The Supreme Court of South Carolina

In the Matter of
Edwin W. Rowland, Respondent.

ORDER

Pursuant to Rule 31, RLDE, Rule 413, SCACR, the Commission on Lawyer Conduct has filed a Petition to Appoint Attorney to Protect Clients' Interests in this matter. This request is based on the current medical condition of the respondent. The petition is granted.

IT IS ORDERED that William W. Jones, Jr., Esquire, is hereby appointed to assume responsibility for Edwin W. Rowland's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Rowland maintained. Mr. Jones shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Rowland's clients. Mr. Jones may make disbursements from Mr. Rowland's trust account(s), escrow account(s), operating account(s), and any other law office account(s)

Mr. Rowland maintained that are necessary to effectuate this appointment.

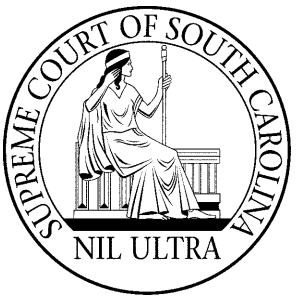
This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Rowland, shall serve as notice to the bank or other financial institution that William W. Jones, Jr., Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that William W. Jones, Jr., Esquire, has been duly appointed by this Court and has the authority to receive Mr. Rowland's mail and the authority to direct that Mr. Rowland's mail be delivered to Mr. Jones' office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

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

Columbia, South Carolina
June 17, 2010



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 24
June 21, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

None

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2010-UP-310-Pinnacle Condominium Assoc. Inc. v. Drake Dev. Corp.
(Horry, Judge Steven H. John and Judge John L. Breeden)

2010-UP-311-State v. David Wayne Short
(Darlington, Judge James E. Lockemy)

2010-UP-312-Allen Morgan v. S.C. Dept. of Probation, Parole and Pardon Services
(Administrative Law Court, Judge Deborah B. Durden)

2010-UP-313-Dana Weldon v. S.C. Dept. of Probation, Parole and Pardon Services
(Administrative Law Court, Judge Carolyn C. Matthews)

2010-UP-314-Thomas L. Clems v. S.C. Dept. of Probation, Parole and Pardon Services
(Administrative Law Court, Judge Deborah B. Durden)

2010-UP-315-Karen Bennett v. S.C. Dept. of Probation, Parole and Pardon Services
(Administrative Law Court, Judge Deborah B. Durden)

PETITIONS FOR REHEARING

4669-Gorecki v. Gorecki	Denied 06/04/10
4672-State v. Porter	Pending
4674-Brown v. James	Pending
4675-Middleton v. Eubank	Pending
4677-Moseley v. All Things	Pending
4680-State v. Garner	Pending
4682-Farmer v. Farmer	Pending
4683-Hale v. Finn	Pending

4685-Wachovia Bank v. Coffey	Pending
4687-State v. S. Taylor	Pending
4688-State v. Carmack	Pending
4691-State v. Brown	Pending
4692-In the matter of Manigo	Pending
4694-Sherlock (London I v. Enterprise)	Pending
2009-UP-596-Todd v. SCDPPPS	Pending
2010-UP-117-State v. N. Teamer #1	Pending
2010-UP-143-State v. L. Leverette	Pending
2010-UP-159-State v. E. Boggans	Pending
2010-UP-182-SCDHEC v. Przyborowski	Pending
2010-UP-237-Miller v. SCDC	Pending
2010-UP-251-SCDC v. James	Pending
2010-UP-267-State v. Tanner	Pending
2010-UP-268-State v. Gadson	Pending
2010-UP-269-Adam C. v. Margaret B.	Pending
2010-UP-272-SCDSS v. Tinikia J.	Pending
2010-UP-273-Epps v. Epps	Pending
2010-UP-276-Ford v. S.Carolina	Pending
2010-UP-278-D. Jones v. State	Pending

2010-UP-281-State v. J. Moore	Pending
2010-UP-282-State v. J. Buckson	Pending
2010-UP-287-Kelly v. Rachels	Pending
2010-UP-289-DiMarco v. DiMarco	Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4367-State v. J. Page	Pending
4370-Spence v. Wingate	Pending
4451-State of South Carolina v. James Dickey	Pending
4462-Carolina Chloride v. Richland County	Granted 06/10/10
4472-Eadie v. Krause	Denied 06/10/10
4473-Hollins, Maria v. Wal-Mart Stores	Granted 06/10/10
4474-Stringer v. State Farm	Pending
4476-Bartley, Sandra v. Allendale County	Pending
4480-Christal Moore v. The Barony House	Pending
4491-Payen v. Payne	Pending
4493-Mazloom v. Mazloom	Pending
4510-State v. Hicks, Hoss	Pending
4518-Loe #1 and #2 v. Mother	Pending
4525-Mead v. Jessex, Inc.	Pending
4526-State v. B. Cope	Pending

4529-State v. J. Tapp	Pending
4534-State v. Spratt	Granted 06/10/10
4541-State v. Singley	Pending
4545-State v. Tennant	Pending
4548-Jones v. Enterprise	Pending
4552-State v. Fonseca	Granted 06/10/10
4553-Barron v. Labor Finders	Pending
4554-State v. C. Jackson	Pending
4560-State v. C. Commander	Pending
4561-Trotter v. Trane Coil Facility	Pending
4574-State v. J. Reid	Pending
4575-Santoro v. Schulthess	Pending
4576-Bass v. GOPAL, Inc.	Pending
4578-Cole Vision v. Hobbs	Pending
4585-Spence v. Wingate	Pending
4588-Springs and Davenport v. AAG Inc.	Pending
4592-Weston v. Kim's Dollar Store	Pending
4597-Lexington County Health v. SCDOR	Pending
4598-State v. Rivera and Medero	Pending
4599-Fredrick v. Wellman	Pending

4600-Divine v. Robbins	Pending
4604-State v. R. Hatcher	Pending
4605-Auto-Owners v. Rhodes	Pending
4606-Foster v. Foster	Pending
4607-Duncan v. Ford Motor	Pending
4609-State v. Holland	Pending
4610-Milliken & Company v. Morin	Pending
4611-Fairchild v. SCDOT/Palmer	Pending
4613-Stewart v. Chas. Cnty. Sch.	Pending
4614-US Bank v. Bell	Pending
4616-Too Tacky v. SCDHEC	Pending
4617-Poch v. Bayshore	Pending
4619-State v. Blackwill-Selim	Pending
4620-State v. K. Odems	Pending
4621-Michael P. v. Greenville Cnty. DSS	Pending
4622-Carolina Renewal v. SCDOT	Pending
4630-Leggett (Smith v. New York Mutual)	Pending
4631-Stringer v. State Farm	Pending
4633-State v. G. Cooper	Pending
4635-State v. C. Liverman	Pending

4639-In the Interest of Walter M.	Pending
4640-Normandy Corp. v. SCDOT	Pending
4641-State v. F. Evans	Pending
4654-Sierra Club v. SCDHEC	Pending
4659-Nationwide Mut. V. Rhoden	Pending
2008-UP-126-Massey v. Werner	Pending
2008-UP-285-Biel v. Clark	Pending
2009-UP-028-Gaby v. Kunstwerke Corp.	Denied 06/10/10
2009-UP-148-State v. J. Taylor	Pending
2009-UP-199-State v. Pollard	Pending
2009-UP-204-State v. R. Johnson	Pending
2009-UP-265-State v. H. Williams	Pending
2009-UP-266-State v. McKenzie	Pending
2009-UP-276-State v. Byers	Pending
2009-UP-281-Holland v. SCE&G	Pending
2009-UP-299-Spires v. Baby Spires	Pending
2009-UP-322-State v. Kromah	Pending
2009-UP-336-Sharp v. State Ports Authority	Pending
2009-UP-337-State v. Pendergrass	Pending

2009-UP-338-Austin v. Sea Crest (1)	Pending
2009-UP-340-State v. D. Wetherall	Pending
2009-UP-359-State v. P. Cleveland	Pending
2009-UP-364-Holmes v. National Service	Pending
2009-UP-385-Lester v. Straker	Pending
2009-UP-396-McPeake Hotels v. Jasper's Porch	Pending
2009-UP-403-SCDOT v. Pratt	Pending
2009-UP-434-State v. Ridel	Pending
2009-UP-437-State v. R. Thomas	Pending
2009-UP-524-Durden v. Durden	Pending
2009-UP-539-State v. McGee	Pending
2009-UP-540-State v. M. Sipes	Pending
2009-UP-564-Hall v. Rodriquez	Pending
2009-UP-585-Duncan v. SCDC	Pending
2009-UP-587-Oliver v. Lexington Cnty. Assessor	Pending
2009-UP-590-Teruel v. Teruel	Pending
2009-UP-594-Hammond v. Gerald	Pending
2009-UP-603-State v. M. Craig	Pending
2010-UP-090-F. Freeman v. SCDC (4)	Pending

2010-UP-111-Smith v. Metts	Pending
2010-UP-138-State v. B. Johnson	Pending
2010-UP-140-Chisholm v. Chisholm	Pending
2010-UP-141-State v. M. Hudson	Pending
2010-UP-154-State v. J. Giles	Pending
2010-UP-156-Alexander v. Abbeville Cty. Mem. Hos.	Pending
2010-UP-158-Ambruoso v. Lee	Pending
2010-UP-162-State v. T. Washington	Pending
2010-UP-173-F. Edwards v. State	Pending
2010-UP-178-SCDSS v. Doss	Pending
2010-UP-196-Black v. Black	Pending
2010-UP-197-State v. D. Gilliam	Pending
2010-UP-215-Estate v. G. Medlin	Pending
2010-UP-220-State v. G. King	Pending

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Danny Cortez Brown, Appellant.

