allen pleaded guilty to those murders in 2004 and was sentenced to life in prison.

1. DETERRENT EFFECT COMMENTS

At his guilty plea, Allen admitted to the facts as recited by the solicitor, essentially those set out above. At sentencing, the state was required to establish its aggravating circumstances, and Allen put up a case in mitigation of punishment. At the conclusion of the sentencing hearing, Judge Cooper stated:

> In considering the outcome of this sentencing hearing I have tried to understand the unique forces and events which have put Mr. Allen in the situation in which he finds himself today. I have considered his upbringing so masterfully chronicled by Deborah Grey.[3] I've considered his list of mental illnesses. . .
> I've considered the facts of the various murders that Mr. Allen does not deny. I've considered the impact to James White, to Dale Hall's family and to the Harr family. I've also considered the effect of this trial on Quincy Allen's two younger brothers who have sat through the majority of this trial. And I have considered the passionate arguments of counsel on both sides of this case. . . .

The trial court gave a lengthy discourse as to the reasons he felt a death sentence was warranted under the circumstances of this case. In concluding the death sentence was appropriate, the judge stated:

> So I come to the consideration of the factors which should control a death penalty sentence: retribution and deterrence. Retribution in a sense is the easiest. Considering the fear Mr. Allen struck into the heart of James White and the subsequent shooting of James White for practice, I find retribution appropriate.
> Considering the fear Mr. Allen struck into the heart of Dale Hall, the absolute depravity of her murder, and the subsequent burning of her body, I find retribution appropriate.

[3] Ms. Grey is a licensed clinical social worker who performed a bio/psycho/social history and a risk assessment of his mental illness factors for the defense.

> Considering the callous killing of Jedediah Harr and the subsequent stalking of Brian Marquis for the purpose of killing him, I find retribution appropriate.
>
> And how could Quincy Allen's death serve as a deterrent to others, to the abused and neglected young people of this community? Maybe it will make some young man or some young girl stop and think about the results of destructive behavior.
>
> **Hopefully, hopefully, it will make some young mother, single or otherwise, think about the love and care that children need, no matter how tough the circumstances, and would deter that mother from making the same horrible choices made with Quincy Allen. I would hope that this sentence has at least that deterrent effect**, but we may never know.
>
> I find that, pursuant to Section 16-3-20 of the [S.C. Code], the death penalty is warranted under the evidence in this case, and is not the result of passion, prejudice or any other factor.

(emphasis supplied). Allen now contends the highlighted language above demonstrates that the trial court imposed a sentence of death to serve as a deterrent to abusive parents and constitutes an arbitrary factor in violation of the Eighth Amendment. We disagree.

It is clear from reading the entirety of the trial court's sentencing order, along with the written sentencing report, that the death sentence was based upon the characteristics of Allen and the circumstances of the crime, such that the penalty is warranted; accordingly, we find no reversible error.

Evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982). A death sentence resulting from passion, prejudice, or any other arbitrary factor constitutes an Eighth Amendment violation. U.S. Const. Amend. 8. See also S.C. Code Ann. § 16-3-25(C) (1) (requiring a death sentence be free from the influence of any arbitrary factor); Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); Beck v. Alabama, 447 U.S. 625, (1980).

The justifications supporting imposition of the death penalty are retribution and deterrence. See Gregg v. Georgia, 428 U.S. 153, 183 (1976). With respect to deterrence, i.e., the interest in preventing capital crimes by prospective offenders, "it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation." Enmund v. Florida, 458 U.S. 782, 799 (1982). Although evidence concerning the effectiveness and propriety of capital punishment as an instrument of deterrence is irrelevant and should not be admitted, State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984), *cert. denied*, 467 U.S. 1265, 104 S.Ct. 3560, 82 L.Ed.2d 862 (1984), general deterrence arguments are admissible in the penalty phase of a capital trial and do not inject an arbitrary factor into the jury's consideration. State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003); State v. Shafer, 340 S.C. 291, 531 S.E.2d 524 (2000), *overruled on other grounds* 532 U.S. 36(2001).

We do not find the trial court's imposition of the death sentence in this case to be the result of any arbitrary factor. In reading the entirety of the court's colloquy, it is clear that the sentence was premised primarily on retribution to this particular defendant, and the fact that the murders were deliberate, premeditated and cruel. The trial court commented on the way Allen put a shotgun to Dale Hall's mouth and pulled the trigger, then went to the gas station, bought gas, and went back and burned her body. He commented on the fact that Allen changed the load in his shotgun to hollow point slugs to make it more destructive. He commented on the fact that it was Allen's intention to become a serial killer in order to garner respect. He commented on the fact that Allen told people he would kill again if given the opportunity. He commented on the fact that Allen then left the state and went and committed more murders in North Carolina.

Notwithstanding the trial court's isolated comment concerning deterrence to abusive parents, it is patent the sentence does not rest on this ground and was not imposed due to an arbitrary factor. Accordingly, the sentence is affirmed.

2. STATUTORY AGGRAVATING FACTOR

At the conclusion of the sentencing phase, the trial court stated:

> After carefully considering all relevant facts and circumstances, including the existence of statutory aggravating circumstances as well as the claim of mitigating circumstances, this Court finds and concludes that the defendant shall be sentenced to death by electrocution or lethal injection as set forth in S.C. Code Ann. § 24-3-530.

Allen now contends the trial court's failure, in its oral ruling, to designate the **specific aggravating circumstances** warranting imposition of the death penalty requires the sentence to be vacated. We find this contention meritless.

The trial court's **written sentencing report** sets forth the following findings of aggravating circumstances:

> Victim Dale Hall: Kidnapping, Larceny with use of a deadly weapon, Physical torture, murder committed by person with prior conviction for murder
> Victim Jedediah Harr: Murder committed by person with prior conviction for murder, knowingly creating a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to more than one person.

Accordingly, Allen's contention that the trial court failed to set forth specific statutory aggravating circumstances is meritless and the sentence was imposed in compliance with S.C. Code Ann. § 16-3-20 (C). State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984), *overruled on other grounds* State v. Torrence, 317 S.C. 45, 451 S.E.2d 883 (1994) (death penalty may be imposed upon finding at least one statutory aggravating factor).

3. EIGHT AND FOURTEENTH AMENDMENTS

Finally, Allen contends the trial court erred in failing to declare S.C. Code Ann. § 16-3-20[4] violates the Eight and Fourteenth Amendments to the United States Constitution by denying him the right to plead guilty while maintaining the right to have a jury determine his sentence. He contends the issue he raises is distinguishable from the **Sixth** Amendment claims repeatedly rejected by this Court. State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005); State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004); State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004). Essentially, he claims the **effect** of denying him a jury at the sentencing phase deprives him of the opportunity to present mitigating evidence (i.e., that he accepts his guilt) to a jury of his peers, and therefore violates due process under the Fourteenth Amendment, resulting in cruel and unusual punishment in violation of the Eighth Amendment.[5] We find no constitutional violation.

This Court has found, in capital cases in which the defendant pleads guilty, that statutorily mandated sentencing by the trial judge does not violate the United States Supreme Court's opinion in Ring v. Arizona, 536 U.S. 584 (2002).[6] Downs, 361 S.C. at 146-147, 604 S.E.2d at 380. Subsequent to Downs, the defendant in Crisp attempted to distinguish Downs contending that, unlike Downs, Crisp sought a life sentence and exhibited remorse for his crimes, as well as claiming that he murdered the victims in fear for his life. We rejected Crisp's attempt to distinguish Downs, stating, "[t]he 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

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[4] Section 16-3-20 requires that, in a capital proceeding in which the defendant pleads guilty, the sentencing proceeding must be conducted before the judge.

[5] U.S. CONST. Amend VIII (excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted); US CONST. Amend XIV (state shall not deprive any person of life, liberty, or property, without due process of law).

[6] Ring held an Arizona statute which required the trial judge to find existence of statutory aggravating circumstances, after jury had found defendant guilty, violated the Sixth Amendment right to a jury trial.

the United States Supreme Court in interpreting the state and federal constitutions." 362 S.C. at 418-419, 608 S.E.2d at 433 (emphasis added). See also State v. Wood, 362 S.C. 136, 607 S.E.2d 57 (2004).

Contrary to Allen's assertion, the statute's requirement that the trial court conduct the sentencing does not deprive him of due process, nor does it result in cruel and unusual punishment. S.C. Code Ann. § 16-3-20(C) requires that, in capital sentencing proceedings conducted by the judge alone, the judge consider any mitigating circumstances allowed by law and must also consider the enumerated statutory aggravating and mitigating circumstances. Although Allen would suggest otherwise, he was indeed permitted to offer evidence of his remorse, and his acceptance of responsibility, to the trial court. Further, the trial court was **required** to receive evidence in extenuation, mitigation, and aggravation of punishment, and was required to find the existence of statutory aggravating circumstances beyond a reasonable doubt prior to imposing a sentence of death. S.C. Code Ann. § 16-3-20(B) & (C).

Contrary to Allen's contention, the sentencer was not precluded from considering, as a mitigating factor, that he accepted responsibility and showed remorse.[7] Allen's Eigth and Fourteenth amendment claims are without merit.

CONCLUSION

We find the trial court's imposition of a death sentence was proper, and was supported by the statutory aggravating circumstances. Further, pursuant to the mandatory review provision of S.C. Code Ann. § 16-3-25 (2003), we find the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the sentence is proportionate to sentences imposed under similar situations. State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007) (death sentence warranted where defendant was convicted of murder, kidnapping, criminal sexual assault, and grand larceny); State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004) (death sentence upheld where

[7] Moreover, we are not persuaded by Allen's claim that, had he proceeded to trial on the issue of guilt or innocence, he would have been unable to convey to the jury his acceptance of guilt and sense of remorse.

jury found aggravating factors of criminal sexual conduct, kidnapping, armed robbery, physical torture, and burglary); State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003) (death sentence warranted for two counts of murder, burglary and physical torture); State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996) (death sentence upheld where defendant was convicted of murder, criminal sexual conduct, armed robbery, and grand larceny of a motor vehicle); Ray v. State, 330 S.C. 184, 498 S.E.2d 640 (1998) (imposing death sentence for murder with aggravating circumstance of kidnapping).

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ex Parte: David G. Cannon, Appellant,

Ex Parte: Georgia Attorney General's Office; South Carolina Attorney General's Office; Terry Brown, Romunzo Brown, Forlando Brown, Darren Lumar; M&T Bank; Tommie Rae Hynie Brown; Stephen L. Slotchiver, the GAL of James Brown, II; Larry Brown, Daryl Brown (individually and on behalf of his minor children Lindsey Delores Brown and Janise Vanisha Brown), Vanisha Brown; Deanna J. Brown Thomas (individually and on behalf of her minor child Jackson Brown-Lewis), Yamma N. Brown Lumar (individually and on behalf of her minor children Sydney Lumar and Carrington Lumar),

Tonya Brown; Robert L. Buchanan, Jr., and Adele J. Pope, as Special Administrators; Albert Dallas and Alfred A. Bradley, as Personal Representatives of the Estate of James Brown, a/k/a James Joseph Brown, Respondents,

In Re: The Estate of James Brown, a/k/a James Joseph Brown, Respondent.

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 4570
Heard May 12, 2009 – Filed June 23, 2009
Withdrawn, Substituted and Refiled November 6, 2009

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Jan L. Warner, of Columbia, for Appellant.

Adele J. Pope, of Columbia, Albert P. Shahid, Jr., of Charleston, Assistant Attorney General C. Havird

Jones, Jr., of Columbia, David Bell, of Augusta, Senior Assistant Attorney General Grace Lewis, of Atlanta, James D. Bailey, of Aiken, Louis Levenson, of Atlanta, Robert L. Buchanan, Jr., of Aiken, Robert Rosen, of Charleston, Ronald A. Maxwell, of Aiken, Stanley G. Jackson, of Aiken, Stephen H. Brown, of Charleston, Tressa T. Hayes, of West Columbia, for Respondents.

