The Supreme Court of South Carolina

O R D E R

The South Carolina Commission on Continuing Legal Education and Specialization has advised that Mildred S. Watson, Municipal Court Judge has not complied with the continuing legal education requirements of Rule 510, SCACR. This judge is hereby suspended from their judicial offices, without pay, until further Order of this Court.

s/ Jean H. Toal C.J.
For the Court

Columbia, South Carolina

September 12, 2008

The Supreme Court of South Carolina

Request for Written Comments on ABA Consultation Team's Recommendations Regarding the South Carolina Lawyer and Judicial Disciplinary Systems

At the request of the Supreme Court of South Carolina, a consultation team sponsored by the American Bar Association (ABA) Standing Committee on Professional Discipline conducted an in-depth review of the lawyer and judicial disciplinary systems in South Carolina. In addition to reviewing rules, annual reports and other documentation, this eminently qualified team conducted extensive on-site interviews with personnel within the Office of Disciplinary Counsel; the Office of the Attorney General; members of the Commission on Lawyer Conduct and Commission on Judicial Conduct; respondents and their counsel; complainants; and members of the Legislature. Additionally, they met with the leadership of the South Carolina Bar and with the members of the Supreme Court.

The Supreme Court is delighted to announce that it has received and reviewed the reports prepared by the ABA consultation team, and it is extremely grateful for the recommendations made by the team. They reflect the highly professional and thoughtful approach which the team applied to its review of our lawyer and judicial disciplinary systems. The reports are available on the Judicial Department Website at www.sccourts.org/ABA.

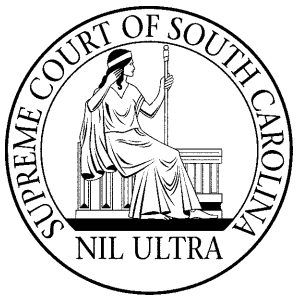
As the team recognized in its reports, this Court is fully committed to improving and modernizing our lawyer and judicial disciplinary systems. While most of the changes recommended by the team do not involve significant changes to the disciplinary process or the protections afforded to the parties in disciplinary matters, several recommendations are significant and will require further study and consideration by this Court. To assist the Court in the review of these recommendations, the Court requests written comments on the ABA recommendations.

Persons desiring to submit written comments regarding the ABA recommendations may do so by filing an original and seven (7) copies of their written comments with the Supreme Court. The comment should clearly identify the ABA recommendation to which the comment is directed (e.g., Recommendation 2, Report on the Lawyer Regulation System). Comments which do not address an ABA recommendation or which involve or reference allegations of misconduct by a specific lawyer or judge will not be accepted for filing as part of this request for written comments. The comments must be sent to the following address:

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

The Supreme Court must receive any written comments by Friday, November 21, 2008. Additionally, the Court requests that an electronic version of the comments in Microsoft Word or WordPerfect be e-mailed to ABARecommendations@sccourts.org.

Columbia, South Carolina
September 18, 2008



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 36
September 22, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Steven K. Fox, Appellant,

v.

George C. Moultrie d/b/a George Moultrie & Associates, Charleston County Business License & User Fee Dept., Commerce Clearing House, Inc., United States Government acting by and through The Internal Revenue Service, State of South Carolina Dept. of Revenue, Charleston County, Charleston County Treasurer, Charleston County Tax Collector, John Doe and Mary Doe, also all other persons Unknown claiming any right, title, estate, interest in or lien upon the real estate described in the Complaint herein, Defendants,

of whom State of South Carolina Department of Revenue and Charleston County Business License User Fee Dept., Charleston County, Charleston County Treasurer, Charleston County Tax Collector are Appellants,

and George C. Moultrie d/b/a George Moultrie & Associates, Commerce Clearing House, Inc., United States Government acting by and through The Internal Revenue Service, John Doe and Mary Doe, also all other persons unknown claiming any right, title, estate, interest in or lien upon the real estate described in the Complaint herein are Respondents.

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

Opinion No. 26546
Heard May 8, 2008 – Filed September 15, 2008

AFFIRMED

Patricia M. Ferguson, of Myrtle Beach, for Appellant Fox.

Joe S. Dusenbury, Jr., of Columbia, for Appellant South Carolina Department of Revenue.