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

Opinion No. 4697
Heard March 2, 2010 – Filed June 14, 2010

REVERSED

Appellate Defender Elizabeth A. Franklin, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, Assistant Attorney General Suzanne H. White, all of Columbia; and John Gregory Hembree, of Conway, for Respondent.

SHORT, J.: Danny Brown was charged with trafficking cocaine. Following a jury trial, he was convicted and sentenced to twenty-five years incarceration. He appeals, arguing the trial court erred by denying his motion to suppress the drugs seized after his arrest for an open container violation. We reverse.

FACTS

Officer Daryl Williams was on patrol in Myrtle Beach, South Carolina. While traveling down a road, he observed a 1976 Plymouth next to him and saw a passenger drinking what appeared to be a beer. The passenger, Brown, saw Officer Williams and tucked the beer can between his legs. Officer Williams pulled the car over and noticed a small duffel bag on the floorboard between Brown's legs. Officer Williams testified he was suspicious of the occupants because the driver acted nervous while Brown appeared "artificially laid back."

Initially, Brown denied having a beer, but then he pulled the can up from his lap. Officer Williams removed Brown from the car, recovered the beer can, arrested him for an open container violation, and placed his duffel bag on the sidewalk. He handcuffed Brown and placed him in a patrol car. After securing Brown, Officer Williams returned to the car to make "small talk" with the driver. He returned to the duffel bag, searched it, and found cocaine concealed inside a Fritos bag. Officer Williams stated he closed the duffel bag and resumed conversation with the driver. He ran the driver's license, discovered it was suspended, and placed the driver under arrest for that offense.

During trial, Brown moved to suppress the drugs on a violation of his Fourth Amendment rights. The trial court denied the motion to suppress, finding there was probable cause to stop the car, and Brown's arrest was lawful. The trial court held the search was proper because it was a search

incident to a lawful arrest. Brown was found guilty and sentenced to twenty-five years imprisonment. This appeal followed.

STANDARD OF REVIEW

When reviewing a Fourth Amendment search and seizure case, we do not review the trial court's ultimate determination de novo, rather we apply a deferential standard. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459-60 (2002). This court reviews the trial court's ruling like any other factual finding, and we will reverse only if there is clear error. Id. Therefore, we will affirm if any evidence exists to support the trial court's ruling. Id.

LAW/ANALYSIS

On appeal Brown argues the trial court erred by denying his motion to suppress the drugs in violation of his Fourth Amendment rights. We agree.

The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. Any evidence seized in violation of the Fourth Amendment must be excluded. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

It is well established that warrantless searches and seizures by the police are per se unreasonable, unless they fall within one of several recognized exceptions. State v. Weaver, 361 S.C. 73, 80-81, 602 S.E.2d 786, 790 (Ct. App. 2004). These exceptions include: (1) search incident to a lawful arrest; (2) hot pursuit; (3) stop and frisk; (4) automobile exception; (5) plain view doctrine; (6) consent; and (7) abandonment. Id.

A. Search Incident to Arrest[1]

Under the search incident to arrest exception, if the arrest is supported by probable cause, police officers may search an arrestee's person and the area within his or her immediate control for weapons and destructible evidence without first obtaining a search warrant. State v. Ferrell, 274 S.C. 401, 405, 266 S.E.2d 869, 871 (1980). However, this doctrine does not allow law enforcement officers to conduct a warrantless search of an arrestee's automobile after the arrestee has been handcuffed or otherwise prevented from regaining access to the car, unless it is reasonable to believe (1) the arrestee might access the vehicle at the time of the search, or (2) that the vehicle contains evidence of the offense of the arrest. Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 1723-24 (2009) (limiting New York v. Belton, 453 U.S. 454 (1981) and Thornton v. U.S., 541 U.S. 615 (2004)).

The burden of establishing the existence of circumstances constituting an exception to the general prohibition against warrantless searches is upon the State. Weaver, 361 S.C. at 81, 602 S.E.2d at 790.

In the present case, neither of the exceptions stated in Gant apply. Officer Williams testified he had Brown exit the car to be handcuffed and arrested for the offense of open container. He took the duffel bag from the car, placed it on the sidewalk, and then put Brown in the back of his patrol car. After securing Brown, Officer Williams returned to the car and made "small talk" with the driver. He testified:

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[1] Initially, the State argues this issue is not preserved for review. We disagree. Trial counsel asked the trial court to suppress the evidence, and the trial court denied this request. This issue was raised to and ruled upon by the trial court and is properly before this court. 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. ").

> I wanted to deal with him later, but I just wanted to get a glance into the bag, so I did unzip the bag, and look in. It was personal items like, perhaps deodorant, undergarments . . . and there was a bag of Fritos potato chips, corn chips, whatever . . . and it was open, so it was kind of crumpled shut, I believe, so I went and just opened it up to get a look into the bag, and then I seen inside that bag a -- what appeared to be a plastic bag with a white powdery substance, which is -- you know, looks -- appears to be cocaine.

It is clear from Officer Williams' testimony that Brown was handcuffed and securely placed in the patrol car prior to Officer Williams searching the duffel bag. During Officer Williams' search, Brown could not have accessed the vehicle or the duffel bag. Thus, it was impossible that Brown could have accessed the vehicle at the time of the search, making the first exception in Gant inapplicable.

As to the second Gant exception, Officer Williams was not looking for evidence for the offense charged. There was no evidence presented that Officer Williams had a reasonable belief that the duffel bag or Frito bag held further evidence of the open container violation. Brown told Officer Williams he did not have any more beer. More to the point, when asked if the beer can was taken into evidence, Officer Williams explained, for this type of charge "we don't take that sort of thing in evidence." We therefore conclude the search incident to arrest exception does not apply in the present case.[2]

[2] In fairness to the trial court, it did not have the guidance provided to us by the United States Supreme Court in the Gant case.

B. The Automobile Exception

Because of its mobility and the lessened expectation of privacy in motor vehicles, a motor vehicle may be searched without a warrant based solely on probable cause. State v. Cox, 290 S.C. 489, 491, 351 S.E.2d 570, 571-72 (1986). Just like a driver of an automobile, passengers possess a reduced expectation of privacy with regard to the property that they transport in cars. Wyoming v. Houghton, 526 U.S. 295, 303 (1999). The standard for probable cause to make a warrantless search is the same as that for a search with a warrant. State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995).

Articulating precisely what probable cause means is not possible. Ornelas v. U.S., 517 U.S. 690, 695-96 (1996). Probable cause is a commonsense, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Id. Probable cause to search exists where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found in a particular place. Id. The principal components of the determination of probable cause will be whether the events which occurred leading up to the search, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause. Id. The scope of a warrantless search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that the object may be found. State v. Perez, 311 S.C. 542, 546, 430 S.E.2d 503, 505 (1993).

If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. Houghton, 526 U.S. at 301-02. This rule applies to all containers within a car, without qualification as to ownership of a particular container and without a showing of individualized probable cause for each container. Id.

As noted above, Officer Williams placed Brown under arrest for an open container. Officer Williams had already recovered the beer can, which interestingly he did not take into evidence, prior to searching the duffel bag. Based on this, the only evidence Officer Williams could have been searching for was more beer. The bag in question was not a grocery bag where one would expect to find beer. Rather, the bag was a zipped-up duffel bag that would be used to carry clothes. One of the officers stated, "The black duffel bag was more like a gym bag, like a small carry-on bag to take on an airplane, or to a gym. . . ."

Additionally, Officer Williams never testified he searched the bag to find evidence of a crime. According to Officer Williams, he removed the bag from the car because it posed a "safety issue," and because he wanted to separate the bag from the driver. Officer Williams stated after he placed Brown in the patrol car, he searched the duffel bag because he "wanted to get a glance into the bag."

Viewing the evidence and testimony through the lens that the State bears the burden to prove an exception to the prohibition against warrantless searches, as we must, we conclude Officer Williams did not have probable cause to search the bag.

C. The Exclusionary Rule, Inevitable Discovery, and Inventory Search

The State urges us to accept that the drugs would have been inevitably discovered during an inventory search. We disagree.

The exclusionary rule provides that evidence obtained as a result of an illegal search must be excluded. State v. Sachs, 264 S.C. 541, 560, 216 S.E.2d 501, 511 (1975). The inevitable discovery doctrine is an exception to the exclusionary rule and states that if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, the information is admissible despite the fact it was illegally obtained. Nix v. Williams, 467 U.S. 431, 443-44 (1984). The fruit of the poisonous tree doctrine, most often associated

with violations of the Fourth Amendment's prohibition of unreasonable searches and seizures, prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure. Wong Sun v. U.S., 371 U.S. 471, 484 (1963).

If the police are following standard procedures, they may inventory impounded property, including closed containers, to protect an owner's property while it is in police custody. Colorado v. Bertine, 479 U.S. 367, 372-73 (1987). Standardized criteria or established routine must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. Florida v. Wells, 495 U.S. 1, 3 (1990).