WILLIAMS, J.: David Cannon appeals the circuit court's order finding him in contempt of court and imposing a sanction of a six-month imprisonment sentence with the ability to purge the confinement upon the payment of specified fees and a fine. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

On August 1, 2000, James Brown signed an irrevocable trust agreement (the Trust) and a last will and testament (the Will). Cannon, Albert Dallas, and Alfred Bradley were named trustees of the Trust. Brown died on December 25, 2006, and the probate court appointed Cannon, Dallas, and Bradley as personal representatives of Brown's Estate (the Estate).

In January 2007, a petition for the removal of the personal representatives was filed in the probate court, alleging issues with the manner in which Cannon, Dallas, and Bradley handled both the Estate and the Trust. The case was removed to the circuit court on the probate court's own motion, and a hearing on the matter was held on February 9, 2007. The circuit court subsequently issued an order allowing for the appointment of limited Special Administrators (the SAs) for monitoring purposes. Robert Buchanan, Jr., and Adele J. Pope were appointed as the SAs. The order also limited the authority of Cannon, Dallas, and Bradley regarding the Estate and the Trust.

The circuit court granted the SAs access to files, books, and records of the Estate and the Trust in June 2007. Upon reviewing the Trust's checkbook, the SAs discovered a $900,000 check payable to an account at M & T Bank (M & T) had been incorrectly deposited in the Trust's checking account. The entire $900,000 was removed from the Trust's account between August 1 and December 28, 2006. The SAs alleged Cannon, rather than Dallas or Bradley, was responsible for the transactions associated with the deposit and removal of the funds.

Because of the misappropriation, the SAs filed a motion seeking removal of one or more of the personal representatives and/or trustees. A hearing on the matter was held on August 10, 2007, and Cannon voluntarily submitted his resignation as personal representative, trustee, and fiduciary to the Estate and the Trust. Following the hearing, the circuit court issued an order immediately relinquishing Cannon's "signatory authority on all transactions, accounts, contracts, checks and/or instruments or undertakings of any kind for James Brown, the Estate, the Brown Entities, and the Brown Trusts." Cannon was ordered to pay the Estate $350,000 and to provide a full accounting to the SAs of all records related to the Estate and the Trust. Cannon paid the $350,000 that same day.

The circuit court held another hearing on September 24, 2007, and issued an order on October 2, 2007. In this order, the circuit court found Cannon in contempt for failing to account to the SAs. The circuit court scheduled a later hearing to determine the willfulness of Cannon's actions in failing to account.

In an effort to recoup funds owed to the Estate, the circuit court additionally ordered Cannon to pay the Estate $373,000 in the October 2, 2007 order. This sum was found to be the remaining amount owed from the misappropriated $900,000. The circuit court also ordered Cannon to pay $30,000 as a deposit towards claims related to attorneys' fees and costs.

Subsequently, a hearing was held on November 15 and 20, 2007, to determine both the willfulness of Cannon's failure to account and whether

Cannon had paid the Estate $373,000 and $30,000 as mandated by the circuit court's October 2, 2007 order. At the hearing, Cannon testified he paid the $30,000 but did not have the ability to pay the $373,000. Cannon also stated he participated in the amendment of tax returns for James Brown Enterprises Corporation (the Corporation) after his resignation and the circuit court's August 10, 2007 order relinquishing all of his authority, including his signatory authority.

On December 18, 2007, the circuit court issued an order finding Cannon in contempt of court for failing to pay the Estate $373,000 and for failing to relinquish all of his authority; he was not, however, found to be in willful contempt for failing to account. Cannon was ordered to be imprisoned for a period of six months, but Cannon could "purge himself of this confinement by the payment of the aforementioned $373,000, the payment into [the circuit] court of $50,000.00 to be applied towards the payment of attorneys' fees as incurred by the various parties, and the payment of a fine of $10,000.00." Cannon had until "January 25, 2008[,] to completely purge himself."

Cannon filed a motion to reconsider, which the circuit court denied. This appeal followed.

I. JURISDICTION

STANDARD OF REVIEW

Personal jurisdiction may be waived, but subject matter jurisdiction may not be waived. Eaddy v. Eaddy, 283 S.C. 582, 584, 324 S.E.2d 70, 72 (1984). Lack of subject matter jurisdiction can be raised at any time, even for the first time on appeal, by a party or by the court. Lake v. Reeder Constr. Co., 330 S.C. 242, 248, 498 S.E.2d 650, 653-54 (Ct. App. 1998).

LAW/ANALYSIS

A. SUBJECT MATTER JURISDICTION

Cannon argues the circuit court lacked subject matter jurisdiction to issue any orders regarding his acts as trustee of the Trust. Specifically, Cannon argues section 62-7-201 of the South Carolina Code (2009) does not provide the circuit court with subject matter jurisdiction over internal trust matters. We disagree.

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." Majors v. S.C. Sec. Comm'n, 373 S.C. 153, 159, 644 S.E.2d 710, 713 (2007). "The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, and is fundamental." Peterson v. Peterson, 333 S.C. 538, 547, 510 S.E.2d 426, 431 (Ct. App. 1998).

When construing a statute, the cardinal rule is to ascertain the intent of the legislature. Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003). "A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." Id. at 22-23, 579 S.E.2d at 336. "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Id. at 23, 579 S.E.2d at 336.

"The legislature's intent should be ascertained primarily from the plain language of the statute." Id. If, however, the language of the statute gives rise to doubt or uncertainty as to legislative intent, the construing court looks to the statute's language as a whole in light of its manifest purpose. Id. at 25, 579 S.E.2d at 337-38. The construing court may additionally look to the legislative history when determining the legislative intent. State v. Byrd, 267 S.C. 87, 92, 226 S.E.2d 244, 247 (1976).

In determining whether the circuit court possessed subject matter jurisdiction in the instant matter, we must first examine the statutes Cannon argues give the probate court exclusive jurisdiction. The South Carolina Probate Code grants the probate court "exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts." § 62-7-201(a). This exclusive jurisdiction, however, is subject to section 62-1-302(c), which states, "The probate court has jurisdiction to hear and determine issues relating to paternity, common-law marriage, and interpretation of marital agreements in connection with estate, trust, guardianship, and conservatorship actions pending before it, concurrent with that of the family court . . . ." S.C. Code Ann. § 62-1-302(c) (2009).

Section 62-7-201(a) specifically deals with the internal affairs of trusts and grants exclusive jurisdiction to the probate court in those proceedings. Section 62-7-201(a) also states, however, that the probate court's exclusive jurisdiction is "[s]ubject to the provisions of [s]ection 62-1-302(c)," meaning there is one instance when this exclusive jurisdiction may be taken away from the probate court. Section 62-1-302(c), on the other hand, has no language divesting the probate court of exclusive jurisdiction. Rather than divesting the probate court of jurisdiction, section 62-1-302(c) provides the probate court with additional jurisdiction it did not previously have. Section 62-1-302(c) gives the probate court concurrent jurisdiction with the family court to determine, in specific circumstances, issues of paternity, common-law marriage, and the interpretation of marital agreements. It is, therefore, difficult to reconcile section 62-7-201(a) with section 62-1-302(c). Consequently, the plain language of section 62-7-201(a) referencing section 62-1-302(c) gives rise to uncertainty. We, therefore, look to the language of the two statutes as a whole and the legislative history to determine the legislative intent of section 62-7-201(a). See Georgia-Carolina Bail Bonds, Inc., 354 S.C. at 25, 579 S.E.2d at 337-38 ("If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. . . . In construing a statute, the court looks to the language as a whole in light of its manifest purpose.").

After reviewing both the language of section 62-7-201 and section 62-1-302 as a whole and the legislative history of the two statutes, we believe the reference to section 62-1-302(c) in section 62-7-201(a) to be a scrivener's error.[1] We find the legislative intent was to reference section 62-1-302(d), which specifically discusses divestment of the probate court's "exclusive jurisdiction" and reads,

> Notwithstanding the exclusive jurisdiction of the probate court over the foregoing matters, any action or proceeding filed in the probate court and relating to the following subject matters, on motion of a party, or by the court on its own motion, . . . must be removed to the circuit court and in these cases the circuit court shall proceed upon the matter de novo: . . . (4) trusts . . . .

S.C. Code Ann. § 62-1-302(d) (2009).

Section 62-7-201 of the South Carolina Trust Code was enacted May 23, 2005. Act No. 66, 2005 S.C. Acts 280, 317. At that time, section 62-1-302(c) was the current section 62-1-302(d), discussing the issue of the circuit court's concurrent jurisdiction with the probate court. S.C. Code Ann. § 62-1-302(c) (1987). Subsequently, on June 3, 2005, section 62-1-302 was amended, and the legislature added the current section 62-1-302(c) and reassigned the sub-section regarding a party's right to remove a proceeding to the circuit court to section 62-1-302(d). Act No. 132, 2005 S.C. Acts 1528. Therefore, when section 62-7-201 was enacted and section 62-1-302(c) was referenced, the legislature was referencing what is the current section 62-1-

[1] While our analysis does not rely on or give weight to the proposed amendment, we note on March 26, 2009, the South Carolina House of Representatives proposed a bill to amend section 62-7-201(a) to read, "Subject to the provisions of Section 62-1-302(c) and (d), ..." H.R. 3803, 118th Sess. (S.C. 2009) (emphasis in original).

302(d), meaning the legislative intent was to give the circuit court jurisdiction to hear trust matters removed from the probate court.

Further, the "South Carolina Comment" section of section 62-7-201 states:

> [South Carolina Trust Code] subsections 62-7-201(a) and (b) incorporate former South Carolina Probate Code Section 62-7-201 regarding the Probate Court's exclusive jurisdiction over the internal affairs of trusts. . . . Such exclusive jurisdiction is subject to Section 62-1-302(c) of the South Carolina Probate Code regarding a party's right to remove a proceeding to the *circuit court*.

(emphasis added). As the current section 62-1-302(c) discusses the family court's jurisdiction and makes no reference to removal of a proceeding or the circuit court, this comment can only indicate the legislature intended to refer to section 62-1-302(d).

Based on the language of the statutes as a whole, the statutes' comments, and the legislative history, we find the legislative intent of section 62-7-201(a) is to allow removal of internal trust matters, by a party or the probate court on its own motion, to the circuit court. Therefore, it was proper for the probate court to remove the matter to the circuit court on the court's own motion, giving the circuit court subject matter jurisdiction to hear the case.

B. PERSONAL JURISDICTION

Cannon argues he was never made a party to any proceedings in his capacity as trustee, has never been served with a rule to show cause for contempt, and was only before the circuit court in his capacity as personal

representative, and therefore, the circuit court lacked personal jurisdiction over him. We disagree.

"By accepting appointment, a personal representative submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person." S.C. Code Ann. § 62-3-602 (2009). "By accepting the trusteeship of a trust having its principal place of administration in this State . . . the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust." S.C. Code Ann. § 62-7-202(a) (2009).

"Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance." Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 337, 644 S.E.2d 793, 796 (Ct. App. 2007). "Voluntary appearance by [a] defendant is equivalent to personal service . . . ." Rule 4(d), SCRCP. "A defendant may waive any complaints he may have regarding personal jurisdiction by failing to object to the lack of personal jurisdiction and by appearing to defend his case." State v. Dudley, 354 S.C. 514, 542, 581 S.E.2d 171, 186 (Ct. App. 2003); see Cheraw Motor Sales Co. v. Rainwater, 125 S.C. 509, 513 119 S.E. 237, 239 (1923) ("The defendant filed his answer and tried his case on the affidavit in attachment, and thereby waived his right to his motion [to dismiss the proceedings because there was no summons and complaint served].").

This failure to object resulting in waiver of personal jurisdiction applies equally in constructive contempt cases. See Bakala v. Bakala, 352 S.C. 612, 629, 576 S.E.2d 156, 165 (2003) (finding constructive contempt proceedings are commenced by a rule to show cause and that the record indicated service of the rule to show cause was not accomplished correctly, but because the appellant never raised the issue, his objections to personal jurisdiction were waived).

Shortly after Brown's death, a petition for the removal of Cannon as trustee was filed in the probate court. A certificate of service was served

upon Cannon's counsel. The probate court, on its own motion, removed all matters to the circuit court, with no objection by Cannon. Later, a petition for accounting was filed, and Cannon's counsel signed an "Acknowledgement of Service," which waived all objections to defects in service of process.