Joseph Dawson, III; Bernard E. Ferrara, Jr.; and Bernice M. Jenkins, all of North Charleston, for Appellants.

Kevin F. McDonald, of Columbia; Lee Ellis Berlinsky, of Charleston; and Randolph L. Hutter, of Washington, for Respondent Internal Revenue Service.

JUSTICE BEATTY: Steven K. Fox, various Charleston County offices, and the Department of Revenue appeal the master-in-equity's finding that a person buying a property in a county delinquent property tax sale purchased the property subject to outstanding Internal Revenue Service (IRS) liens. We affirm.

FACTS

George C. Moultrie, d/b/a George Moultrie & Associates, owned property on Rivers Avenue in Charleston County. Moultrie failed to pay federal income taxes, and the IRS filed a notice of a tax lien on his property in the amount of $89,789.10 on September 2, 1997, in the R.M.C. office for Charleston County. Moultrie died in 2001, and the IRS filed its claim with the probate court for Charleston County on July 2, 2002. Moultrie's state ad valorem taxes on the property for the tax year 2001 were not paid. Charleston County issued a tax execution for the 2001 taxes and directed the Charleston County Sheriff to levy by distress and sell the property at a non-judicial tax sale to satisfy the delinquent property taxes. Charleston County followed the statutory notice provisions and properly conducted a tax sale of the property on December 2, 2002. Steven Fox was the successful bidder and paid $14,000 for the property. It is undisputed that the IRS was not given notice of the tax sale. Neither Moultrie's estate nor the IRS attempted to redeem the property before the end of the statutory redemption period on December 2, 2003.

Fox was given a deed to the property on March 31, 2004. He initiated a declaratory judgment action on June 8, 2005, seeking to quiet title pursuant to the two-year statute of limitations. The named parties included Moultrie's estate, various Charleston County offices (collectively, the "County"),

including the treasurer and tax collector, the United States Government acting through the IRS, the South Carolina Department of Revenue, and any other unknown heirs. The parties consented to having the case referred to a master-in-equity.

Although the County, the Department of Revenue, and the estate did not contest the tax sale, the IRS appeared at the February 15, 2006 hearing to contest the sale. The IRS argued that because they were not given notice of the tax sale pursuant to federal law and there was no application to discharge the tax lien, Fox purchased the property subject to the federal tax lien. At the time of the hearing on the declaratory judgment action, the parties estimated the outstanding federal lien, plus interest, had grown to $145,000.

After hearing arguments from the parties and reviewing their submitted briefs, the master-in-equity ruled the property was purchased subject to the IRS tax lien. The master noted that while the County followed all the state statutory notice procedures for performing a tax sale and the state statute did not require notice to be given to the federal government, federal law holds that federal tax liens survive a sale of the property where the federal government is not given notice of the sale. Fox, the County, and the Department of Revenue (collectively, "Appellants"), all appealed, and this Court granted the Court of Appeals' motion to certify the case.

SCOPE OF REVIEW

An action to quiet title is one in equity. Van Every v. Chinquapin Hollow, Inc., 265 S.C. 474, 477, 219 S.E.2d 909, 910 (1975). In an action in equity, tried with reference to a master, this Court reviews the evidence and determines the facts according to its own view of the preponderance of the evidence, though it is not required to disregard the findings of the master. Friarsgate, Inc. v. First Fed. Sav. & Loan Ass'n, 317 S.C. 452, 456, 454 S.E.2d 901, 904 (Ct. App. 1995).

DISCUSSION

Appellants all argue the master erred in interpreting federal law by holding it merely subordinated the federal lien. They argue the master erred by not recognizing the law provides that the federal lien is not valid when there is a local property tax lien on the property which is entitled to priority. Thus, they assert, since the lien was not valid, the failure to follow the federal notice provisions did not make the federal lien survive the sale.

In interpreting these statutes, we must look to the plain meaning. "If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' . . . The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." Bd. of Governors, FRS v. Dimension Fin. Corp., 474 U.S. 361, 368 (1986) (quoting Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837, 842-43 (1984)); New York Times Co. v. Spartanburg County Sch. Dist. No. 7, 374 S.C. 307, 310, 649 S.E.2d 28, 29-30 (2007) ("We cannot construe a statute without regard to its plain and ordinary meaning, and this Court may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope."). In determining the plain meaning of a statute, the courts must look at the particular statutory language at issue and the language and design of the statute as a whole. Bethesda Hosp. Ass'n v. Bowen, 485 U.S. 399, 403-05 (1988); Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.").