The State provided very scant testimony, at best, that the duffel bag or car would have been taken into police custody after Brown and the driver were arrested.[3] Although commonsense dictates the police would have done exactly this, we are confined by the law that the prosecution bears the burden to establish by a preponderance of the evidence that the evidence would inevitably have been discovered. Nix, 467 U.S. at 443-44. Additionally, police must follow standard procedures to conduct an inventory search and no such testimony was presented. Thus, we conclude the inevitable discovery doctrine does not apply and the trial court erred by failing to exclude the evidence. See State v. Grant, 174 S.C. 195, 177 S.E.2d 148, 149 (1934) ("The right of people to go about their business without being subjected to undue search and seizure . . . by the authorities of the law . . . . are essential to an orderly government."). Consequently, we reverse Brown's conviction and vacate his sentence.

[3] The solicitor asked an officer, "Did you have occasion to search that vehicle pursuant to the arrest?" In reply the officer testified, "Yes. Yes sir. Under lawful search incident to arrest of the vehicle (sic), in the passenger area, and pursuant also to guidelines of doing inventory of the vehicle before towing, we searched that vehicle."

CONCLUSION

Accordingly, the trial court's decision is

REVERSED.

WILLIAMS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Mark Baker, Appellant.

Appeal From Sumter County
Howard P. King, Circuit Court Judge

Opinion No. 4698
Heard May 18, 2010 - Filed June 15, 2010

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William M. Blitch, Jr., all

of Columbia; and Cecil Kelly Jackson, of Sumter, for Respondent.

SHORT, J.: Mark Baker appeals his convictions for committing a lewd act upon a minor, arguing the trial court erred in: (1) refusing to quash the indictment; (2) denying his motion for a continuance; (3) limiting his cross-examination of a witness; and (4) qualifying a witness as an expert in forensic interviewing. We affirm.

FACTS

Baker was indicted on five counts of committing a lewd act upon a minor and one count of criminal sexual conduct with a minor. These charges arose after Baker's two nieces made allegations that Baker was abusing them. The younger niece accused Baker of abusing her older sister, Baker's older niece. The older niece indicated Baker abused her by rubbing his penis on her buttocks, back, and other areas of her body. She testified that Baker kissed her, digitally penetrated her, and attempted to make her perform oral sex on him. The younger niece stated Baker had also molested her.

The original indictments alleged these events occurred from May 2002 through September 2004. However, the five counts of lewd act were amended to expand the time frame back to June 1998. Baker moved to quash the indictments because they were unconstitutionally overbroad. Baker also moved the trial court for a continuance, arguing he needed more time to prepare for trial because two weeks prior to the trial the time frame was expanded by four years. The trial court denied both of these motions.

Prior to trial, the State moved to limit cross-examination of the younger niece. During the same month the younger niece accused Baker of abuse, she was expelled from school for one year for a narcotics violation. She also received a disciplinary infraction for skipping school. Over Baker's objection, the trial court agreed to the State's request that Baker not be

allowed to cross-examine the younger niece about her school disciplinary records.

During the trial, the State sought to qualify Gwen Herod, a victim assistance officer with the Sumter County Sheriff's Department, as an expert in forensic interviewing and assessment of child abuse. Despite Baker's objection, the trial court qualified Herod as an expert in forensic interviewing only. Ultimately, Baker was convicted of four of the five counts of lewd act. He was acquitted of criminal sexual conduct and one count of lewd act. The trial court sentenced Baker to concurrent fifteen-year terms for three of the counts of lewd act and a fifteen-year consecutive term for the fourth count, for a total of thirty years imprisonment. This appeal followed.

STANDARD OF REVIEW

In criminal cases, this court reviews errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id.

LAW/ANALYSIS

Baker argues the trial court erred by: (1) failing to quash the indictments; (2) denying his motion for a continuance; (3) limiting cross-examination of the younger niece about her school disciplinary records; and (4) qualifying Herod as an expert in forensic interviewing. We address each argument in turn.

A. Indictments

Baker argues the trial court erred in denying his motion to quash the indictments because the time frame was overbroad and prevented him from adequately preparing a defense. We disagree.

An indictment is merely a notice document. State v. Gentry, 363 S.C. 93, 102-03, 610 S.E.2d 494, 500 (2005). The true test of the sufficiency of an indictment is not whether it could be made more definite and certain. Id. Rather, the court must look at the indictment with a practical eye in view of all the surrounding circumstances. Id. The sufficiency of the indictment is determined by whether: (1) the offense charged is stated with sufficient certainty and particularity to enable a court to know what judgment to pronounce, and the defendant to know what he or she is called upon to answer and whether he or she may plead an acquittal or conviction thereon, and (2) whether it apprises the defendant of the elements of the offense that are intended to be charged. Id.

A two-prong test is utilized to determine the sufficiency of an indictment involving a purportedly overbroad time period. State v. Tumbleston, 376 S.C. 90, 98-99, 654 S.E.2d 849, 853-54 (Ct. App. 2007). The first prong is whether time is a material element of the offense, and the second is whether the time period covered by the indictment occurred prior to the return of the indictment by the grand jury. Id.

Regarding the first prong, time is not a material element of committing a lewd act on a minor. Id. at 101, 654 S.E.2d at 855. Likewise, time is not an element of criminal sexual conduct with a minor. State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 423 (Ct. App. 1991). In the present case, Baker was indicted on five counts of committing a lewd act upon a minor and one count of criminal sexual conduct with a minor. Time is not an essential element in either of these offenses; thus, the first prong is met. See State v. Nicholson, 366 S.C. 568, 574, 623 S.E.2d 100, 102-03 (Ct. App. 2005) (holding if time is not an essential element of the offense, the indictment need not specifically charge the precise time the offense allegedly occurred).

As to the second prong, the offenses complained of occurred from June 1998 through September 2004, and Baker was served notice of the amended indictments on October 3, 2006. The time period covered by the indictments occurred prior to the return of the indictments by the grand jury. Thus, the second prong is met, and the indictments were not overly broad.

Additionally, an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood. Tumbleston, 376 S.C. at 98, 654 S.E.2d at 853.

The amended indictments for lewd act state:

> That MARK BAKER, a person over the age of fourteen (14) years, did in Sumter County between the period of June 1, 1998 and September 1, 2004 violate Section 16-15-140 of the Code of Laws of South Carolina . . . in that . . . MARK BAKER did willfully and lewdly commit or attempt to commit a lewd and lascivious act upon or with the body, or any part or member thereof, of a child under the age of sixteen (16) years, to wit: [older niece] (Date of Birth: 1/6/89), with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of himself or of the said child.

Section 16-15-140, which defines the crime of committing or attempting to commit a lewd act on a child, states:

> It is unlawful for a person over the age of fourteen years to willfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child.

S.C. Code Ann. § 16-15-140 (Supp. 2009).

The indictment for criminal sexual conduct with a minor states:

> That MARK BAKER did in Sumter County between the period of June 1, 2004 and September 1, 2004, willfully and unlawfully commit criminal sexual conduct with a minor in the second degree by engaging in sexual battery with a minor who was at least fourteen (14) years of age but who was less than sixteen (16) years of age, to wit: [older niece] (Date of birth: 1/6/89) and the actor was in a position of familial, custodial, or official authority to coerce the victim to submit or was older than the victim, to wit: vaginal digital intrusion and cunnilingus, in violation of Section 16-3-655(3) of the Code of Laws of South Carolina. . . .

Section 16-3-655, which defines criminal sexual conduct, states:

> A person is guilty of criminal sexual conduct with a minor in the second degree if: (1) the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age; or (2) the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim.

S.C. Code Ann. § 16-3-655 (Supp. 2009).

The indictments clearly identify the elements of lewd act and criminal sexual conduct. The indictments substantially track the statutory language so plainly that the nature of the charged offense can be easily understood. The indictments establish the offense of lewd act on a minor as defined by section 16-15-140 and the offense of criminal sexual conduct as defined by section

16-3-655. Baker's contention regarding the sufficiency of the indictments is without merit, and we discern no abuse of discretion in the trial court's ruling.

B. Motion for a Continuance

Baker argues the trial court erred in denying his motion for a continuance based on the expanded time frame in the amended indictments. We disagree.

The trial court's decision to deny a motion for continuance is a matter within its discretion. State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957). This court will not reverse the trial court unless there was an abuse of discretion that resulted in prejudice. Id.

Baker was served notice of the amended indictments on October 3, 2006, and his trial commenced on November 13, 2006. Baker had more than one month to prepare for the trial. Additionally, the time frame was expanded only for the lewd act charges, and as explained above, time is not an essential element for this offense. We see no reversible error in the trial court's decision. See id. (holding reversals of the refusal of a continuance are almost as "rare as the proverbial hens' teeth").

C. Cross-examination

Relying on Rule 608(c), SCRE, Baker argues the trial court erred by limiting his cross-examination of the younger niece regarding two school disciplinary incidents because they demonstrated her bias or motive to fabricate the allegation. We disagree.

The admission of evidence rests in the sound discretion of the trial court. State v. Johnson, 318 S.C. 194, 196, 456 S.E.2d 442, 443 (Ct. App. 1995). The trial court's decision will not be overturned unless controlled by an error of law resulting in undue prejudice. Id.