Cannon and his counsel appeared at the August 10, September 24, and November 15 and 20, 2007 hearings and never made a motion or an objection as to the personal jurisdiction of the circuit court. At the August 10, 2007 hearing, counsel for the SAs began by discussing their "motion related to the recommendation that one or more of the [personal] representatives and trustees be removed." Counsel stated, "[A]lthough some of these captions bear the name Estate, this is an order that clearly extends to the estate – a recommendation that it extends to the estate, the trusts, and what we call the Brown entities . . . ." Again, no objection was made by Cannon or his counsel. Cannon then specifically consented to the terms of the August 10, 2007 order, which formed the basis for all contempt proceedings.

Before the conclusion of the August 10, 2007 hearing, the circuit court issued an "oral subpoena" ordering Cannon to be present at the September 24, 2007 hearing, ready "to be called for testimony subject to cross examination . . . ." As before, no objection was made. With this oral subpoena, the circuit court gave Cannon actual notice of the proceedings in which he was a party, and in response, Cannon and his counsel appeared and again argued the merits.

Cannon clearly had notice of all proceedings and waived any defects that might have occurred. See Stickland v. Consol. Energy Prods. Co., 274 S.C. 554, 555, 265 S.E.2d 682, 683 (1980) ("A general appearance constitutes a voluntary submission to the jurisdiction of the court and waives any defects and irregularities in the service of process."); H.S. Chisholm, Inc. v. Klinger, 229 S.C. 8, 16, 91 S.E.2d 538, 542 (1956) ("[T]he appellants had actual notice of the issuance and contents of the rule [to show cause, which was improperly filed] by the personal service of it upon them, and in response to it they appeared by counsel."). Cannon never raised the issue of improper service of process and, consequently, never objected to personal

jurisdiction of the circuit court. See Bakala, 352 S.C. at 629, 576 S.E.2d at 165 (finding husband never raised the issue of improper service of rule to show cause in constructive contempt case and, therefore, waived his objection to personal jurisdiction). By appearing and arguing the merits of the action multiple times before the circuit court, we find Cannon consented to the circuit court's personal jurisdiction and waived any defense of lack of personal jurisdiction.[2]

Finding the circuit court had both subject matter jurisdiction and personal jurisdiction to hear this matter, we now address the merits of Cannon's appeal.

II. CONTEMPT

STANDARD OF REVIEW

"A decision on contempt rests within the sound discretion of the [circuit] court." Floyd v. Floyd, 365 S.C. 56, 71, 615 S.E.2d 465, 473 (Ct. App. 2005). It is within the circuit court's discretion to punish by fine or imprisonment every act of contempt before the court. Miller v. Miller, 375 S.C. 443, 454-55, 652 S.E.2d 754, 760 (Ct. App. 2007). On appeal, this Court should reverse the contempt decision only if it is without evidentiary support or the circuit court abused its discretion. Floyd, 365 S.C. at 71-72, 615 S.E.2d at 473. Additionally, the finding of contempt is immediately appealable. Id. at 72, 615 S.E.2d at 473-74.

LAW/ANALYSIS

Cannon argues the circuit court erred by converting his civil contempt into criminal contempt and by not affording him due process. We disagree.

All courts have the inherent power to punish for contempt, which "is essential to the preservation of order in judicial proceedings, and to the

[2] We additionally note, Cannon's counsel conceded the circuit court had personal jurisdiction over Cannon at oral arguments.

enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice." Miller, 375 S.C. at 453, 652 S.E.2d at 759. "Contempt results from the willful disobedience of a court order, and before a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct." Widman v. Widman, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct. App. 2001). "A willful act is one . . . done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." Miller, 375 S.C. at 454, 652 S.E.2d at 759-60 (internal quotations and citations omitted).

"In addition, courts have the inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice." Id. at 455, 652 S.E.2d at 760. "[J]udges have the authority to [sua sponte] use contempt proceedings to preserve the authority and dignity of their courts." McEachern v. Black, 329 S.C. 642, 649, 496 S.E.2d 659, 662-63 (Ct. App. 1998).

"Once the moving party has made out a prima facie case [for contempt], the burden then shifts to the respondent to establish his . . . defense and inability to comply with the order." Miller, 375 S.C. at 454, 652 S.E.2d at 760. If, through no fault of his own, the contemnor is unable to obey a court order, the contemnor cannot be held in contempt. Id.

There is a distinction between constructive and direct contempt. Floyd, 365 S.C. at 75, 615 S.E.2d at 475. "Constructive contempt is contempt that occurs outside the presence of the court." Id. "In contrast, direct contempt involves contemptuous conduct occurring in the presence of the court." Id.

Further, "[c]ontempt can be either civil or criminal." Id. "The distinction between civil and criminal contempt is crucial because criminal contempt triggers additional constitutional safeguards." Ex parte Jackson, 381 S.C. 253, 259, 672 S.E.2d 585, 588 (Ct. App. 2009). "Intent for purposes of criminal contempt is subjective, not objective, and must necessarily be

ascertained from all the acts, words, and circumstances surrounding the occurrence." State v. Passmore, 363 S.C. 568, 571-72, 611 S.E.2d 273, 275 (Ct. App. 2005). Additionally, civil contempt must be proven by clear and convincing evidence, while criminal contempt must be proven beyond a reasonable doubt. Poston v. Poston, 331 S.C. 106, 113, 502 S.E.2d 86, 89 (1998).

In determining whether the contempt is civil or criminal, the major factor to consider "is the purpose for which the power is exercised, including the nature of the relief and the purpose for which the sentence is imposed." Id. at 111, 502 S.E.2d at 88. "The purpose of civil contempt is to coerce the defendant to do the thing required by the order for the benefit of the complainant[,]" while "[t]he primary purposes of criminal contempt are to preserve the court's authority and to punish for disobedience of its orders." Id. If it is for civil contempt, the punishment is remedial and for the benefit of the complainant. Id. If it is for criminal contempt, the sentence is punitive and meant to vindicate the authority of the court. Id.

"[A]n unconditional penalty is considered criminal contempt because it is solely and exclusively punitive in nature." Ex parte Jackson, 381 S.C. at 258-59, 672 S.E.2d at 587. When sanctions are conditioned on compliance with the court's order, the contempt is civil in nature. Poston, 331 S.C. at 112, 502 S.E.2d at 89.

> The conditional nature of the punishment renders the relief civil in nature because the contemnor can end the sentence and discharge himself at any moment by doing what he had previously refused to do. If the relief provided is a sentence of imprisonment, it is remedial if the defendant stands committed unless and until he performs the affirmative act required by the court's order. Those who are imprisoned until they obey the order, carry the keys of their prison in their own pockets. If the sanction is a fine, it is remedial and civil if paid to the complainant even

> though the contemnor has no opportunity to purge himself of the fine or if the contemnor can avoid the fine by complying with the court's order.

Id. at 112-13, 502 S.E.2d at 89.

In the present case, Cannon was found to be in willful contempt of court for failure to pay $373,000 to the Estate as ordered by the circuit court at the September 24, 2007 hearing, and for failure to relinquish all authority in relation to the Estate, the Trust, and all other related entities as ordered by the circuit court on August 10, 2007. The circuit court ordered Cannon to six months imprisonment but allowed him to "purge himself of this confinement by the payment of the . . . $373,000, the payment into [the circuit court] of $50,000.00 to be applied towards the payment of attorneys' fees as incurred by the various parties, and the payment of a fine of $10,000.00." Although Cannon was held in contempt in part for disobeying the circuit court's order to relinquish all authority associated with the Estate and the Trust, the purpose of the contempt order was to coerce Cannon to comply with the circuit court's order to pay $373,000 to the Estate. Additionally, Cannon was not subject to an unconditional, fixed term of imprisonment; he could avoid confinement by complying with the circuit court's order. Thus, we find the contempt to be civil in nature. See Curlee v. Howle, 277 S.C. 377, 386, 287 S.E.2d 915, 920 (1982) (stating a purpose of civil contempt is to coerce the defendant to comply with a court order); Miller, 375 S.C. at 462, 652 S.E.2d at 764 (finding the contempt proceeding was civil in nature because the term of imprisonment was not unconditional or fixed and the contemnor could obtain release by complying with the court's directive).

Finding civil contempt, the record must contain clear and convincing evidence of Cannon's contemptuous behavior. See Durlach v. Durlach, 359 S.C. 64, 70-71, 596 S.E.2d 908, 912 (2004) (stating an appellate court should reverse a decision regarding contempt if it is without evidentiary support or the circuit court abused its discretion, and clear and convincing evidence must support a finding of civil contempt). Cannon provided the circuit court with clear and convincing evidence, through his testimony and conduct, upon

which to base its decision, including admitting to not complying with either circuit court order. Cannon went so far as to testify that he knowingly and willfully disregarded an order of the circuit court.

As for Cannon's failure to pay the Estate $373,000 as ordered by the circuit court on October 2, 2007, Cannon readily admitted he did not pay the fee. Cannon, however, argued he did not have the ability to pay the fee and, therefore, could not comply with the court order. The circuit court did not find this testimony to be credible. This finding was in light of the evidence of Cannon's earnings from the previous seven years, the purchase of land in Honduras, and his entry into a contract for the construction of a home on that land.

According to Cannon's federal income tax returns,[3] Cannon's adjusted gross income from 2000 to 2006 was as follows: $1,397,000; $959,851; $169,334; $749,639; negative $514,509;[4] $348,831; and $1,058,790, respectively. Additionally, Cannon claimed $1,529,000 in deductions from his business income in 2003. Further, $1,323,972 in income was reported on a Schedule C form attached to Cannon's 1999 tax return. When asked by the circuit court to provide a current financial statement, Cannon provided one showing his current net value to be negative $311,592.38.

[3] Due to IRS and SLED investigations involving Cannon's income, Cannon continually invoked his Fifth Amendment privilege on questions concerning his income. The circuit court was, therefore, only able to use the numbers listed on his federal income tax returns, with no explanations or discussions, to determine Cannon's income from 2000-2006.

[4] The circuit court's December 18, 2007 order incorrectly stated Cannon's adjusted gross income for 2004 was $514,509. Cannon's 2004 federal income tax return showed Cannon had a business income of $203,226 and took deductions of $721,601. Cannon's adjusted gross income for 2004 was negative $514,509. During this testimony, Cannon again invoked his Fifth Amendment privilege, giving the circuit court no explanation of the significant deductions taken in 2004.

Cannon also testified as to the land and the contract to build a home he and his wife purchased in Honduras around August 16, 2007. This purchase took place less than one week after the hearing where the circuit court ordered Cannon to pay the Estate $350,000 of the $900,000 that had been misappropriated, where the circuit court raised serious questions about those remaining funds, and where the circuit court made it clear the payment of $350,000 was only a partial payment. Cannon testified he and his wife planned to retire in Honduras, which was the reason for building in that location. Cannon and his wife formed a corporation in Honduras called Bay Island Hermitage in order to buy property in the country; Cannon and his wife equally own 99% of the corporation while a Honduran attorney owns 1%, which is required by Honduran law. Cannon stated he paid $223,000 for the lot in Honduras and then $866,000 for a "turn-key contract" for the construction and furnishing of a home. Cannon stated he paid the entire cost up front in cash, and the property is unencumbered. He also testified, however, that the funds used for these purchases belonged to his wife.

Based on the record, we find there was clear and convincing evidence Cannon was in contempt of the October 2, 2007 court order requiring him to pay the Estate $373,000. Remaining mindful the circuit court was in a better position to judge the credibility of the witnesses, we also find Cannon failed to carry his burden of proving he was without fault in not being able to satisfy the circuit court's order. See Reed v. Ozmint, 374 S.C. 19, 24, 647 S.E.2d 209, 211 (2007) (deferring to the circuit court because the judge, who saw and heard the witnesses, was in a better position to evaluate credibility and assign comparative weight to their testimony); Thornton v. Thornton, 328 S.C. 96, 112, 492 S.E.2d 86, 94-95 (1997) (stating that in response to the husband's argument he could not pay child support and should, therefore, not be held in contempt for failure to pay, our Supreme Court looked at factors which included: "(1) Husband's ownership of valuable property, as evidenced by his own financial declaration; [and] (2) Husband's extensive history of lying to virtually everyone about his assets or hiding those assets"); see generally 17 Am. Jur. 2d *Contempt* § 141 (2008) ("The defense of inability to comply with a court order is not available where the contemnor has voluntarily created the incapacity or, said another way, when the inability to

comply is self-induced."). Thus, the circuit court did not abuse its discretion in holding Cannon in contempt.