A county property tax becomes a first lien on real property and attaches at the beginning of the fiscal year in which the tax is levied. Taylor v. Mill, 310 S.C. 526, 528, 426 S.E.2d 311, 312 (1992); S.C. Code Ann. § 12-49-10 (2000). While there are strict statutory requirements for a valid tax sale, the parties do not dispute that the County properly followed those requirements and notified the delinquent taxpayer and any mortgagees of the tax sale. See

S.C. Code Ann. § 12-51-140 (2000) (adopting notice requirements to mortgagees from section 12-49-220 to apply to non-judicial sales); S.C. Code Ann. § 12-51-40 (2000) (providing procedure for a levy of execution on delinquent taxpayer's property and notice to delinquent taxpayer); S.C. Code Ann. § 12-49-220 (2000) (providing that notice must be given to mortgagees twenty days before a tax sale). Nothing in the state statutes required the County to notify the IRS of the tax sales. Thus, the key question is whether the federal tax laws hold that the federal tax lien survives the state tax sale where no notice of the sale was given.

When a person fails to pay a federal tax liability, the amount due becomes a "lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C.A. § 6321 (2002). This lien continues until the lien is satisfied or becomes unenforceable after a lapse of time. 26 U.S.C.A. § 6322 (2002). "The overriding purpose of the tax lien statute obviously is to ensure prompt revenue collection" because the "collection of taxes is vital to the functioning, indeed existence," of the government. United States v. Kimbell Foods, Inc., 440 U.S. 715, 734-35 (1979). Thus, the property "shall, except as otherwise provided, be made subject to and without disturbing" the federal lien if the United States recorded notice of its lien thirty days before the sale but the United States was not given notice[1] of the sale. 26 U.S.C.A. § 7425 (b)(1) (2002).

However, in section 6323, entitled, "Validity and priority against certain persons," the federal government has provided ten instances where federal liens are subordinated in priority against certain persons, even where the United States has filed its notice of a lien. 26 U.S.C.A. § 6323 (2002);

[1] Under 26 U.S.C.A. § 7425(c)(1), the notice of a nonjudicial sale of property "shall be given . . . in writing, by registered or certified mail or by personal service, not less than 25 days prior to such sale, to the Secretary." The section further provides that the nonjudicial sale of the property "shall discharge or divest such property of the lien or title of the United States *if the United States consents to the sale* of such property free of such lien or title." 26 U.S.C.A. § 7425(c)(2) (2002) (emphasis added).

see Hinkley & Donovan v. Paine, 424 F.Supp. 1013, 1019 (D.C.N.H. 1977) (interpreting section 6323 and stating "Congress very specifically provided for various kinds of transactions which would have priority even over filed tax liens"); United States v. Amos, 287 F.Supp. 886, 890-91 (D.C. Ill. 1968) (interpreting section 6323(b)(6), as modified by the Federal Tax Lien Act, as rendering "federal tax liens junior to liens securing local real estate taxes, if such real estate taxes are entitled to priority under local law"). For example, an IRS lien "shall not be valid" against: a purchaser of securities without notice of the lien; a purchaser of a motor vehicle without notice of the lien; a purchaser of personal property without notice of the lien where purchased at a retail establishment; a purchaser of personal property without knowledge of the lien where purchased at a casual sale for less than $1,000;[2] a holder of a possessory lien on personal property; a holder of a mechanic's lien on residential property for certain repairs and improvements where the contract price was less than $5,000;[3] an attorney who holds a lien or contract against a judgment for compensation; the organization which is the insurer of a life insurance, endowment, or annuity contract before the organization had actual notice of the lien; and an institution providing loans with respect to a savings deposit, share, or other account where the loan is made without knowledge of the lien. 26 U.S.C.A. § 6323 (b)(1)-(5), (7)-(10) (2002). It is the sixth situation that is relied upon in this case, and it provides that a federal "lien shall not be valid":

> (b)(6) **Real property tax and special assessment liens.**-- With respect to real property, as against a holder of a lien upon such property, if such lien is entitled under local law to priority over security interests in such property which are prior in time, and such lien secures payment of –

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[2] This amount has recently been amended to $1,320. 26 U.S.C.A. § 6323(b)(4) (Supp. 2008).