Initially, Baker argues the trial court erred by limiting cross-examination of the younger niece in violation of his right to confront witnesses conferred by the Sixth Amendment of the United States Constitution. This constitutional claim is not preserved for review because it was not raised at trial. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (holding to be preserved for appeal, an issue must be raised to and ruled upon by the trial court). During the trial, Baker argued he should be allowed to cross-examine the younger niece regarding her disciplinary incidents based on Rule 608(c), SCRE. Baker cannot now add a constitutional claim on appeal because he cannot raise one ground to the trial court and a different ground on appeal. See State v. Addison, 338 S.C. 277, 284-85, 525 S.E.2d 901, 905 (Ct. App. 1999) (holding issue not preserved for appeal where one ground is raised below and another ground is raised on appeal); see also State v. Gaster, 349 S.C. 545, 552, 564 S.E.2d 87, 91 (2002) (holding a constitutional claim must be raised to and ruled upon to be preserved for appellate review).

As to the merits of the issue, Rule 608(c), SCRE states, "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Under this rule, anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded to his or her testimony. State v. Jones, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001). During cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness. State v. Starnes, 340 S.C. 312, 325, 531 S.E.2d 907, 914 (2000).

Baker contends the younger niece fabricated the allegations against him in an attempt to deflect attention away from her school disciplinary incidents. The first incident involved the younger niece being in the library when she did not have a pass. As a result, she was written up for cutting class. We find it extremely unlikely that this simple incident would have a legitimate tendency to show the younger niece would fabricate a story of her uncle abusing her older sister in order to avert attention from her minor infraction.

As to the second incident, the younger niece was expelled from school for one year. In October 2004, the younger niece had a prescription pill in her possession on school grounds without proper documentation. Pursuant to the school's no-tolerance policy, she was expelled for one year for this infraction. This incident occurred after the younger niece had made the allegations against Baker. On October 17, 2004, the younger niece disclosed to her mother that Baker had been abusing the older niece. The incident, for which she got expelled for one year, did not occur until October 20, 2004, which was three days after she confided in her mother. While this incident is a more serious infraction than the one described above, it could not have been used to demonstrate bias or a motive to misrepresent because it occurred after the younger niece made the allegations against Baker. Thus, we see no reversible error in the trial court's decision.

D. Expert Witness

In his final argument, Baker alleges the trial court erred in qualifying Officer Herod as an expert witness and in allowing her testimony, which constituted impermissible bolstering. We hold that even if the trial court committed error in qualifying Herod as an expert, Baker suffered no prejudice as a result of the trial court's decision.

The trial court qualified Officer Herod as an expert in forensic interviewing. After being qualified as an expert, Officer Herod testified the older niece disclosed the abuse while the younger niece denied the abuse. Officer Herod opined that, as a result of the interview, she believed the older niece should be referred for a medical exam.

The trial court's determination regarding a witness's qualification to testify as an expert will not be disturbed on appeal absent a showing of an abuse of discretion. State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct. App. 1997).

The facts of this case are similar to the South Carolina Supreme Court's decision in State v. Douglas, 380 S.C. 499, 499-500, 671 S.E.2d 606, 606-07

(2009). In that case, Douglas was convicted of committing a lewd act on a minor. Id. During his trial, Douglas objected to the trial court's classification of Officer Herod as an expert in forensic interviewing and asserted Herod's testimony improperly bolstered the victim's testimony. Id. The trial court qualified Herod as an expert and found her testimony relevant and admissible. Id. Herod testified she received information leading her to conclude the victim needed to be referred for a medical exam. Id. at 501, 671 S.E.2d at 607. Douglas appealed this decision to this court, and we concluded the trial court did not abuse its discretion in finding Herod an expert in forensic interviewing. State v. Douglas, 367 S.C. 498, 519, 626 S.E.2d 59, 70 (Ct. App. 2006) (affirmed as modified).

Douglas appealed to our supreme court, which reversed our conclusion and stated "it was unnecessary for Herod to be qualified as an expert." Douglas, 380 S.C. at 501, 671 S.E.2d at 608. However, the supreme court affirmed Douglas's conviction and concluded "Douglas suffered no prejudice either as a result of Herod's testimony or by her qualification as an expert." Id. at 503, 671 S.E.2d at 608-09.

Even if we assume the trial court erred in qualifying Herod as an expert, we find Baker suffered no prejudice as a result of this decision. The jury was free to accept or reject Herod's testimony. The mere fact that Herod was qualified as an expert did not require the jury to give her testimony any greater weight than that given to a non-expert witness. The trial court made this point explicitly clear by stating:

> As jurors . . . it is your duty to determine . . . the effect, the value, the weight, and the truth of the evidence presented. You should consider the expert opinion received [into] evidence in this case and like any other evidence give it the weight you think that it deserves. If you decide that the opinion of the expert witness is not based on sufficient education and experience or if you conclude that the reasons given in support of their opinion are not sound or that the

> opinion is outweighed by other evidence you may disregard the opinion entirely. An expert witness['s] testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert. Further, you are not required to accept an expert's opinion even though it is not contradicted.

The foregoing demonstrates the jury was informed it was free to assign no weight to Herod's testimony. Further, the jury understood Herod's testimony was not to be afforded more weight simply because she was qualified as an expert. Thus, Baker was not prejudiced by the trial court's decision. See id. at 503, 671 S.E.2d at 609 ("The fact that Herod was qualified as an expert did not require the jury to accord her testimony any greater weight than that given to any other witness.").

Baker's contention that Herod's testimony constituted impermissible bolstering is without merit. As in the Douglas case, Herod did not testify she believed the testimony of the younger or older niece, and she did not vouch for the victims' veracity. Thus, we conclude Herod's testimony did not constitute improper bolstering.

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Louis Manios and Jimmy B. Rogers, Jr., as partners in M&R Investors, a South Carolina General Partnership, and M&R Investors, a South Carolina General Partnership, Appellants/Respondents,

v.

Nelson, Mullins, Riley & Scarborough, LLP, and David E. Hodge, Esquire, Respondents/Appellants.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 4699
Heard April 13, 2010 – Filed June 15, 2010

AFFIRMED

Desa Ballard & P. Christopher Smith, Jr. of West Columbia, for Appellants-Respondents.

R. Davis Howser & Andrew E. Haselden of Columbia, for Respondents-Appellants.

SHORT, J.: In this legal malpractice case, M&R Investors, LLC, and Louis Manios and Jimmy Rogers, Jr., as partners in M&R Investors (collectively, M&R), argue the trial court erred in: (1) denying M&R's motion for new trial nisi additur; (2) striking M&R's claim for damages for lost profits; (3) denying M&R's motion for directed verdict or judgment notwithstanding the verdict on the issue of legal malpractice; and (4) denying M&R's motion for a new trial absolute on the issue of damages. In its cross-appeal, Nelson Mullins Riley & Scarborough, LLP, and David Hodge (collectively, Nelson Mullins), argue the trial court erred in denying Nelson Mullins' motions: (1) for summary judgment; (2) to strike with respect to M&R's alleged damages; (3) for a directed verdict; and (4) for judgment notwithstanding the verdict. We affirm.

FACTS

M&R is a limited liability company dealing in real estate transactions. In January 2000, William J. Burk, individually and on behalf of Landex, Inc. and Concord Development Group, LLC (collectively, Borrowers) agreed to borrow $1.1 million from M&R, including a $100,000 fee to make the loan. The loan was to be secured by a 55-acre tract of land in Mecklenburg and Cabarrus counties, North Carolina.

M&R retained David Hodge of Nelson Mullins to handle the transaction including securing M&R's status as the first priority lienholder. M&R had retained Hodge for six or seven real estate transactions prior to the transactions in this case. Tim Gilbert, of Nexsen Pruet Law Firm's Charlotte office, represented Borrowers and was to perform the title work and obtain a title policy.

Unbeknownst to M&R, the property was encumbered by a 1999 deed of trust[1] to Michael J. Gallis, which was recorded against the property. The deed of trust arose from a 1998 agreement between Borrowers and Gallis.[2] In return for Gallis' "past and present efforts" regarding development and zoning on Borrowers' behalf, Gallis was to receive a $300,000 fee and a $200,000 bonus payment if re-zoning efforts on the secured property were successful. The 1998 agreement states: "This Agreement will be secured by a deed of trust described below." The agreement later states: "While this Agreement is fully binding in all respects, we would like to prepare a more detailed agreement. . . . Upon receiving the information related to the Property, we will prepare the deed of trust which will provide for payment to Michael Gallis as provided herein." The deed of trust was for $300,000.

Borrowers and Gallis entered into a subordination agreement on May 9, 2000. The subordination agreement provided Gallis would subordinate his deed of trust to M&R's $1.1 million loan to Borrowers. The agreement provided for penalty interest at 5 percent per month, compounded monthly, if payment to Gallis for his fee and bonus was not made within one business day after a "triggering event" such as a sale, or by July 17, 2000.

Borrowers and their counsel coordinated with Nelson Mullins to prepare the subordination agreement. According to a facsimile cover page from Hodge, "[t]he idea . . . [was] to make it clear that . . . [M&R's] security interest is, and will continue to be, first to the extent of the indebtedness."

The subordination agreement states in part:

> This Agreement only subordinates the Michael J. Gallis Deed of Trust to the Lender's [M&R's] Deed of Trust to the extent of the original amount of $1,100,000.00 and any amounts advanced pursuant to

[1] A deed of trust is a security interest in property, similar to a mortgage. See Black's Law Dictionary 414 (6th 1990) (defining a deed of trust).

[2] This and other agreements at issue here are between Gallis and two companies including one of Borrowers', Concord Development Group, LLC.