As for Cannon's failure to relinquish all authority relating to the Estate, the Trust, and the related entities by participating in the amendment of some of the Corporation's tax returns, Cannon unequivocally stated that despite knowing the circuit court's order prohibited him from doing so, he disregarded the order and amended the tax returns with no authority. At the hearing to determine the willfulness of Cannon's failure to account and whether he had paid specified sums to the Estate, Cannon admitted he amended corporate tax returns for the Corporation, which were filed September 26 and October 16, 2007, after his resignation as personal representative and trustee on August 10, 2007. When questioned as to whether he was aware of the circuit court's order relinquishing his duties effective upon his resignation, he stated he had notice of the order and understood he did not have the authority to take the actions he took. Cannon informed the circuit court "[he] knew that probably [he] would have to take the heat for [amending the tax returns without authority], but [he] would rather take the heat for doing it than not doing it."

The record contains clear and convincing evidence that Cannon was in contempt of the circuit court's August 10, 2007 order, and again, Cannon failed to carry his burden of proving a defense for his actions. Consequently, there was no abuse of discretion in the circuit court's finding of contempt.

Finding the circuit court was correct to hold Cannon in civil contempt, we must also review the sanction imposed by the circuit court. Cannon was sentenced to six months imprisonment with the ability to purge his confinement by paying specified fees and fines. We find no abuse of discretion in the circuit court's imposition of the six-month prison sentence or in handing Cannon the keys to his prison by allowing him to purge the confinement upon the payment of $373,000 as previously ordered by the court. We do, however, take issue with the $50,000 award towards attorneys' fees, and we find the $10,000 fine to be an abuse of discretion.

Regardless of whether a six-month imprisonment sentence is imposed for civil or criminal contempt, a contemnor has no right to a jury trial for an imprisonment sentence of six months or less. See Curlee, 277 S.C. at 385, 287 S.E.2d at 919 ("If [the contempt] was civil, [the contemnor's] sentence of one year without a right to jury trial is proper. If it was criminal, [the contemnor] had a constitutional right to a jury trial before a sentence of *more than six months* could be imposed.") (emphasis added); Passmore, 363 S.C. at 572, 611 S.E.2d at 275 ("Currently, these provisions [of the Constitution] require a contemnor to be allowed a jury trial when facing a serious sentence-i.e., one of *greater than six months in prison*.") (emphasis added). Cannon was, therefore, not deprived of any due process rights with the imposition of a six-month imprisonment sentence, especially in this civil contempt proceeding.[5]

Furthermore, Cannon's sentence was made conditional on his compliance with the circuit court's order. As we have already stated, looking at the evidence in the record and deferring to the circuit court on matters of credibility, we find Cannon either had the ability to pay the $373,000 to purge his confinement or was unable to pay this fee as a direct consequence of his own actions and behavior from the start of the proceedings. See Miller, 375 S.C. at 454, 652 S.E.2d at 760 (stating contemnor must be without fault in his inability to comply with the court order); cf. Thornton, 328 S.C. at 104, 492 S.E.2d at 90-91 (stating the family court found husband had the ability to pay arrearages of $21,000 and was, therefore, in contempt for failure to pay, despite his claim that he lacked the means to pay because husband had received approximately $350,000 from a recent legal settlement, he had a "substantial" lifestyle, and he owned several properties, including a lien-free Georgetown office valued at $250,000 and a one-half interest in a Colorado vacation home valued at $600,000).

[5] Additionally, at the November 2007 contempt hearing, Cannon's counsel highlighted the right to a jury trial when a criminal contempt sentence exceeds six months. The circuit court responded that Cannon's sentence would not exceed six months. Moreover, counsel did not request any rights associated with a criminal proceeding even if we were to construe the fine as a criminal sanction.

"Courts, by exercising their contempt power, can award [attorneys'] fees under a compensatory contempt theory." Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 609, 567 S.E.2d 514, 520 (Ct. App. 2002) (citation omitted). The award of attorneys' fees is not a punishment but an indemnification to the party bringing the action. Miller, 375 S.C. at 463, 652 S.E.2d at 764-65. Because the record lacks sufficient evidence from which the circuit court could determine the appropriate amount of attorneys' fees required for reimbursement, we find the $50,000 award for attorneys' fees to be an abuse of discretion. We reverse and remand the issue of attorneys' fees to the circuit court for findings of fact as to the proper amount of attorneys' fees required for indemnification.

Courts may also impose fines on a party held in contempt. Cheap-O's Truck Stop, Inc., 350 S.C. at 609, 567 S.E.2d at 520. "If the sanction is a fine, it is punitive when it is paid to the court." Poston, 331 S.C. at 112, 502 S.E.2d at 89. A fine may also be "remedial and civil if paid to the complainant even though the contemnor has no opportunity to purge himself of the fine . . . ." Miller, 375 S.C. at 457, 652 S.E.2d at 761 (citations omitted). However, "[a]ny component of a sanction must be directly related to the contemptuous conduct and the loss incurred by the offended party." Cheap-O's Truck Stop, Inc., 350 S.C. at 609, 567 S.E.2d at 520.

The circuit court imposed an additional $10,000 fine on Cannon. The order did not state the purpose of the fine. If the fine was imposed for compensation purposes, it was improper because the record contains no reasonable relationship between Cannon's contemptuous conduct and the imposition of the $10,000 fine. Consequently, we reverse the $10,000 fine imposed. Cf. id. (reversing the circuit court's improper imposition of a fine on the contemnor).

Cannon also argues the circuit court erred in (1) finding Cannon in civil contempt for conduct that took place after August 10, 2007, and (2) imposing a purge remedy based upon the assets or financial strength of Cannon's wife. We find these arguments abandoned on appeal due to Cannon's failure to cite

any legal authority in support of either argument. See Mulherin-Howell v. Cobb, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (stating an issue is deemed abandoned on appeal when no legal authority is cited to support the argument).

Finally, Cannon argues the circuit court erred in requiring him to pay $373,000 into the circuit court regarding a disputed civil claim even though Cannon had not been served with a summons and complaint affording him an opportunity to be heard and to engage in discovery, thereby placing him in the position of being estopped with regard to any claim that may be brought against him for the funds that are at issue. We disagree.

Cannon begins his argument with the premise that the circuit court held him in both civil and criminal contempt. As previously discussed, we find the present contempt proceedings to be civil in nature, meaning the additional constitutional safeguards required in criminal contempt proceedings were not triggered. See Ex parte Jackson, 381 S.C. at 259, 672 S.E.2d at 588 ("The distinction between civil and criminal contempt is crucial because criminal contempt triggers additional constitutional safeguards."). Further, even if the contempt proceedings were criminal in nature, Cannon was not entitled to a jury trial on the matter because his imprisonment sentence did not exceed six months. See Curlee, 277 S.C. at 385, 287 S.E.2d at 919 ("If [the contempt] was civil, [the contemnor's] sentence of one year without a right to jury trial is proper. If it was criminal, [the contemnor] had a constitutional right to a jury trial before a sentence of *more than six months* could be imposed.") (emphasis added); Rhoad v. State, 372 S.C. 100, 107, 641 S.E.2d 35, 38 (Ct. App. 2007) ("[A] contemnor may be tried without a jury under certain circumstances, as long as the sentence imposed is no longer than six months."); Passmore, 363 S.C. at 572, 611 S.E.2d at 275 ("Currently, these provisions [of the Constitution] require a contemnor to be allowed a jury trial when facing a serious sentence-i.e., one of *greater than six months in prison*.") (emphasis added).

Cannon continues his argument by stating the circuit court sanctioned him without first determining whether the sanction was appropriate. An issue

must be raised to and ruled upon by the circuit court to be preserved for appellate review. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Cannon failed to raise this argument to the circuit court despite his many opportunities to do so. Thus, we will not address this argument.

CONCLUSION

Based on the foregoing, the circuit court's order is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

GEATHERS, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Alonzo Brinkley, Appellant,

v.

South Carolina Department of Corrections, Respondent.

Appeal From Marlboro County
Paul M. Burch, Circuit Court Judge

Opinion No. 4629
Heard October 7, 2009 – Filed November 10, 2009

AFFIRMED

John Terrence Mobley, of Columbia, for Appellant.

Samuel F. Arthur, III, of Florence, for Respondent.

HEARN, C.J.: Alonzo Brinkley appeals the circuit court's vacation of the jury award and grant of a new trial in favor of Respondent, South Carolina Department of Corrections (Department). Brinkley asserts sufficient evidence of gross negligence existed to support the verdict and the

amount of the verdict was not so excessive as to shock the conscience. We affirm.

FACTUAL/PROCEDURAL HISTORY

Brinkley was an inmate with Department, housed at the Evans Correctional Facility (Evans) in November of 2004. During the first part of the month, a special unit of Department officers, known as the Rapid Response Team (the Team), was in control of Evans pursuant to an institutional lock-down to investigate suspicions of contraband being smuggled into the facility. Brinkley asserts that during the lock-down the Team physically assaulted him. According to Brinkley he was sprayed with mace; struck in the back of his head with the mace canister; punched and kicked while on the ground; and finally rammed, head-first, into a brick wall.

Brinkley testified he received medical attention for his injuries immediately following the assault, including multiple bruises and a large bump on his head that remained for several weeks. Thereafter, Brinkley filed suit against Department, alleging gross negligence, assault and battery, and intentional infliction of emotional distress. A jury trial resulted in a verdict for Brinkley in the amount of $600,000. Department filed a post-trial motion, requesting judgment notwithstanding the verdict, and, alternatively, a new trial based on the excessiveness of the verdict or the thirteenth juror doctrine, or new trial nisi remititur, pursuant to Rules 50(b) and 59, SCRCP. The circuit court held a hearing on the motions and subsequently issued an order granting Department's motion for a new trial absolute. This appeal follows.

STANDARD OF REVIEW

A circuit court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. Rush v. Blanchard, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993). "The jury's determination of damages, however, is entitled to substantial deference." Id. The circuit court should grant a new trial absolute on the excessiveness of the verdict only if the amount is so grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice,

prejudice, partiality, corruption, or some other improper motives. Id. at 379-80, 426 S.E.2d at 805.

The grant or denial of new trial motions rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. Umhoefer v. Bollinger, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989); see also Boozer v. Boozer, 300 S.C. 282, 283, 387 S.E.2d 674, 675 (Ct. App. 1988) (stating the court of appeals has no power to review circuit court's ruling unless it rests on basis of fact wholly unsupported by evidence or is controlled by error of law). "In deciding whether to assess error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." Umhoefer, 298 S.C. at 224, 379 S.E.2d at 297.

LAW/ANALYSIS

Brinkley contends the circuit court erred in granting Department's motion for a new trial absolute, arguing sufficient evidence of gross negligence existed to support the verdict and the amount of the verdict was not so excessive as to shock the conscience.[1] In essence, Brinkley maintains the circuit court did not give substantial deference to the credibility determinations typically left to the discretion of the jury, and in so doing, was not justified in invading the jury's province.

[1] Brinkley also asserted in oral argument that the circuit court committed an error of law when it improperly melded the standards for granting a new trial based on the excessiveness of the verdict or the thirteenth juror doctrine. Because Brinkley neither filed a Rule 59(e), SCRCP, motion asking the circuit court to address the alleged error in the application of two legal remedies in its order, nor included this argument in its brief to this court, we find the argument is not preserved for our review. See Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004) (stating an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review).