[3] Likewise, this amount has recently been changed to $6,600. 26 U.S.C.A. § 6323(b)(7) (Supp. 2008).

> (A) a tax of general application levied by any taxing authority based upon the value of such property;

26 U.S.C.A. § 6323 (b)(6)(A) (2002).

Appellants interpret section 6323(b)(6)(A) to mean that the lien on the property became invalid once the County took possession of the property to sell at a tax sale. Thus, they argue, because the lien was not valid as to the property pursuant to section 6323(b)(6)(A), and the County conveyed to Fox the interest it had in the property, free and clear of the federal lien, then Fox likewise took the property free and clear of the invalid lien. They further argue the "except as otherwise provided" language in section 7425 means that it only applies to valid liens. Therefore, since the present federal lien was invalid, the failure to give the IRS notice of the tax sale was of no consequence. Appellants extensively cite congressional history on these sections to support their argument that a county ad valorem tax sale extinguishes an IRS tax lien as to the property.[4]

While it is understandable how Appellants interpret the "shall not be valid" language in section 6323 to mean the lien was extinguished, their interpretation ignores the clear wording of the statutes themselves. Section 6323(b)(6)(A) provides protection for "a holder of a lien upon such property, if such lien is entitled under local law to priority . . . and such lien secures payment of" a property tax. Nothing in section 6323 provides that the purchaser of a property subject to both a local property tax lien and a federal lien takes the property free of the federal lien. Congress certainly could have

[4] The congressional history of section 6323 does show that Congress intended to protect certain individuals from being surprised by a federal tax lien that has not been filed, or "secret lien," and thus, certain entities were given priority over the federal liens. However, this history does not indicate that section 6323 was intended to extinguish the federal liens. In fact, the Congressional history regarding subsection (b)(6) specifically notes that local and state property taxes and assessments are given priority over federal liens. There is no indication that the liens were extinguished completely.

listed a subsequent purchaser in section 6323, but it opted not to.[5] This interpretation is also consistent with section 6322, providing that the federal lien continues with the property until the lien is satisfied. 26 U.S.C.A. § 6322 (2002).

Looking to other subsections within section 6323, Congress gave other indications that the phrase "shall not be valid" indicates priority of liens, not the total invalidation of a lien. Section 6323(e), entitled, "Priority of interest and expenses," provides that "[i]f the lien imposed by section 6321 is not valid as against a lien or security interest, the priority of such lien or security interest shall extend to" any interest or carrying charges on the obligation secured, the reasonable expenses incurred in collecting or enforcing the lien, and the amount paid to satisfy a lien with priority over a federal lien. 26 U.S.C.A. § 6323(e) (2002) (emphasis added).[6] Thus, in addition to giving

[5] To illustrate their belief that the master's interpretation was erroneous, Appellants argue that it would be ridiculous for a federal lien, declared invalid by section 6323, to "spring back to life" upon the later resale by the entities entitled to priority in section 6323(b). They cite the example of an unknowing consumer purchasing socks from a store with a federal lien in place on the stock of the store. While we agree with Appellants that it would seem impossible, at best, for the IRS to attempt to recover on the lien should the consumer attempt to re-sell the socks, we are not asked to determine that question in this case. Real property is very different from mere personal property in that it is immovable and there are strict recording requirements in place. It is much easier for local and federal governments to keep track of real property – and for a prospective purchaser of property at a delinquent tax sale to be put on notice of any federal liens -- by consulting the local R.M.C. office.

[6] Similar to the socks argument, Appellants also asserted at oral argument that it would be ridiculous to apply such an interpretation to the further transfer of property, such as where the State or County office decided to donate land seized for delinquent property taxes to the forfeited land commission. While we understand the argument, we believe the federal law is intended to do nothing more than allow both the local and federal

certain liens priority, the section allows priority for the collection of fees and costs necessary to enforce the lien. The section makes clear that Congress intended the phrase "not valid against" to indicate priority. An IRS lien that is "not valid" against a local property tax lien does not evaporate once a local nonjudicial tax sale occurs.