> the provisions of the Lender's Deed of Trust for payment of insurance premiums, taxes, costs of collection, or protection of the value of the Lender Property or Lender's rights in the Lender Property. This Agreement is not a subordination of the lien of the Michael J. Gallis Deed of Trust to any renewals, future advances, modifications, or rearrangements of the Lender's Note and Deed of Trust to the extent any such modification increases the amount secured by the Lender's Deed of Trust.

(Emphasis added.) The subordination agreement was recorded in both counties. M&R likewise recorded a deed of trust in each county.

In December 2000, M&R agreed to lend Borrowers an additional $1.6 million to be secured by the subject property.[3] M&R again retained Nelson Mullins to represent its interests in the transaction. Hodge testified he was "heavily involved in the drafting and negotiation" of the note on the second loan. The note provides the loan is secured by a deed of trust that "shall be in second position behind the Existing Deed of Trust." The deeds of trust likewise indicate the $1.6 million loan is second in priority.

Gilbert handled the title work and secured the title insurance policy. The title commitment indicates the subordination agreement as an exception, but not the Gallis deed of trust. The commitment was faxed to Susan Hughes, a licensed title insurance agent and paralegal at Nelson Mullins. Hodge did not recall reviewing it but conceded "[t]here's an excellent chance that I did." There was no billing record for anyone at Nelson Mullins reviewing the title commitment. In preparing the second loan, however, Hughes billed for reviewing the prior loan documents.

The title insurance policy also listed the subordination agreement as an exception, but not Gallis' deed of trust. Hodge testified he did not realize

[3] There were two loans, one for $400,000 and one for $1.2 million, consolidated into one loan.

there was an intervening lien between the M&R deeds of trust until a "year or so after these transactions occurred." Hodge testified none of the documents put him on notice that the second loan would not have second priority.

Borrowers defaulted on the loans and M&R hired Ashley Hogewood of Parker Poe Adams & Bernstein, LLP to handle a foreclosure action. At the time, M&R believed they had first and second priority. During the course of preparing the foreclosure action, Hogewood found Gallis' recorded subordination agreement and deed of trust. Hogewood notified M&R. According to Louis Manios of M&R, Hodge had never informed him of the subordination agreement. Manios testified he told Hogewood: "There's no way. . . . We have got a first and a second. David Hodge was told from day one we had to be in the first and second position." Manios testified that he, Rogers, Hodge, and Hogewood met, and Hodge claimed to know nothing about a subordination agreement. Although M&R had used Hodge in the past, this was the first time it hired Hodge to represent it as a lender. Manios testified he dealt only with Nelson Mullins and was not aware Nexsen Pruet was involved.

Robert McNeill, an attorney hired by the title insurance company, testified the priority of liens in North Carolina is not determined in a foreclosure action but in a separate proceeding in Superior Court. In this case, the foreclosure sale was held in December 2001. M&R bid $1,418,500 for the property. The bidding in North Carolina is held open for ten days and a subsequent bid must exceed the latest bid by five percent. Gallis bid $1,495,000. The Speedway, who owned property adjacent to the subject property, entered the next bid of $1,569,750. The required amount for a subsequent bid was $1,648,237. M&R entered a bid of $3,328,000. This was the final bid and the property was deeded to M&R. The Final Report and Account of Foreclosure Sale reports M&R was paid $1,390,304.79 but that "Adverse claims are asserted and the Trustee is in doubt as to who is entitled to surplus" funds of $1,923,137.

In March 2002, Gallis filed a petition to determine the ownership of the surplus funds. Gallis claimed entitlement to the second lien priority and

$795,989.28, including compound interest. The title insurance company hired Robert McNeill to represent M&R in Gallis' action. The trial court granted summary judgment to Gallis and ordered that $300,000 of the surplus proceeds be distributed to Gallis. M&R appealed. The North Carolina Court of Appeals reversed the trial court and remanded the matter for trial. M&R settled with Gallis for $300,000. M&R filed this action alleging legal malpractice, breach of fiduciary duty, and breach of contract.

At trial, Manios testified M&R borrowed $1 million from NBSC to lend to Borrowers on the first note. Hodge was aware M&R borrowed funds to make this loan. Manios explained the bank required additional collateral for the $1.6 million loan, so he and his partner, Jimmy Rogers, pledged other real property and personally-owned stock to borrow the loan amount to lend to Borrowers. Hodge knew M&R had to borrow money to fund both loans, and the partners had to pledge personal assets to fund the $1.6 million loan.

M&R also borrowed $3.2 million to purchase the property at the foreclosure sale. M&R paid interest on the $1.1 million loan until it was paid as the first lienholder from the proceeds of the foreclosure sale; paid $316,225 in interest on the $1.6 million loan during the note period and the three years of litigation; and paid interest on the $3.2 million loan.

The parties introduced expert testimony at trial. Warren Herndon, Jr., a real estate lawyer practicing in South Carolina, was qualified as an expert as to the standard of care owed by a South Carolina attorney with reference to a commercial real estate transaction. Herndon testified Hodge had a "duty to fully find out what was represented by the subordination agreement, and . . . to find out" the effect on the new loan. Herndon opined Hodge and Nelson Mullins failed to meet their obligations to M&R in connection with the $1.6 million loan, and the deviation from the standard of care was the proximate cause of damages to M&R. Herndon testified obtaining the title policy did not automatically discharge the attorney's obligation to the client. During cross-examination, Herndon admitted Gilbert should have notified Borrowers, the title company, and Hodge about the Gallis lien when doing the title work for the closing on the $1.6 million loan. Herndon testified

Hodge should have reviewed the subordination agreement at the time of the $1.6 million loan as it "was such an important part of making sure the lien position was correctly handled in the first lien."

H. Dave Whitener, Jr. was qualified as an expert in real estate law. Whitener opined Hodge did not deviate from the standard of care by relying on the title insurance policy and failing to conduct an independent title search for either loan. Whitener testified the Gallis deed of trust should have been reflected in the warranty sections of M&R's deeds of trust for the $1.6 million loan. Whitener stated the title commitment and policy should also have mentioned the Gallis lien. Due to the failure of these documents to mention the Gallis lien, according to Whitener, Hodge could logically conclude the Gallis lien had been satisfied or was no longer a lien against the property as it related to the $1.6 million loan. Finally, Whitener concluded Hodge met the standard of care in handling a real estate transaction by relying on the documents, which placed the two M&R loans in first and second priority. Whitener conceded he would have determined the $1.6 million loan was not in second position.

At the close of M&R's case, the trial court granted Nelson Mullins' motions for directed verdicts as to: (1) breach of fiduciary duty; (2) punitive damages on the breach of contract action; and (3) punitive damages on the malpractice claim, finding insufficient evidence to support punitive damages. The trial court also granted Nelson Mullins' motion to strike M&R's claim of damages for lost profits. The court gave a curative instruction to the jury to disregard the evidence of lost profits. The trial court, inter alia, denied Nelson Mullins' motions for directed verdicts as to: (1) the statute of limitations; (2) breach of contract; (3) a bar of the malpractice claim by comparative negligence; and (4) a bar of the malpractice claim by intervening negligence. The trial court also denied Nelson Mullins' motion to strike the claim for interest damages. At the close of the evidence, the trial court denied both parties' motions for directed verdicts.

The jury found for Nelson Mullins on the malpractice claim and for M&R on the breach of contract claim, awarding $53,088 in damages. The trial court denied the parties' post-trial motions. All parties appealed.

STANDARD OF REVIEW

In an action at law on appeal of a case tried by a jury, this court's review is restricted to corrections of errors of law. Factual findings of the jury will not be disturbed unless there is no evidence reasonably supporting the findings. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

I. M&R's Appeal

A. Nisi Additur

M&R argues the trial court erred in denying its motion for new trial nisi additur. We disagree.

The determination of damages by a jury is entitled to substantial deference. Stevens v. Allen, 336 S.C. 439, 446-47, 520 S.E.2d 625, 629 (Ct. App. 1999). "The trial court has the power to grant a new trial nisi additur when it finds the amount of the verdict to be merely inadequate." Ligon v. Norris, 371 S.C. 625, 635, 640 S.E.2d 467, 472 (Ct. App. 2006). The denial of a motion for additur is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. Id. "The consideration of a motion for a new trial nisi additur requires the court to consider the adequacy of the verdict in light of the evidence presented." Id. There is no abuse of discretion in the trial court's denial of a motion for new trial nisi where there is evidence to support the verdict. Id. at 635, 640 S.E.2d at 473. "When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between

awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004).

In Todd v. Joyner, 385 S.C. 509, 512, 685 S.E.2d 613, 615 (Ct. App. 2008), aff'd, 385 S.C. 421, 685 S.E.2d 595 (2009), this court affirmed the trial court's denial of Todd's motion for new trial nisi additur where Joyner stipulated to her negligence and the jury awarded only the amount of Todd's medical expenses. We found evidence in the record supporting Joyner's argument at trial that not all of the damages claimed were proximately caused by Joyner. Id. at 517, 685 S.E.2d at 618.

In Ligon, 371 S.C. at 635, 640 S.E.2d at 472-73, this court likewise affirmed the trial court's denial of plaintiff's motion for new trial nisi additur. In Ligon, plaintiff claimed a one percent interest in a corporation, alleging damages of $5,468,881, the value of the one percent at the time of the initial public stock offering. Id. at 631-32, 640 S.E.2d at 470. This court found evidence in the record that the jury could have relied on to value the corporation at a time other than the initial stock offering in reaching its verdict of $382,148. Id. at 632-33, 640 S.E.2d at 471.