In its order, the circuit court determined little or no evidence substantiated Brinkley's claims for damages outside of his own testimony and that of two other inmates who claimed to have witnessed the assault. The court noted Brinkley failed to introduce any medical records supporting the testimony of injuries, while the testimony of Department's doctor, who claims to have seen Brinkley some four days following the alleged assault, testified Brinkley neither exhibited signs or symptoms of an assault, nor complained to him that he had been assaulted. Moreover, the court noted Brinkley himself testified he had no permanent scars or other marks resulting from the alleged assault. Additionally, the circuit court discussed the possibility that the jury reached its decision by considering improper punitive or exemplary measures. The circuit court noted Brinkley's counsel came close in his closing statement to asking the jury to "send a message" to Department when calculating any damages award; this, it concluded, contributed to the excessiveness of the verdict.[2] Finally, the circuit court determined the amount of damages the jury awarded, based on the evidence and testimony admitted at trial, clearly indicated the verdict must have been the result of caprice, passion, prejudice, partiality, corruption, or other improper motive, and it was so excessive that it shocked the conscience.

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[2] A review of the record reveals Brinkley's counsel actually stated:

> Now, when you think about damages in this case you've got to determine what's an appropriate amount, a monitory [sic] amount to award Alonzo Brinkley. That's your decision. Obviously, you know you've got to keep in mind that he doesn't have any medical bills to present to the jury. The best you can give him is money in this case. I want you to think about something. See, <u>in order to get somebody's attention</u> you've got to make them pay the money . . .

(emphasis added). Counsel for Department then objected to this statement, and the court sustained the objection.

We agree with the Appellant that the record contains some evidence to support a verdict against Department. Unfortunately for Brinkley, that is not the lens through which an appellate court must view a circuit court's grant of a new trial absolute. Brinkley did not introduce into evidence any medical records tending to show the effects of the alleged assault, although he does correctly point out that Department is in sole possession and control of those records. Additionally, Brinkley did testify to some aspects of pain and suffering on which a jury could base an award of damages. However, we agree with the circuit court that an award of $600,000, for an assault that admittedly left Brinkley no permanent scars or injuries, is so excessive as to shock the conscience. This is particularly true in a case in which an award could not, and should not, have contained any element of punitive or deterrent-based damages, because the defendant was a governmental entity. See Macmurphy v. S.C. Dep't of Highways & Public Transp., 295 S.C. 49, 51, 367 S.E.2d 150, 151-52 (1988) (stating that punitive damages are not recoverable, absent an authorizing statute, against the State of South Carolina or its agencies).

Nevertheless, as stated above, our standard also requires a finding that the jury award was clearly reached as a result of passion, caprice, prejudice, partiality, corruption, or some other improper motives. Brinkley contends the circuit court's justification for that finding – a statement made by Brinkley's counsel in closing argument that was both objected to and sustained – is the only evidence of prejudice in the record and is wholly insufficient to support the circuit court's ruling. Notwithstanding, our standard of review dictates that we must only look to see if there is evidence in the record to support the circuit court's decision to grant a new trial, and, only in the complete absence of such evidence, is it within our province to find the circuit court abused its discretion. Because there is evidence and testimony in the record to support its finding of both elements, we cannot say the circuit court abused its discretion in granting Department's motion for a new trial absolute. The decision of the circuit court is therefore

AFFIRMED.

KONDUROS, J., and LOCKEMY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Brandon Leggett,	Respondent
v.	
Bryan J. Smith,	Respondent,
Kenneth Smith, Mary Elizabeth Hall Smith and New York Central Mutual Fire Insurance Company,	Defendants,
and New York Mutual Fire Insurance Company	Appellant.

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 4630
Heard September 1, 2009 – Filed November 10, 2009

AFFIRMED

Charles V. Leonard, of Myrtle Beach, Jeffrey D. Wait, of Saratoga Springs, Steven P. Curvin, of Buffalo, for Appellant.

Douglas Charles Baxter, of Myrtle Beach, Gene McCain Connell, Jr., of Surfside Beach, for Respondent.

HUFF, J.: In this appeal from a declaratory judgment action, New York Central Mutual Fire Insurance Company (New York Central) appeals the trial court's ruling that South Carolina had personal jurisdiction over New York Central and New York Central provided coverage for the accident at issue. We affirm.

FACTS/PROCEDURAL HISTORY

On April 23, 2004, Bryan Smith was involved in an accident in which he failed to yield the right-of-way to a motorcycle driven by Brandon Leggett.[1] Smith was driving a 1996 Ford Escort, which he had recently titled in his name. Until that time, the Escort had been owned by his father, Kenneth P. Smith (Father). The car had been insured under a policy with New York Central in which Father and Smith's mother, Mary Elizabeth Hall Smith, (Mother) were the named insureds. Smith was listed as a "covered driver" under this policy.

New York Central is a New York corporation licensed to engage in the insurance business in New York. It is not licensed to do business or to sell insurance in South Carolina. Smith's parents are New York residents. Smith moved from New York to Myrtle Beach, South Carolina in 1999. At that time he drove an Audi owned and insured by his parents. In 2001, Father purchased the Ford Escort and provided it for Smith to use while he attended college at Coastal Carolina University. Before starting college, Smith established legal residency in South Carolina. He turned in his New York driver's license and acquired a South Carolina license in March of 2001.

[1] Smith was charged with driving under the influence.

Mother testified that she informed her New York Central agent, the Mang Agency, Smith was using the car while he attended college in South Carolina.

Father signed over title to Smith in January of 2004 with the intent Smith would have ownership of the vehicle once it was titled and insured in South Carolina. On April 5, 2004, Smith went to the South Carolina Department of Motor Vehicles (DMV) to transfer the title and register the vehicle in his name. At the request of the DMV employee, he presented the New York Central insurance card and told her both of his parents' names were on the card. He listed the Mang Insurance Company on the DMV application as the insurance agency. According to Smith, the DMV employee told him he had thirty days to change the insurance to South Carolina. Smith called several insurance agents before choosing State Farm. He called a State Farm agent on April 12 and was told he needed a copy of the declaration page from the New York Central policy. That same day Smith called the Mang Agency and requested a faxed copy of the policy. Smith testified he told the agent he had transferred the title to his name and that he needed the document in order to acquire insurance within the thirty-day time frame. Although Smith received the fax from the Mang Agency, he failed to acquire insurance from State Farm or any other agency before the accident. New York Central sent Smith's parents notice that effective May 4, 2004, eleven days after the accident, the Ford Escort was deleted from the policy and amended the covered drivers on the policy to remove Smith due to his being "out of household." In addition, New York Central sent notice it was cancelling the policy effective May 21, 2004. New York Central refunded some of the premiums paid by Smith's parents for coverage for Smith, but it refused to refund any premiums paid through May 4, 2004. It subsequently reinstated the policy as to Smith's parents' remaining vehicle.

After the accident, New York Central informed Leggett's counsel of the limits of the policy. It hired South Carolina insurance adjusters to appraise the damage to Leggett's motorcycle and paid Leggett $5,636.65 for the motorcycle on June 7, 2004. On June 9, 2004, New York Central sent Leggett's counsel a letter denying liability coverage for the claim.

Leggett filed this action asserting a negligence claim against Smith and his parents and requesting a declaratory judgment that New York Central provided coverage for the accident. Smith filed a cross-claim requesting the court determine he was in fact an insured under the New York Central policy. New York Central answered denying coverage and asserting the state of South Carolina lacked jurisdiction over it. The trial court stayed the negligence claims against the Smiths until the declaratory judgment action was heard. After a hearing on the declaratory judgment action, the trial court determined South Carolina had personal jurisdiction over New York Central. Applying New York law,[2] the court held New York Central was obligated to provide coverage for the accident. The court subsequently denied New York Central's Rule 59, SCRCP, motion. This appeal followed.

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). An action to determine coverage under an insurance policy is an action at law. City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 543, 677 S.E.2d 574, 578 (2009). On appeal of an action at law tried without a jury, the findings of fact of the trial court will not be disturbed unless found to be without evidence which reasonably supports the trial court's findings. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

A. Personal jurisdiction

New York Central argues the trial court erred in determining South Carolina had personal jurisdiction over it. We disagree.

[2] Both parties assert New York law applies to this case.

"The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case." State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81, 88, 666 S.E.2d 218, 221 (2008). The circuit court's decision should be affirmed unless unsupported by the evidence or influenced by an error of law. Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005).

"Personal jurisdiction is exercised as 'general jurisdiction' or 'specific jurisdiction.'" Coggeshall v. Reprod. Endocrine Assocs. of Charlotte, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). The court acquires specific jurisdiction over a cause of action arising from a defendant's contacts with the state through the long arm statute. S.C. Code Ann. § 36-2-803 (Supp. 2008); Cockrell, 363 S.C. at 491, 611 S.E.2d at 508. "Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process." Cockrell, 363 S.C. at 491, 611 S.E.2d at 508.

"General jurisdiction attaches even when the nonresident defendant's contacts with the forum state are not directly related to the cause of action, if the defendant's contacts are both 'continuous and systematic.'" Id. at 495, 611 S.E.2d at 510 (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 413-14 nn. 8-9, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984)).

> These contacts must be "so substantial and of such a nature as to justify suit against [the respondents] on causes of action arising from dealings entirely different from those activities." International Shoe Co. v. Washington, 326 U.S. 310, 318, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Furthermore, the defendant's contacts with the forum must satisfy the due process clause. Federal Ins. Co. v. Lake Shore Inc., 886 F.2d 654, 660 (4th Cir. 1989).

Cockrell, 363 S.C. at 495, 611 S.E.2d at 510.

Due process requires minimum contacts exist between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. Id. at 491, 611 S.E.2d at 508. "Further, the due process requirement mandates the defendant possess sufficient minimum contacts with the forum state such that he could reasonably anticipate being haled into court there." Power Prods. & Servs. Co. v. Kozma, 379 S.C. 423, 431-32, 665 S.E.2d 660, 665 (Ct. App. 2008). In determining whether such minimum contacts exist, courts apply a two-pronged analysis. S. Plastics Co. v. S. Commerce Bank, 310 S.C. 256, 260, 423 S.E.2d 128, 130-131(1992). The court must (1) find that the defendant has the requisite minimum contacts with the forum, without which, the court does not have the "power" to adjudicate the action and (2) find the exercise of jurisdiction is reasonable or fair. Id. at 260, 423 S.E.2d at 131. "If either prong fails, the exercise of personal jurisdiction over the defendant fails to comport with the requirements of due process." Id.

Under the power prong, a minimum contacts analysis requires a court to find the defendant directed its activities to residents of South Carolina and the cause of action arises out of or relates to those activities. Moosally v. W.W. Norton & Co., 358 S.C. 320, 331-32, 594 S.E.2d 878, 884 (Ct. App. 2004).

> It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts.

Moosally, 358 S.C. at 332, 594 S.E.2d at 884 (citations omitted). Neither should a defendant be haled into a forum solely as a result of the unilateral

activity of another party. Carson v. Vance, 326 S.C. 543, 549, 485 S.E.2d 126, 129 (Ct. App. 1997).

The Fourth Circuit Court of Appeals ruled that the Eastern District Court of Virginia had personal jurisdiction over an Illinois insurer when the policy included a territory-of-coverage clause in which the insurer contracted to provide coverage for accidents and losses that occurred within the policy territory, which included all of the United States of America. Rossman v. State Farm Mut. Auto. Ins. Co., 832 F.2d 282 (4th Cir. 1987). The Fourth Circuit found there was no doubt the insurer could foresee being haled into court in Virginia because insurance, by its very nature, often necessitates litigation and an automobile policy is typically sued upon where an accident takes place. Id. at 286. The court stated the insurer's expectation of being haled into court was an express feature of its policy. Id. It explained, "[p]resumably, [the insurer] offers this type of broad coverage to induce customers to buy its policies and pay higher premiums for them. The benefits thereby accruing to [the insurer] are neither fortuitous nor incidental." Id. at 287. It noted an insurance company has the ability to exclude a state in which it wanted to avoid litigation from the policy territory. Id.[3]

[3] This court found South Carolina had personal jurisdiction over an out-of-state insurer where the appellant took no exception to the trial court's finding that the insured vehicle would "travel in a carnival over the eastern portion of this country [and that] [the insurer] should certainly be put on notice that vehicles traveling in a carnival would be very likely to be involved in accidents in states in which the carnival travels such as South Carolina." Parker v. Fireman's Ins. Co. of Newark, N.J., 297 S.C. 166, 169, 375 S.E.2d 325, 326 (Ct. App. 1988). It held the plaintiff's declaratory judgment action arose from the insurer's contracting to insure the insured's automobile while it moved through the eastern United States, including South Carolina, and from the insurers entry into an insurance contract to be performed at least in part in states along the eastern seaboard, including South Carolina. Id. Citing to Rossman, the court noted it could not determine if the policy expressly defined its coverage to include South Carolina because the policy was not in the record on appeal and the insurer as the appellant bore the burden of

Other jurisdictions have also held a territory-of-coverage provision that includes the forum state, coupled with the insured event occurring in the forum state, is sufficient to establish minimum contacts. Payne v. Motorists' Mut. Ins. Cos., 4 F.3d 452, 456 (6th Cir. 1993) ("The fact that [insurer] chose to provide coverage for all fifty states . . . constitutes purposeful availment of any individual state's forum."); Ferrell v. West Bend Mut. Ins. Co., 393 F.3d 786, 791 (8th Cir. 2005) (holding insurance policy's territory of coverage clause established sufficient contact between insurer and Arkansas to satisfy the strictures of the Due Process Clause); Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co., 907 F.2d 911, 914 (9th Cir. 1990) (finding minimum contacts where insurer had purposefully availed itself of the forum state by agreeing to defend its insured throughout the United States); McGow v. McCurry, 412 F.3d 1207, 1215 (11th Cir. 2005) (noting that by including Georgia in territory of coverage, insurer purposefully sought to provide coverage for accidents occurring in Georgia and reasonably should have foreseen being haled into court in Georgia); State Farm Mut. Auto. Ins. v. Tenn. Farmers Mut. Ins. Co., 645 N.W.2d 169, 174 (Minn. Ct. App. 2002) (holding the out-of-state insurer could reasonably anticipate being haled into Minnesota courts, by virtue of its policy provisions and the inherently mobile nature of the motor vehicle); see also, TH Agric. & Nutrition, LLC v. Ace European Group Ltd., 488 F.3d 1282, 1290 (10th Cir. 2007) (noting that with territory-of-coverage clause, insurers purposefully avail themselves of the privilege of conducting business in the forum state by affirmatively choosing to include the forum state in the territory of coverage).

The policy in this case includes a territory-of-coverage clause limiting coverage to the United States, its territories or possessions, Puerto Rico, and Canada. It also includes a provision specifically addressing out-of-state coverage. In addition, New York Central was on notice the vehicle it was insuring was being kept in South Carolina and Smith was living in South Carolina. On cross-examination by Leggett's counsel, Mother testified that

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providing the court with an adequate record on appeal as well as showing the trial court erred. Id. at 169 n.1, 375 S.E.2d at 326 n.1.

when she went to the Mang Agency to ensure Smith would still be covered by the policy, she told the agent that Smith was taking the Ford Escort with him to South Carolina. We find that by virtue of the policy provisions, as well as New York Central's notice that it was insuring a vehicle kept in South Carolina, New York Central could reasonably expect to be haled into court in South Carolina. Thus, the "power prong" is met.

We must next examine the "fairness prong."

> In order to determine whether the exercise of jurisdiction over a foreign defendant meets the fairness prong, the court must consider the following: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident's acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction. Cockrell, 363 S.C. at 492, 611 S.E.2d at 508.

Power Prods. and Servs. Co., 379 S.C. at 432, 665 S.E.2d at 665.

New York Central had been on notice for several years the vehicle had been garaged in South Carolina and was aware Smith was living in the state at the time. As to the convenience of the parties, all of the witnesses to the declaratory judgment action, including Smith who had returned to New York to live with his parents, were residing in New York at the time of the hearing. In addition, New York law applied. However, Leggett, the injured party, was a South Carolina resident with a South Carolina attorney. As far as South Carolina's interests, Smith and Leggett, who were requesting the court determine coverage was available for the accident, were South Carolina citizens. Thus, South Carolina has a substantial interest in exercising jurisdiction. See Rossman, 832 F.2d at 287 (holding Virginia has a substantial interest in providing relief for its citizens when insurance

companies refuse to pay claims). The Rossman court explained, "These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant state in order to hold it legally accountable." Id. (quoting McGee v. International Life Insurance Co., 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957)).

We conclude the trial court's assertion of jurisdiction over New York Central comported with traditional notions of fair play and substantial justice. Accordingly, as both the power prong and the fairness prong have been met, we find the trial court did not err in holding it had personal jurisdiction over New York Central.[4]

B. Coverage on Ford Escort

New York Central argues the trial court erred in finding coverage on the Ford Escort. We disagree.

New York Central first contends the coverage on the Ford Escort terminated upon transfer of title. Generally, an insurer's coverage of an insured automobile terminates upon the transfer of title by its insured to another. However, coverage may continue if the insurer is notified and consents to continued coverage. Allstate Ins. Co. v. Santos, 673 N.Y.S.2d 694, 694 (N.Y. App. Div. 1998). "When a party is under a duty to speak, or when his failure to speak is inconsistent with honest dealings and misleads another, then his silence may be deemed to be acquiescence." LeCorre v. Bijesse Belford Dolewski & DiMicco, 703 N.Y.S.2d 279, 281 (N.Y. App. Div. 2000) (internal quotations omitted). "Furthermore, an insurer has an implied duty to act in good faith in dealing with its insured." Id. In LeCorre, the court held a question of fact existed as to whether the insurer's silence on the issue of subrogation regarding the underinsurance claim could have been

[4]Although the circuit court held it had personal jurisdiction over New York Central for different reasons, this court may affirm for any ground appearing in the record. See I'On v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (noting an appellate court can affirm for any reason appearing in the record).

viewed as consenting to a settlement for the policy limits of the other driver's vehicle, as well as whether the insurer was acting in good faith regarding potential claims by insured. Id.

In the present case, the trial court held New York Central consented to the transfer because it failed to cancel the policy after Smith informed the Mang Agency that title had been transferred to him. Smith testified when he called the Mang Agency to inform it of the transfer and have the policy faxed to him, he specifically told the agent with whom he spoke he believed he had thirty days to acquire new insurance for the vehicle. No one from the Mang Agency indicated to him he did not have continued coverage or warned him not to drive the car. New York Central did not actually cancel the policy on the Ford Escort until May 4, 2004, eleven days after the accident. It only credited Smith's parents for the premium charged after that date. Thus, although it now claims coverage terminated before the accident, it retained the premiums charged though the date of the accident and eleven days afterwards.

We find New York Central's failure to formally cancel the policy as to the Ford Escort after Smith informed it of the transfer of ownership, along with its silence after Smith expressed his belief that he had continued coverage for thirty days to find new insurance, supports the trial court's determination that New York Central consented to the continued coverage. Accordingly, we find no error in the trial court's decision on this issue.

The trial court also found New York Central was estopped from denying coverage due to the transfer of title. Equitable estoppel is the "doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had." Besicorp Group Inc. v. Enowitz, 652 N.Y.S.2d 366, 369 (N.Y. App. Div. 1997). Under this doctrine, a party is precluded from asserting rights against another who has justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct. Id.

Here, as stated above, Smith expressed his belief to New York Central's agent he had continuing coverage for thirty days after the transfer of title to obtain new insurance in South Carolina. The agent failed to correct this mistaken belief. Smith testified that if he had known he did not have coverage, he would not have driven the vehicle.

We hold the record supports the trial court's finding that due to New York Central's agent's silence when Smith informed him of the title transfer, New York Central is estopped from asserting coverage terminated upon transfer. Thus, we find no error in the trial court's ruling.

C. Coverage for Smith

New York Central argues Smith was not entitled to liability coverage because he was not a household resident at the time of the accident and the car was not principally garaged in New York. We disagree.

Smith was listed as a "covered driver" on the policy. This term was not defined and the rights of a covered driver were not set forth in the policy. The New York Appellate Division found when a son was listed as a "named driver" along with his parents and the policy failed to define the term "named driver" or to exclude it from coverage, an ambiguity arose, which must be construed in favor of the insured. Kennedy v. Valley Forge Ins. Co., 612 N.Y.S.2d 712, 713 (N.Y. App. Div. 1994). The court noted that if the insurers had wished to exclude a "named driver" from coverage, they must have done so in clear and unmistakable language. Id. Because the insurers failed to do so, the court concluded the son must be afforded the same coverage as his parents. Thus, the son as a "named driver" fell within the same exception to an exclusion for "named insureds." Id.

There is no indication in the present policy the residency requirement applied to "covered drivers." Furthermore, we hold the record supports the trial court's ruling New York Central waived the residency requirement.

The policy stated it would "pay damages for 'bodily injury' or 'property damage' for which any 'insured' becomes legally responsible because of an auto accident." It defined the term "insured" as "You and any 'family member' for the ownership maintenance or use of any auto or 'trailer'" and "[a]ny person using 'your covered auto.'" It defined "family member" as "a person related to you by blood, marriage or adoption who is a resident of your household."

Waiver is a voluntary and intentional relinquishment of a known right. Albert J. Schiff Assocs. v. Flack, 417 N.E.2d 84, 87 (N.Y. 1980). The court explained:

> "[w]aiver evolved because of courts' disfavor of forfeitures of the insured's coverage which would otherwise result where an insured breached a policy condition, as for instance, failure to give timely notice of a loss or failure to co-operate with the insured. To defeat the forfeiture, courts find waiver where there is direct or circumstantial proof that the insurer intended to abandon the defense."

Id. (citations omitted).

Mother testified when Smith moved to South Carolina, she immediately told their insurance agent at the Mang Agency about the move and that Smith would be taking the Ford Escort with him. She stated their insurance premiums were higher based upon the fact Smith was listed as a covered driver. No one from New York Central ever informed her Smith was no longer a covered driver before the accident. In addition, on March 16, 2004, New York Central received actual notice Smith had surrendered his New York driver's license on March 8, 2001. Although Timothy Trueworthy, Vice President of Claims Division with New York Central, testified the company would have investigated whether Smith's coverage should continue, there is no evidence it ever took any action in this regard. Thus, although New York Central had actual notice Smith was a South

Carolina resident for over a month before the accident, it took no action to remove Smith from the policy.

We hold the record contains evidence to support the trial court's finding that while New York Central knew about Smith's change of residency, it continued to accept premium payments to include him as a covered driver and thus waived the household residency requirement. Similarly, we find New York Central continued to accept premiums on the Ford Escort even though it had notice that the vehicle was kept in South Carolina and therefore waived any condition that the vehicle be principally garaged in New York.

D. Knowledge of terms of policy

New York Central argues the Smiths are bound by the terms of the insurance policy because they are conclusively presumed to have knowledge of its contents. The trial court did not address this issue and New York Central failed to raise it in its post-trial motion. Accordingly, this issue is not properly before the court. See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding where a trial court does not explicitly rule on an argument raised, and appellant makes no Rule 59(e), SCRCP, motion to obtain a ruling, the appellate court may not address the issue); Floyd v. Floyd, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (Ct. App. 2005) (stating when a trial judge makes a general ruling on an issue, but does not address the specific argument raised by the appellant and the appellant fails to raise the issue in a Rule 59(e) motion, the appellate court cannot consider the argument on appeal).

CONCLUSION

We hold the evidence supports the trial court's finding that New York Central waived the household residency requirement through its continued acceptance of premium payments and inclusion of Smith as a covered driver despite knowledge of his change in residency. Similarly, through continued acceptance of premiums with the knowledge the Ford Escort was being kept

in South Carolina, New York Central waived any condition that the vehicle be principally garaged in New York. For the above stated reasons, the decision of the trial court is

AFFIRMED.[5]

THOMAS, and PIEPER, JJ. concur.

[5]We need not address New York Central's remaining issues. See Hagood v. Sommerville, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005) (stating the appellate court need not address additional issues when resolution of prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Andrew F. Stringer, III, Respondent,

v.

State Farm Mutual Automobile Insurance Company, Appellant.