M&R claimed damages of $316,225, which was the interest paid on the funds it borrowed to make the $1.6 million loan. M&R claimed entitlement to this interest based on the three years the surplus funds were held by the court pending resolution of the Gallis claim. Although it is unclear from the record exactly how the jury arrived at its verdict of $53,088, there is evidence to support an award of less than $316,225. As in Todd, the jury could have determined that not all of the interest claimed was proximately caused by the breach of contract. For instance, at the time M&R bid $3.328 million for the property during the foreclosure bidding, the bid was at $1,569,750 and M&R could have bid five percent above that bid rather than $3.328 million.[4]

[4] The trial court denied Nelson Mullins' motion for a directed verdict based on comparative and/or intervening negligence. The trial court permitted Nelson Mullins to argue M&R's bid of $3.328 million was not foreseeable.

As in Ligon, the jury in this case could have determined M&R was entitled to interest for a period less than three years. For instance, the trial court awarded Gallis $300,000 in September 2003. The North Carolina Court of Appeals' judgment was entered in December 2004. M&R and Gallis settled for $300,000 after that time. We find no error by the trial court in denying M&R's motion for new trial nisi additur.

B. Lost Profits

M&R argues the trial court erred in striking its claim of damages for lost profits. We disagree.

M&R claimed it had to forego other investment opportunities during the period of the North Carolina litigation and this was foreseeable to Nelson Mullins. Manios testified M&R lost $120,000 due to a loan they could not make in October 2002 to developer Arthur Cleveland, and $96,000 in December 2003 on another loan to Cleveland. Manios testified he and Rogers lost profits of $655,600 on Pinckney Retreat, a development in Beaufort, because their assets were tied up and M&R had to bring in outside investors. M&R also claimed to have lost the benefit of a tax deduction worth $228,000 from the donation of a conservation easement to the Beaufort Historical Society. The trial court struck the claim for lost profits, finding them not foreseeable. The court stated:

> [C]ertainly it was well within the contemplation that [Hodge] was aware that personal assets had been pledged . . . and I think it is foreseeable that if there was a problem . . . that those assets could be tied up[;] I do not find that it is foreseeable that . . . he would understand that by tying up those personal assets in this particular transaction that [M&R] would then be prohibited from using those personal assets in . . . other individual projects down the road.

Lost profits may be recovered in a breach of contract action under a three-prong test:

> First, profits must have been prevented or lost as a natural consequence of the breach of contract. The second requirement is foreseeability; a breaching party is liable for those damages, including lost profits, which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made as a probable result of the breach of it. The crucial requirement in lost profits determinations is that they be established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative.

Drews Co. v. Ledwith-Wolfe Assocs., 296 S.C. 207, 213, 371 S.E.2d 532, 535-36 (1988) (internal citations omitted). Damages must either flow as a natural consequence of the breach or have been reasonably within the parties' contemplation at the time of the contract. Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 595, 493 S.E.2d 875, 880 (Ct. App. 1997); see S.C. Fin. Corp. of Anderson v. West Side Fin. Co., 236 S.C. 109, 122, 113 S.E.2d 329, 335-36 (1960) (stating "profits that have been prevented or lost as the natural consequence of a breach of contract are recoverable as an item of damages in an action for such breach").

In Sterling Development Co. v. Collins, the South Carolina Supreme Court stated:

> In claiming lost profits, the degree of proof required is that of reasonable certainty. The proof must pass the realm of conjecture, speculation or opinion not founded on facts, and must consist of actual facts

> from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn.

309 S.C. 237, 242, 421 S.E.2d 402, 405 (1992) (internal citation omitted).

We find the trial court did not err in finding lost profits in this case were not in the contemplation of the parties. Although Hodge knew Manios and Rogers were pledging personal assets to fund the $1.6 million loan, this was the first time M&R had used Hodge in a transaction in which M&R was lending money to a third party. Furthermore, the Pinckney Retreat project was approximately three years after the $1.6 million loan was made. We conclude it was not foreseeable that Hodge would understand that by pledging personal assets on the $1.6 million loan, M&R would potentially lose future business opportunities.

C. Denial of Directed Verdict on Legal Malpractice Claim

M&R argues the trial court erred in denying its motion for directed verdict or judgment notwithstanding the verdict on the issue of legal malpractice. We disagree.

When reviewing the denial of a motion for directed verdict or judgment notwithstanding the verdict, the appellate court applies the same standard as the trial court. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004). The court must view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). The appellate court will only reverse the trial court's ruling when there is no evidence to support the ruling or when the ruling is controlled by an error of law. Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

In an action for legal malpractice, the claimant must prove four elements: (1) the existence of an attorney-client relationship; (2) breach of a

duty by the attorney; (3) damage to the client; and (4) proximate causation of the client's damages by the breach. Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 435 n.2, 472 S.E.2d 612, 613 n.2 (1996).

During the trial, each side presented expert testimony. Herndon testified Nelson Mullins did not meet its obligations to M&R in connection with the $1.6 million loan because it did not fully explore the effect of the subordination agreement although it was listed in the title insurance commitment. Herndon opined this deviation from the standard of care caused damages to M&R. Contrarily, Whitener testified Nelson Mullins did not deviate from the standard of care by relying on the loan documents that placed the two M&R loans in first and second priority. Viewed in the light most favorable to Nelson Mullins, the trial court did not err in denying M&R's motion for directed verdict on the legal malpractice claim.

D. Denial of Motion for New Trial Absolute on Damages Based on Jury Instructions Regarding Intervening Acts

M&R argues the trial court erred in denying its motion for a new trial absolute on the issue of damages based on erroneously charging the jury on intervening acts in the jury instructions on proximate cause. We disagree.[5]

The grant or denial of new trial motions rests within the discretion of the trial court and its decision will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. Vinson v. Hartley, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996). An appellate court will not reverse a trial

[5] Nelson Mullins argues this issue is not preserved because the trial court did not rule on its motion for directed verdict based on intervening acts, made at the close of all evidence. Nelson Mullins made the motion in conjunction with several other motions. The trial court stated: "I think those are all jury issues, and so I'm going to deny them on that basis." To preserve an issue for appellate review, the issue must be raised to and ruled upon by the trial court. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). We find the issue is preserved and address it on the merits.

court's ruling regarding jury instructions unless the trial court abused its discretion. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues." Id. at 390, 529 S.E.2d at 539.

"Evidence of an independent negligent act of a third party is directed to the question of proximate cause." Matthews v. Porter, 239 S.C. 620, 628, 124 S.E.2d 321, 325 (1962). "The intervening negligence of a third person will not excuse the first wrongdoer if such intervention ought to have been foreseen in the exercise of due care. In such case, the original negligence still remains active, and a contributing cause of the injury." Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998). Ordinarily, proximate cause is a question for the jury. McKnight v. S.C. Dep't of Corr., 385 S.C. 380, 387, 684 S.E.2d 566, 569 (Ct. App. 2009).

During the trial, evidence of intervening acts of others was presented including Whitener's testimony that the title insurance policy on the first loan contained an error by omitting mention of the Gallis deed of trust. This error, according to Whitener, "end[ed] up perpetuating itself through the title insurance commitment for the [$]1.6 [million loan] and later the title insurance policy . . . ." Whitener testified the second title insurance policy was probably based on an "update of the title[,]" leading "to the problem that later presented itself with the issue as to what happened to the Gallis lien." We find no error by the trial court in denying M&R's motion for new trial absolute based on jury instructions regarding intervening acts of negligence.

II. Nelson Mullins' Appeal

A. Denial of Motion for Summary Judgment

Nelson Mullins argues the trial court erred in denying its motion for summary judgment. Prior to trial, Nelson Mullins moved for summary judgment and the trial court denied the motion. "[T]he denial of a motion for

summary judgment before trial is not reviewable after a trial of a case on its merits." Holloman v. McAllister, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986). Accordingly, we decline to address this issue.

B. Motion to Strike Evidence of Damages

Nelson Mullins argues the trial court erred in denying its motion to strike evidence of damages including interest paid on the $1.6 million loan and lost profits. We disagree.

1. Interest

The admission of evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Pike v. S.C. Dep't of Transp., 343 S.C. 224, 234, 540 S.E.2d 87, 92 (2000). A motion to strike is likewise within the trial court's discretion and will not be reversed absent an abuse of discretion. Mayes v. Paxton, 313 S.C. 109, 115, 437 S.E.2d 66, 70 (1993). The trial court found the interest paid was a foreseeable consequence of pledging assets and denied the motion to strike evidence of interest. We find no abuse of discretion in the trial court's denial of Nelson Mullins' motion to strike evidence of interest paid on the $1.6 million loan.

2. Lost Profits

At the close of M&R's case, the trial court granted Nelson Mullins' motion to strike M&R's claim of damages for lost profits. The court gave a curative instruction to the jury to disregard the evidence of lost profits. The trial court stated:

> [A]ny damages that . . . have been claimed relating to the Pinckney Landing, the Beaufort County transaction, are not allowed; as well as any damages that are claimed from the inability to make certain loans to Mr. Cleveland . . . those also are not allowed.

> Therefore, ladies and gentlemen, you are to treat that evidence as if it had not been presented to you. You must not consider it in any way in your deliberations when we get to that particular point. It is no longer an issue for you all to consider.

A curative instruction is generally deemed to have cured any alleged error. State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006). We find the trial court's curative instruction was sufficient to cure any alleged error arising from the evidence of lost profits.

C. Denial of Motion for Directed Verdict

Nelson Mullins argues the trial court erred in denying its motions for directed verdict on the issues of: (1) the statute of limitations; (2) the measure of damages; (3) breach of contract; and (4) legal malpractice. We disagree.

"In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or non-existence of evidence." Sims v. Giles, 343 S.C. 708, 714, 541 S.E.2d 857, 861 (Ct. App. 2001). The trial court must view the evidence in the light most favorable to the nonmoving party. Id. at 714, 541 S.E.2d at 860. If the evidence as a whole is susceptible of more than one reasonable inference, the case should be submitted to the jury. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct. App. 2002). "In an action at law, on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the corrections of errors of law." Pinckney v. Winn-Dixie Stores, Inc., 311 S.C. 1, 3, 426 S.E.2d 327, 328 (Ct. App. 1992).

1. Statute of Limitations

Nelson Mullins argues the trial court erred in denying its motion for directed verdict based on the statute of limitations. This action is governed by a three-year statute of limitations period. S.C. Code Ann. §§ 15-3-530 (1) & (5)(2005). See RWE Nukem v. ENSR Corp., 373 S.C. 190, 196, 644 S.E.2d

730, 733 (2007) (applying three year statute of limitations in breach of contract action); Berry v. McLeod, 328 S.C. 435, 444-45, 492 S.E.2d 794, 799 (Ct. App. 1997) (finding three year statute of limitations applies to legal malpractice actions). The discovery rule applies in this action. See Kelly v. Logan, Jolley, & Smith, LLP, 383 S.C. 626, 632-33, 682 S.E.2d 1, 4 (Ct. App. 2009) (applying discovery rule in legal malpractice action); Maher v. Tietex Corp., 331 S.C. 371, 376-77, 500 S.E.2d 204, 207 (Ct. App. 1998) (applying discovery rule in breach of contract action). According to the discovery rule, the statute of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence that a cause of action might exist. Abba Equip., Inc. v. Thomason, 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct. App. 1999). If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 338-39, 534 S.E.2d 672, 681-82 (2000).

When Borrowers defaulted on the loans, M&R hired Hogewood to handle the foreclosure action. Manios testified in his deposition that he contacted Hogewood in May 2001. According to Manios, Hogewood informed him about a month later of the Gallis deed of trust. Hogewood testified he became aware of the problem when preparing to file the foreclosure action, about "Octoberish." He further testified he did not determine the Gallis deed of trust would interfere with the foreclosure sale proceeds until receiving the order to foreclose and the foreclosure sale was held. The foreclosure sale was held in December 2001. The Final Report and Account of Foreclosure Sale, indicating adverse claims were asserted, was issued on February 28, 2002. Gallis filed his petition to determine the ownership of surplus funds in March 2002. This action was filed in November 2004.

We find the date the statutes of limitations began to run involves questions for the jury and find there was no error by the trial court in denying the motion for directed verdict on the issue of statutes of limitations.

2. Measure of Damages

Nelson Mullins argues the trial court erred in denying its motion for directed verdict, which was based on the measure of damages, and alleges the proper amount of damages for a missed lien is the amount it takes to remove that lien from the property. Nelson Mullins argues because the title insurance company paid the settlement amount to Gallis, M&R suffered no damages to remove the lien and was not entitled to interest paid on the $1.6 million loan during the pendency of the litigation. We find no error.

In a breach of contract action, a party may recover for those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. Benford v. Berkeley Heating Co., 258 S.C. 357, 362-63, 188 S.E.2d 841, 842-43 (1972). The proper measure of damages for breach of contract is the loss that was actually suffered as the result of the breach. S.C. Fin. Corp. of Anderson v. West Side Fin. Co., 236 S.C. 109, 122, 113 S.E.2d 329, 335 (1960). In this case, although the title insurance company paid the Gallis settlement funds, M&R alleged damages including interest paid on the funds it borrowed to make the $1.6 million loan to Borrowers.

3. Denial of Directed Verdict on Breach of Contract Claim

Nelson Mullins argues the trial court erred in denying its motion for a directed verdict on the breach of contract cause of action. We disagree.

In deciding a motion for directed verdict, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party. Dalon v. Golden Lanes, Inc., 320 S.C. 534, 538, 466 S.E.2d 368, 370 (Ct. App. 1996). If more than one inference can be drawn from the evidence, the case must be submitted to the jury. Id. The necessary elements of a contract are offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). To recover for a breach of contract, the plaintiff must prove: (1) a

binding contract; (2) a breach of contract; and (3) damages proximately resulting from the breach. Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962).

Viewed in the light most favorable to M&R, there is evidence in the record that M&R contracted with Nelson Mullins to provide legal services to protect its status as a first-priority lienholder for both loans. Manios testified Hodge knew M&R wanted to remain first in priority. M&R also presented evidence of a breach of the agreement through expert testimony that Nelson Mullins failed to protect this priority status. Finally, M&R presented evidence of damages proximately resulting from the breach in the form of interest. Therefore, we find the trial court properly submitted this issue to the jury.

4. Denial of Directed Verdict on Malpractice Claim

Nelson Mullins next argues the trial court erred in denying its motion for a directed verdict on the legal malpractice cause of action. We disagree.

The jury returned a verdict for Nelson Mullins on the legal malpractice claim so Nelson Mullins is able to show no prejudice resulting from the trial court's failure to direct a verdict in its favor on legal malpractice. See Am. Fed. Bank v. Number One Main Joint Venture, 321 S.C. 169, 174-75, 467 S.E.2d 439, 442 (1996) (stating the conduct of a trial is within the trial judge's sound discretion and will not be disturbed on appeal without a showing of abuse of discretion, error of law, and resulting prejudice).

D. Denial of Motion for Judgment Notwithstanding the Verdict

Nelson Mullins argues the trial court erred in denying its motion for judgment notwithstanding the verdict (JNOV). We disagree.

In ruling on a motion for JNOV, the trial judge must view the evidence in the light most favorable to the nonmoving party. Rogers v. Norfolk S. Corp., 356 S.C. 85, 92 n.4, 588 S.E.2d 87, 90 n.4 (2003). The court should

not grant JNOV where the evidence yields more than one inference. Id. An appellate court may not overturn the decision of the trial court if there is any evidence to support the trial court's ruling. Id. This is the same standard applied to a motion for directed verdict. Creech v. S.C. Wildlife & Marine Res. Dep't, 328 S.C. 24, 29, 491 S.E.2d 571, 573 (1997). For the reasons discussed in reviewing Nelson Mullins' motions for directed verdicts, we find no error by the trial court in denying its motion for JNOV.

CONCLUSION

For the foregoing reasons, the jury verdict and orders on appeal are

AFFIRMED.

LOCKEMY, J. and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Timothy R. Wallace, Donna P. Wallace, William Andrew Wallace, Kimberly A. Wallace, David Jonathan Wallace and Christine Ponder Wallace, Respondents,

v.

Lynn Wellborn Day, Appellant.

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

Opinion No. 4700
Heard March 2, 2010 – Filed June 16, 2010

REVERSED IN PART, VACATED IN PART, and REMANDED

Amanda A. Bailey and Henrietta U. Golding, of Myrtle Beach, for Appellant.

George Hunter McMaster, of Columbia, and Brooks R. Fudenberg, of Mount Pleasant, for Respondents.

PER CURIAM: Respondents, Timothy Wallace and several members of his family (the Wallaces), filed this action against Appellant Lynn Day (Day), seeking damages for breach of a contract to purchase a condominium in the Camelot by the Sea Resort in Myrtle Beach. Day filed counterclaims for breach of contract, intentional interference with contractual relations, and civil conspiracy. The master-in-equity granted the Wallaces' summary judgment motion, and Day appeals the master's order. We reverse in part and vacate in part the master's order and remand for a full trial on the merits.

FACTS/PROCEDURAL HISTORY

On February 19, 2005, the Wallaces entered into a contract to purchase Day's condominium in the Camelot by the Sea Resort in Myrtle Beach.[1] The contract required a closing date of March 18, 2005; however, the parties executed an addendum to the contract to extend the closing date to April 6, 2005. The parties also executed a separate addendum stating that the Wallaces were "exercising a 1031 tax free purchase."[2]

When the April 6th closing date arrived, the Wallaces were unable to close the transaction due to problems with the loan package. On April 7, Day presented an earnest money release to the Wallaces' agent, proposing to return the Wallaces' earnest money. On April 8, the Wallaces were ready to close, but Day signed a contract to sell the condominium to Steve and Sandra

[1] At this time, the property was titled in the name of Day's late husband, but Day had authority to sign the contract.

[2] See 26 U.S.C. § 1031(a)(1) (Supp. 2009) ("No gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like kind [that] is to be held either for productive use in a trade or business or for investment.").

Purwell (the Purwells). On April 18, Day sent a letter to her agent authorizing the return of the Wallaces' earnest money and also sent a copy of the letter to the Wallaces' agent. On April 21, the Wallaces filed a Notice of Lis Pendens as to the condominium. On May 12, Day sent a letter to her agent withdrawing the offer to refund the Wallaces' earnest money and also sent a copy of the letter to the Wallaces' agent. On that same day, the Wallaces filed an Amended Notice of Lis Pendens. Subsequently, the Wallaces filed a Second Amended Notice of Lis Pendens on June 2, a Third Amended Notice of Lis Pendens on June 22, and a complaint for breach of contract against Day on June 24. The Wallaces' complaint sought damages, or, in the alternative, specific performance.