Appeal From Anderson County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 4631
Heard April 29, 2009 – Filed November 10, 2009

REVERSED

Charles R. Norris, of Columbia, and John P. Riordan, of Greenville, for Appellant.

Donald Leverette Allen, of Anderson, for Respondent.

THOMAS, J.: We consider this case *en banc* to determine whether the language of an insurance policy provides coverage for an accident that occurred following receipt of a notice of cancellation, or whether coverage may be resurrected based on representations of a State Farm Mutual Automobile Insurance Co., employee to the insured after the accident. We answer both questions in the negative and reverse.

FACTUAL/PROCEDURAL BACKGROUND

Andrew F. Stringer, III paid a premium of $424.76 to State Farm in exchange for a six-month automobile insurance policy that provided coverage from February 15, 2002, to August 15, 2002. The policy stated the premium was subject to increase "during the policy period based upon corrected, completed, or changed information." During the policy period, a policy adjustment caused Stringer's premium to increase by $47.25.[1] State Farm sent a bill to Stringer for this increase in premium, which he failed to pay. On July 11, 2002, State Farm mailed a notice of cancellation to Stringer, informing him the policy would be cancelled on July 29, 2002, unless he paid $47.25 on or before that date.[2] The notice further stated that payment after July 29, 2002, would reinstate the policy, however, "[t]here [would be] no coverage between the date and time of cancellation and the date and time of reinstatement." Stringer took no action in response to this notice.

On July 31, 2002, Stringer was involved in an automobile accident with an uninsured driver. On August 1, Stringer notified State Farm employee Sherri Jennings of the accident. Stringer testified Jennings informed him there would be uninterrupted coverage if he paid the $47.25 due.[3] On August 2, Stringer paid the additional premium, and Jennings issued a receipt and mailed a form FR-10 to the Department of Motor Vehicles verifying that Stringer had valid coverage on the date of the accident.

Ultimately, State Farm refused to pay Stringer's claim under the policy, contending the policy was not in effect when the accident occurred. Stringer

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[1] The trial court found the increase in premium was due to the addition of a driver to the policy at the request of Stringer. On appeal, State Farm takes exception to this finding and argues a traffic accident in October 2001 caused Stringer's premium to increase. The cause for the increase in premium is of no consequence to our analysis.

[2] The policy allowed State Farm to cancel Stringer's policy for failure to pay the premium when due.

[3] At trial, Jennings denied making this statement.

commenced this action to determine whether coverage existed at the time of the accident. By order dated September 6, 2006, the trial court ruled Stringer was entitled to uninterrupted coverage because he fulfilled his obligations under the policy by paying the entire premium prior to the expiration of the six-month policy period. In addition, the trial court found Jennings's post-accident and post-cancellation representations of coverage precluded State Farm from denying coverage. State Farm appealed. In a split decision, a three-judge panel of this court affirmed the trial court's order. See Stringer v. State Farm Mut. Auto. Ins. Co., Op. No. 4474 (S.C. Ct. App. Filed Dec. 23, 2008) (Shearouse Adv. Sheet No. 48 at 68-78). We granted State Farm's petition for *en banc* review.

ISSUES

Whether the trial court erred in finding Stringer was entitled to uninterrupted automobile insurance coverage after receiving a notice of cancellation from State Farm based on: (I) the language of the policy or (II) representations of coverage by a State Farm employee.

STANDARD OF REVIEW

The determination of coverage under an insurance policy is an action at law. Nationwide Mut. Ins. Co. v. Prioleau, 359 S.C. 238, 241, 597 S.E.2d 165, 167 (Ct. App. 2004). On appeal, we are limited to determining whether the trial court based its ruling on an error of law or on a factual conclusion without evidentiary support. S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E Underwriters Risk Retention Group, 347 S.C. 333, 338, 554 S.E.2d 870, 873 (Ct. App. 2001).

LAW/ANALYSIS

I. Policy Language

State Farm contends the trial court erred in construing the terms of the policy liberally in favor of Stringer without finding the policy ambiguous. In addition, State Farm argues the trial court erred in finding the language of the

policy provided for continuous and uninterrupted coverage on the date of Stringer's accident. We agree in part.

Ambiguous terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer. Diamond State Ins. Co. v. Homestead Indus., Inc., 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995). "However, in cases where there is no ambiguity, contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary and popular sense." Garrett v. Pilot Life Ins. Co., 241 S.C. 299, 304, 128 S.E.2d 171, 174 (1962).

In our view, the trial court neither found the policy ambiguous nor construed the policy in favor of Stringer. In its order, the trial court determined Stringer was covered under the policy because he "complied with the terms of the insurance contract, drafted by State Farm, in that he made all of his premium payments . . . before the end of the current policy period." While the trial court referenced the proposition of law requiring courts to construe an ambiguous insurance policy in favor of the insured, it never made any specific findings of fact to support the conclusion the policy in question is ambiguous as a matter of law.[4] Because the trial court did not find the policy to be ambiguous, we review only the plain language of the insurance policy to determine whether any evidence supports the trial court's ruling that Stringer was entitled to uninterrupted coverage. See USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) ("Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary, and popular meaning." (quoting Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1997))).

The trial court found Stringer entitled to uninterrupted coverage because he complied with the terms of the insurance policy by paying the additional premium prior to the end of the policy period on August 15, 2002. The trial court relied solely on the following policy provision in making this finding: "[t]he policy period is shown . . . on the declarations page and is for

[4] We further hold that even if the trial court found the policy ambiguous, this was error.

successive periods of six months each for which you pay the renewal premium. Payments must be made on or before the end of the current policy period." (Emphasis added by trial court). The trial court erred in isolating the statement "[p]ayments must be made on or before the end of the current policy period," from its proper context. See Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 593, 225 S.E.2d 344, 349 (1976) ("[T]he meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and subject matter of the insurance contract." (citing 13 Appleman Ins. Law and Practice, § 7382, p. 43-45 (1976))); Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975) ("[T]he parties have a right to make their own contract and it is not the function of this Court to rewrite it or torture the meaning of a policy to extend coverage never intended by the parties."). In proper context, this sentence clearly refers to renewal and provides that payments of renewal premiums must be made before the end of the current policy period. This sentence does not contemplate whether the insured's payment of an additional premium before the expiration of the current policy period provides for uninterrupted coverage. Accordingly, the trial court erred in failing to consider the context in which this provision appears.

In reviewing the language of the insurance policy as a whole, no evidence supports the trial court's conclusion that Stringer was entitled to uninterrupted coverage. The policy in question provides that the initial $424.76 premium was subject to increase "during the policy period based upon corrected, completed, or changed information." Further, pursuant to the policy, Stringer agreed to pay any additional premium that might become due during the policy period. In this case, changed information caused an additional premium of $47.25 to be due in order to keep the policy in effect until August 15, 2002. State Farm sent two notifications to Stringer, informing him that failure to pay the additional premium on or before July 29, 2002, would result in cancellation of the policy on that date. State Farm specifically retained the right to cancel the policy for failure to pay the premium when due as the policy states: "[State Farm] will not cancel your policy before the end of the current policy period unless . . . you fail to pay the premium when due."

In this case, Stringer's failure to pay the increase in premium by July 29, 2002, effectively cancelled his coverage under the plain language of the policy on that date. Thus, when Stringer was involved in an automobile accident two days later, he was not covered under the policy. In addition, the cancellation notice specifically and unequivocally provided that "[t]here is no coverage between the date and time of cancellation and the date and time of reinstatement." Thus, Stringer's payment of $47.25 on August 2 failed to provide coverage from the date his policy was cancelled–July 29–to the date his policy was reinstated–August 3.[5] While payment of the additional premium reinstated Stringer's coverage from August 3 to the end of the policy period, the payment of the additional premium could not resurrect the policy to provide coverage during the gap between July 29, 2002, and August 3, 2002. Accordingly, the trial court erred in finding payment of the additional premium during the policy period provided for uninterrupted coverage.

II. Employee Representation

Finally, State Farm argues the trial court erred in finding uninterrupted coverage based on post-accident and post-cancellation representations of coverage made by Jennings. We agree.

Notwithstanding Stringer's failure to plead estoppel in this action at law, such a defense still fails on the merits. See Rule 8(c), SCRCP (stating that all affirmative defenses shall be pleaded); see also Wright v. Craft, 372 S.C. 1, 21, 640 S.E.2d 486, 497 (Ct. App. 2006) (finding that estoppel must be "affirmatively pleaded as a defense and cannot be bootstrapped onto another claim"). In appropriate circumstances, estoppel can be used to prevent the insurer from denying coverage to the insured. Koren v. Nat'l Home Life Assurance Co., 277 S.C. 404, 407, 288 S.E.2d 392, 394 (1982). In order to prevail on a claim of estoppel, the insured must demonstrate: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reasonable reliance on the other party's conduct; and (3) a

[5] Although payment was made on August 2, Stringer's policy was not reinstated until the following day.

prejudicial change in position. Provident Life & Accident Ins. Co. v. Driver, 317 S.C. 471, 477, 451 S.E.2d 924, 928 (Ct. App. 1994).

Here, the trial court did not find uninterrupted coverage based on estoppel.[6] Rather, the trial court concluded Stringer was entitled to uninterrupted coverage because he reasonably relied on Jennings's representations of coverage. As the elements of estoppel make clear, reasonable reliance alone does not provide a basis upon which to prevent State Farm from denying coverage. Accordingly, the trial court erred in determining reasonable reliance sufficiently bound State Farm to coverage.

In addition, nothing in the record demonstrates Stringer satisfied the remaining elements of estoppel. Namely, Stringer has failed to prove that he suffered a prejudicial change in position or detrimentally relied on the representations of Jennings. See Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 359, 628 S.E.2d 902, 912 (Ct. App. 2006) (indicating the lack of detrimental reliance is fatal to a claim of estoppel). Stringer has failed to do so because Jennings' representation of coverage occurred after the accident took place. While our appellate courts have prevented insurance companies from denying coverage, they have done so when the insurer, or its agent, makes representations of coverage before the loss occurred. See Riddle-Duckworth, Inc. v. Sullivan, 253 S.C. 411, 424, 171 S.E.2d 486, 492 (1969) (holding an insured was entitled to rely on representations that he was "fully covered"; accordingly, when an accident later occurred, the insurer could not deny coverage); Giles v. Landford & Gibson, Inc., 285 S.C. 285, 289, 328 S.E.2d 916, 918-19 (Ct. App. 1985) (finding that when an insured specifically requested particular coverage and an employee, in writing the policy, represented the policy provided such coverage, the insurer could not deny coverage when the loss subsequently occurred). These cases are not analogous to the case *sub judice* because here, the representation of coverage occurred after the loss.

As we stated in dictum in Jones v. State Farm Mutual Automobile Insurance Co., "[The Appellant] cites no legal authority establishing that a policy, once effectively canceled, can somehow become renascent by virtue

[6] We also note that the record indicates Stringer stated that recovery was not being sought on an estoppel theory.

of a qualified representation of coverage by an agent after a loss." 364 S.C. 222, 236, 612 S.E.2d 719, 726 (Ct. App. 2005). Similarly, we have failed to find any legal authority to support this proposition. Accordingly, the trial court erred in determining Stringer was entitled to uninterrupted coverage based on representations of coverage made by Jennings after the accident.

CONCLUSION

Because neither the plain language of the policy nor the representations made to Stringer operate to provide uninterrupted coverage or to resurrect the policy, the ruling of the trial court is

REVERSED.[7]

HEARN, C.J., WILLIAMS, PIEPER, KONDUROS, and LOCKEMY, JJ., CURETON, A.J., concur.

HUFF and SHORT, JJ., dissent.

HUFF and SHORT, JJ. (dissenting): We would affirm the judgment of the court below, and therefore, we respectfully dissent from the majority opinion. In doing so, we adopt the opinion of Judge Ralph King Anderson, Jr. that originally constituted the majority opinion of the panel that heard this case. See Stringer v. State Farm Mut. Auto. Ins. Co., Op. No. 4474 (S.C. Ct. App. Filed Dec. 23, 2008) (Shearouse Adv. Sh. No. 48 at 68).