Day filed a counterclaim for breach of contract, intentional interference with contractual relations, and civil conspiracy. Day sought summary judgment on her breach of contract claim; however, the circuit court denied the motion. While Day's motion for reconsideration was still pending, the parties agreed to a referral of the case to the master-in-equity, and the Wallaces filed a summary judgment motion. Subsequently, the parties entered into a stipulation of facts. After the circuit court denied Day's motion for reconsideration, the master granted the Wallaces' summary judgment motion and dismissed Day's breach of contract counterclaim. Although the Wallaces' summary judgment motion was originally limited to their cause of action for specific performance, they later elected to proceed on their cause of action for breach of contract. In his final order, the master awarded the Wallaces $65,000 for the difference between the condominium's market price and contract price at the time of Day's alleged breach and $15,500 for lost profits, for a total damages award of $80,500. The master also awarded the Wallaces $33,749.10 for attorney's fees and costs. This appeal followed.

STANDARD OF REVIEW

On appeal from the grant of a summary judgment motion, this Court applies the same standard as that required for the circuit court under Rule 56(c), SCRCP. Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). "'Summary judgment is proper where there is no

genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" Adamson v. Richland County Sch. Dist. One, 332 S.C. 121, 124, 503 S.E.2d 752, 753 (Ct. App. 1998) (quoting Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997)).

"Summary judgment should be granted when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009). "However, summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law." Id. "Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Doe ex rel. Doe v. Batson, 345 S.C. 316, 321-22, 548 S.E.2d 854, 857 (2001) (citing Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)).

"In determining whether any triable issues of fact exist, the evidence and all inferences must be viewed in the light most favorable to the non-moving party." Pee Dee, 381 S.C. at 240, 672 S.E.2d at 802. "Thus, the appellate court reviews all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party." Id. Further, "'[s]ummary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts.'" Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009) (quoting Brockbank v. Best Capital Corp., 341 S.C. at 378, 534 S.E.2d at 692 (2000)).

"Summary judgment is improper when there is an issue as to the construction of a written contract and the contract is ambiguous because the intent of the parties cannot be gathered from the four corners of the instrument." Pee Dee, 381 S.C. at 241, 672 S.E.2d at 802. "The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed." Id. "Construction of an ambiguous contract is a question of fact to be decided by the trier of fact." Id. (citing Soil

Remediation Co. v. Nu-Way Envtl., Inc., 325 S.C. 231, 234, 482 S.E.2d 554, 555 (1997)).

LAW/ANALYSIS

I. The Wallaces' Breach of Contract Claim

Day asserts that the master erred in granting summary judgment to the Wallaces on their breach of contract claim because the Wallaces admitted they were in default for failing to close on April 6, 2005 and because she was not required to provide the Wallaces with either a notice of default or five days to cure their default. We agree that the master erred in granting summary judgment, but not for the reason asserted by Day. Rather, we find that summary judgment is inappropriate because there is an ambiguity in the contract's default provision.

Initially, we note that counsel stated during oral arguments the parties were not arguing the contract's provisions were ambiguous. However, their opposing viewpoints on the meaning of the contract's default provisions requires the Court to consider whether an ambiguity in the contract precluded the master from granting summary judgment. See Greer v. McFadden, 295 S.C. 14, 17-18, 366 S.E.2d 263, 265 (Ct. App. 1988) (citing Bartles v. Livingston, 282 S.C. 448, 464, 319 S.E.2d 707, 716-17 (Ct. App. 1984)) ("When this Court construes an exception, it will make its construction as liberal as the language will allow, in order to decide the question involved, unless it is satisfied that the statement has misled the respondent to his prejudice."). Day framed the first issue in her appellate brief as follows: "Whether the trial court erred in granting summary judgment in favor of the Wallaces' breach of contract claim against Day when the Wallaces admit they were in default for failing to close on April 6, 2005?" This issue necessarily involves Day's interpretation of the contract in a manner that would relieve her of any further obligations to the Wallaces. The Wallaces dispute this interpretation, and, consequently, this Court is called upon to decide whether the provisions in question are reasonably susceptible to more than one interpretation and thus ambiguous. Under these circumstances, we are not

satisfied that Day's statement of the first issue in her brief could have misled the Wallaces to their prejudice. See id. Therefore, in the spirit of judicial economy advanced by Greer, we address the question of the contract's ambiguity and its effect on the master's summary judgment ruling.

When interpreting a contract, a court must ascertain and give effect to the intention of the parties. Chan v. Thompson, 302 S.C. 285, 289, 395 S.E.2d 731, 734 (Ct. App. 1990). To determine the intention of the parties, the court "must first look at the language of the contract . . . ." C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). When the language of a contract is clear and unambiguous, the determination of the parties' intent is a question of law for the court. Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). Whether an ambiguity exists in the language of a contract is also a question of law. S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001).

"A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." McClellanville, 345 S.C. at 623, 550 S.E.2d at 302. "The uncertainty in interpretation can arise from the words of the instrument, or in the application of the words to the object they describe." Pee Dee, 381 S.C. at 242, 672 S.E.2d at 803. "Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties." McClellanville, 345 S.C. at 623, 550 S.E.2d at 303. "The determination of the parties' intent is then a question of fact." Id. (emphasis added).

Here, paragraph 16 of the contract addresses the options available in the event of a party's default:

> If Buyer or Seller fails to perform any covenant of this Agreement, the other may elect to seek any remedy provided by law, including but not limited to

> attorney fees and actual costs incurred (as defined in paragraph 17), or terminate this Agreement with a five day written notice.

(emphasis added).

The Wallaces assert that this paragraph provides a party with two options when the other party is in default: (1) elect to seek any remedy provided by law; or (2) terminate the agreement with a five day written notice. They argue that Day opted for the second alternative—termination—and therefore she was required to provide them with a five day written notice. Day, on the other hand, maintains that she opted for the first alternative—electing to seek any remedy provided by law. She asserts that this alternative allowed her to treat the contract as abandoned by the Wallaces when they failed to close on the designated date and to refrain from any further performance without having to provide notice to the Wallaces. She argues that because the contract contains multiple provisions emphasizing that time is of the essence, the contract expired pursuant to its own terms when the Wallaces failed to close by the contract's deadline. She insists that under these circumstances, she had no further obligation to the Wallaces.

We find the terms of the contract's default provision to be reasonably susceptible to more than one interpretation. Therefore, the determination of the parties' intent at the time they executed the contract is a question of fact that should not have been decided on summary judgment. See Pee Dee, 381 S.C. at 241, 672 S.E.2d at 802 (holding that summary judgment is improper when there is an issue as to the construction of a written contract and the contract is ambiguous); McClellanville, 345 S.C. at 623, 550 S.E.2d at 302-3 (holding that a contract is ambiguous when the terms of the contract are reasonably susceptible to more than one interpretation and that once the court decides that the language is ambiguous, the determination of the parties' intent is then a question of fact). For this reason, we conclude that the master erred in granting summary judgment to the Wallaces on their breach of contract claim and in dismissing Day's breach of contract counterclaim.

II. Dismissal of Day's Remaining Counterclaims

Day claims the master erred in finding that Judge Breeden's May 5, 2006 order reflected her voluntary withdrawal of her counterclaims for intentional interference with contractual relations and civil conspiracy.[3] She argues that Judge Breeden's order reflected her withdrawal of her motion for summary judgment with respect to those counterclaims.[4] We agree.

Judge Breeden's May 5, 2006 order is a form order that begins with the following boilerplate: "**IT IS ORDERED** that the MOTION BE STRUCK FROM THE ACTIVE motion calendar for the following reason(s)[.]" The following language was added in handwriting:

> Def Motion for Summary Judgment: Under Advisement
> Both Attorneys to submit a proposed order within
> 10 days.
> Defendant withdraws the intentional Interference
> with Contractual Relations and Civil Conspiracy.
> Def Motion to Refer: Plaintiff consents to the referral

This form order was obviously created for striking motions from the active roster, not the underlying claims. Viewing the May 5, 2006 order as a whole, we believe it indicates that Day was merely withdrawing her summary judgment motion with respect to her counterclaims for intentional interference with contractual relations and civil conspiracy and not the counterclaims themselves. This is confirmed by the statement of counsel made during the hearing on Day's summary judgment motion: "We have also moved for Summary Judgment on our last two cause [sic] of action: Intentional Interference with Contractual Relations and Civil Conspiracy.

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[3] The master's order and Day's brief both refer to Judge Breeden's order as being filed on May 12, 2006, but the date stamp on the order indicates that it was filed on May 11, 2006. To avoid confusion, we will refer to the order according to the date that Judge Breeden signed it, May 5, 2006.

[4] At oral arguments, counsel for the Wallaces conceded this point.

And Your Honor, at this particular time . . . I would withdraw that motion as to those two causes of action."

Based on the foregoing, it is appropriate to vacate the finding that Day withdrew her counterclaims for intentional interference with contractual relations and civil conspiracy and to remand those counterclaims for a trial on the merits.

CONCLUSION

Based on the foregoing, we reverse the master's grant of the Wallaces' summary judgment motion as well as his dismissal of Day's breach of contract counterclaim. Additionally, we vacate the master's finding that Day voluntarily withdrew her counterclaims for intentional interference with contractual relations and civil conspiracy. All of the parties' respective causes of action are remanded for a full trial on the merits.

Accordingly, the master's order is

REVERSED IN PART, VACATED IN PART, and REMANDED.

HUFF, PIEPER, and GEATHERS, JJ., concur.