[7] In light of our decision on the aforementioned issues, it is not necessary for this court to address State Farm's additional arguments on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that an appellate court need not address remaining issues when a decision on a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Plantation A.D., LLC,	Appellant,
v.	
Gerald Builders of Conway, Inc., and Jimmy Gerald, Individually, and as President of Gerald Builders of Conway, Inc.,	Respondents,
of whom Gerald Builders of Conway, Inc., is	Third-Party Plaintiff,
v.	
Scott Pyle, ABD Development Inc. and Wachovia Securities, Inc.,	Third-Party Defendants.

Appeal From Horry County
Paul M. Burch, Circuit Court Judge

Opinion No. 4632
Heard September 1, 2009 – Filed November 10, 2009

REVERSED AND REMANDED

Natale Fata, of Surfside Beach, for Appellant.

Desa Ballard and Stephanie Weissenstein, of West Columbia, J. Jackson Thomas, of Myrtle Beach, for Respondents.

HUFF, J.: Plantation A.D., LLC appeals the trial court's grant of summary judgment in favor of Gerald Builders and Jimmy Gerald (collectively Respondents). We reverse and remand.

FACTS/PROCEDURAL HISTORY

In October of 2003, Jimmy Gerald, as President of Gerald Builders, entered into a Purchase Agreement to purchase 45 acres in the International Club PUD from Plantation A.D. (the Property). At the time the Purchase Agreement was executed, SouthTrust Bank had foreclosed on the Property. Gerald claimed he did not know about the foreclosure proceedings at the time he executed the Purchase Agreement. Soon after entering into the Purchase Agreement, Gerald Builders' attorney discovered the foreclosure action. However, Gerald continued negotiating with Scott Pyle of Plantation A.D. concerning a development deal for the Property.

Gerald Builders' attorney drafted a Memorandum of Understanding, which provided for a 50/50 profit participation between Gerald Builders and Plantation A.D. The Memorandum required Gerald Builders to fully satisfy the SouthTrust Bank first mortgage and repay a $950,000.00 loan to Ralph Jones and Charlie Floyd as the lots in the development were sold with the

interest deducted from Plantation A.D.'s share of the profits. The Memorandum also provided: "Plantation A.D., LLC will cooperate fully with Jimmy Gerald in the closing of [the Property] on or before December 31, 2003 upon this signed understanding." Although the parties were listed as Jimmy Gerald of Gerald Builders as the Buyer and Scott Pyle of Plantation A.D. as the Seller, the Memorandum stated, "This memorandum shall not be deemed as a contract for the sale of Real Estate."

Gerald signed the Memorandum on November 3, 2003. According to Gerald, Pyle refused to accept the Memorandum and threatened to file for bankruptcy. Gerald authorized his attorney to offer the Memorandum to Pyle again two days later at the upset bid sale. Gerald claimed Pyle again rejected the Memorandum. Pyle, however, claimed that Plantation A.D. accepted the terms of the Memorandum and he signed the Memorandum when it was faxed to him on November 3.

Gerald Builders purchased the Property at the upset bid sale for $2,327,500.00. It borrowed $2,517,500.00 from Wachovia Bank to pay for the purchase. Gerald Builders began developing the property for a single family subdivision. In March of 2005, Pyle contacted Gerald and informed him that he knew of potential purchasers for the property. Gerald Builders agreed to the sale. On September 26, 2005, Gerald Builders sold the property to Signature Homes for $6,870,000.00. Gerald Builders' distribution from the sale was $1,510,222.23. It did not share the profit with Plantation A.D.

Plantation A.D. brought this action against Respondents asserting claims for breach of contract, breach of contract with fraudulent intent, fraud, unfair trade practices, unjust enrichment, constructive trust, and conversion. Respondents asseverated in their answer that Gerald's signature had been forged on the draft of the Memorandum and also asserted counterclaims and third party claims against Pyle and ADB Development due to the sale of the Property to Signature Homes. Plantation A.D., ADB Development, and Pyle denied Respondents' claims and asserted defenses including statute of limitations and unclean hands. In addition, Pyle asserted a claim for defamation.

While discovery motions and Plantation A.D.'s motions to amend its complaint and answer to Respondents' counterclaim and third-party claim were pending, the trial court granted summary judgment in favor of Respondents on Plantation A.D.'s claims in an order filed July 5, 2007. The trial court found the Memorandum was a complete, unambiguous agreement and therefore parol evidence was not admissible. It held the Memorandum lacked consideration and was unenforceable. The court also found the Memorandum contained two conditions precedent: 1) Gerald Builders had to purchase the property from Plantation A.D. (and not from the master-in-equity or some other party); and 2) Gerald Builders had to develop the property and not simply resell it. The court held as these conditions precedent did not occur, the Memorandum was void. In addition, the court ruled there was no evidence of individual liability of Gerald. Plantation A.D. filed a Rule 59, SCRCP, motion asking the court to alter or amend the judgment. It subsequently amended its motion and included excerpts from depositions taken after the order granting summary judgment.

While the Rule 59 motion was pending, the court ruled on other pending motions. The court denied Plantation A.D.'s motion to amend the complaint as summary judgment had already been granted, but allowed Plantation A.D. leave to amend its answer to the third-party complaint and counterclaim. It also ruled on discovery motions. On November 7, 2007, Plantation A.D. filed a motion pursuant to Rule 60, SCRCP, asserting in their Second Amended Answer and Counterclaim, Respondents made allegations contrary to the arguments they had made previously to the court.

The trial court denied the Rule 59 motion in an order filed December 10, 2007. The court provided all other pending motions would be heard before a judge with proper jurisdiction. It did not address Plantation A.D.'s Rule 60, SCRCP, motion. This appeal followed.

STANDARD OF REVIEW

In reviewing the grant of summary judgment, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP Nexsen v. Haddock, 353 S.C. 74, 77, 576 S.E.2d 183, 185 (Ct. App. 2002). Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." Brockbank v. Best Capital Corp., 341 S.C. 372, 378-79, 534 S.E.2d 688, 692 (2000). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Management Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "However, in cases requiring a heightened burden of proof or in cases applying federal law, we hold that the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment." Id. at 330-31, 673 S.E.2d at 803.

LAW/ANALYSIS

I. Consideration

Plantation A.D. argues the trial court erred in holding as a matter of law the Memorandum was void for lack of consideration. We agree.

"It is a question of law for the court whether the language of a contract is ambiguous." S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). "Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract." Farr v. Duke Power Co., 265 S.C. 356, 362, 218

S.E.2d 431, 433 (1975). An ambiguous contract is one that can be understood in more ways than just one or is unclear because it expresses its purpose in an indefinite manner. Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977); see Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) ("A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business.") (internal citation and quotation omitted).

Construction of an ambiguous contract is a question of fact. Skull Creek Club Ltd. P'ship v. Cook & Book, Inc., 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct. App. 1993). When an agreement is ambiguous, the court should seek to determine the parties' intent. Ebert v. Ebert, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct. App. 1995). Any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the ambiguous language. Myrtle Beach Lumber Co. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981). "The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument." Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 471, 581 S.E.2d 496, 502 (Ct. App. 2003). However, if a contract is ambiguous, parol evidence is admissible to ascertain the true meaning of the contract and the intent of the parties. Klutts Resort Realty, 268 S.C. at 89, 232 S.E.2d at 25.

"The necessary elements of a contract are an offer, acceptance, and valuable consideration." Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997). "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385,

389, 503 S.E.2d 184, 186 (Ct. App. 1998). "A forbearance to exercise a legal right is valuable consideration." Id.

Plantation A.D. asserts the Memorandum does state consideration. Item 3 of the Memorandum provides: "Plantation A.D., LLC will cooperate fully with Jimmy Gerald in the closing of the 45 acres on or before December 31, 2003 upon this signed understanding." As this provision is indefinite, we hold the trial court erred in ruling the Memorandum was unambiguous and in refusing to consider parol evidence. A fact finder may view the "cooperation" listed in Item 3 as a responsibility undertaken by Plantation A.D. In his affidavit, Pyle explained Plantation A.D. cooperated by ceasing negotiations with other prospective buyers and refraining from filing bankruptcy, thus allowing the upset bid sale to Gerald Builders to go forward. Therefore, Plantation A.D. produced more than a "scintilla of evidence" that the Memorandum was supported by valuable consideration.

We find the trial court erred in holding as a matter of law the contract was not supported by valuable consideration.

II. Conditions precedent

Plantation A.D. argues the trial court should not have found conditions precedent at the summary judgment stage. We agree.

Respondents assert this argument is not preserved because Plantation A.D. failed to make it when Respondents raised the issue at the summary judgment hearing. Plantation A.D. did not address the issue of conditions precedent at the hearing but did fully address the issue in its Rule 59 motion. The Respondents had the burden of proof on this issue. See Youmans v. S.C. Dep't of Transp., 380 S.C. 263, 281-82, 670 S.E.2d 1, 10 (Ct. App. 2008) (stating defendant asserting an affirmative defense bears the burden of its proof), cert. granted (July 9, 2009); Floyd v. St. Paul Fire & Marine Ins. Co., 285 S.C. 148, 150, 328 S.E.2d 132, 132 (Ct. App. 1985) (noting defendant asserted as an affirmative defense plaintiff had not complied with condition

precedent). Plantation A.D. is not attempting to raise a new theory of law but rather simply asserts that there is a genuine issue of material fact as to whether the agreement between the parties actually includes the conditions precedent as found by the trial court. As the issue of whether the Memorandum included the conditions precedent was raised to and ruled on by the trial court, we find the issue properly before this court. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

The trial court found the Memorandum contained the following two conditions precedent: 1) Gerald Builders had to purchase the property from Plantation A.D. (and not from the master-in-equity or some other party); and 2) Gerald Builders had to develop the property and not simply resell it.

> A condition precedent entails something that is essential to a right of action, as opposed to a condition subsequent, which is something relied upon to modify or defeat the action. In contract law, the term connotes any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises. The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ.

Worley v. Yarborough Ford, Inc., 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994) (internal citations and quotation marks omitted). Generally, "a condition precedent may not be implied when it might have been provided for by the express agreement." Id. at 210, 452 S.E.2d at 625.

The Memorandum does not expressly set forth the conditions precedent as found by the trial court. The Respondents assert the condition that Gerald

Builders purchase the property from Plantation A.D. can be implied from the designation of the parties as "Seller" and "Buyer" although the Memorandum clearly states it "shall not be deemed as a contract for the sale of Real Estate." Respondents also claim the development condition is implied from Paragraph 2, which provides for the repayment of a loan to Ralph Jones and Charlie Floyd on a per lot basis. The profit participation provision, however, does not include similar language concerning payment on a per lot basis. We find the conditions cannot as a matter of law be implied from the Memorandum. Accordingly, we hold the trial court erred on this issue.

III. Individual liability of Gerald

Plantation A.D. argues the trial court erred in granting summary judgment as to Gerald individually. We agree.

The Uniform Limited Liability Company Act provides:

> (a) Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.
>
> (b) The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company.

S.C. Code Ann. § 33-44-303 (2006).

The comment to this section provides: "A member or manager is responsible for acts or omissions to the extent those acts or omissions would be actionable in contract or tort against the member or manager if that person were acting in an individual capacity."

"Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights." Ellis v. Davidson, 358 S.C. 509, 527, 595 S.E.2d 817, 826 (Ct. App. 2004).

The trial court held Gerald was not individually liable for Plantation A.D.'s claims. However, as the comment to section 33-44-303 provides, a member of an LLC may be held individually liable for his or own acts and omissions.

After the sale of the Property to Signature Homes, Gerald Builders deposited the profit from the sale into its checking account. Since then, Gerald has made disbursements from the account. In addition, Gerald made representations to Plantation A.D. regarding the Memorandum and plans for the property. We find Plantation A.D. has presented at least a scintilla of evidence to support its claims against Gerald individually. Accordingly, we find the trial court erred in granting summary judgment to Gerald individually.

CONCLUSION

For the above stated reasons, the trial court's order granting summary judgment to Gerald Builders and Gerald individually is REVERSED and the matter REMANDED to the trial court.

REVERSED AND REMANDED.

THOMAS and PIEPER, JJ., concur.