Further, our courts have looked at this section and also determined that it provides for the priority of liens, not the extinguishment of them. In Taylor v. Mill, Taylor purchased property at a federal tax lien sale, failed to record his deed, and meanwhile, the same property was sold to someone else at a county delinquent property tax sale. In reviewing section 6323(b)(6), this Court noted that it provides that a county's tax lien has priority over a federal lien, and thus, Taylor purchased the property still subject to the county's lien. Taylor v. Mill, 310 S.C. 526, 528, 426 S.E.2d 311, 312 (1992). Thus, this Court has already noted that section 6323 operates to establish priority, not extinguish liens.

Interpreting all of the sections together, section 6323 (b)(6)(A) provides that the federal lien is subordinated to the County's lien; it does not render the federal lien invalid as to the property itself or any other party. See, e.g., In re Tabone, Inc., 175 B.R. 855, 859 n.8 (Bankr. D.N.J. 1994) (noting that section 6323(b)(6)(A) provides that the township's tax liens hold priority status over the federal lien); Hinkley & Donovan, 424 F.Supp. at 1019; Amos, 287 F.Supp. at 890-91. Thus, the federal lien remained valid and survived the County's tax sale. Because the IRS was not given notice of the County's tax sale after the IRS had filed notice of its lien on the property, the lien attached to the property and Fox purchased the property subject to the lien. 26 U.S.C.A. § 7425(b)(1) (holding that where property subject to the IRS's timely filed lien is sold during a nonjudicial sale and the IRS is not given notice of the sale, the sale of the property is made subject to and without disturbing the lien). While the County argues that interpreting the

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governments to collect delinquent taxes. To allow a County's decision to transfer property instead of collect its lien to extinguish the federal lien would amount to a windfall to local and state governments. This is not something clearly intended by the law.

section in this manner will stifle tax sales, potential buyers must research tax sale property purchases and would be put on notice of any federal tax liens.[7]

Finally, Appellants argue that the master erred by not giving section 6323, a more specific statute, priority over section 7425, a general statute. See Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (holding that a specific statutory provision prevails over a more general one). While this is a correct statement of the law, it does not appear this argument was ruled upon by the master, and thus, it is not preserved. Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (holding that issues not raised to or ruled upon by the lower court are not preserved for appellate review).

To summarize, there is controversy regarding whether the "shall not be valid" language from section 6323 applies to the property or to the entity imposing an ad valorem tax on the property, and whether it indicates the federal lien is extinguished or merely subordinated. It is the opinion of this Court that section 6323 merely provides that the federal lien becomes subordinate to the local property tax lien, but the lien remains with the property. The IRS properly filed notice of the lien with both the probate court and the Charleston County R.M.C office, such that anyone researching the property would be aware it was subject to a federal tax lien. Because the lien was valid as to the property and no notice of the nonjudicial sale was given to the IRS, the sale to Fox was "subject to and without disturbing" the federal tax lien. 26 U.S.C.A. § 7425(b).

[7] In fact, proposed legislation was introduced in Congress in 2007 that would establish a national Federal tax lien registry so that persons buying property could check tax lien status on the internet instead of having to go the local R.M.C. office. S. 2394, 110th Cong. (2007); S. 1124, 110th Cong. (2007). However, that has no impact on this case.

CONCLUSION[8]

Our review of the federal law convinces us that the federal lien was merely subordinate to, and not extinguished by, the County's ad valorum tax lien. Because the federal government was not given notice of the nonjudicial sale, the law provides that the federal tax lien survived the sale. Accordingly, the master's order is

AFFIRMED.

MOORE, Acting Chief Justice, WALLER, PLEICONES, JJ., and Acting Justice James E. Lockemy, concur.

[8] The various Charleston County offices also argue that because the IRS failed to redeem the property during the redemption period, the federal lien was discharged in spite of the master's interpretation of federal law. While the question of whether the IRS's failure to redeem the property during the redemption period was before the master, it does not appear the master addressed the question in the order. It also does not appear that the parties filed a Rule 59(e), SCRCP motion to request that the master address the question. Thus, the issue is not preserved for appellate review and we decline to address it. Staubes, 339 S.C. at 412, 529 S.E.2d at 546.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte: Eric Steven Bland
and Ronald L. Richter, Jr.,

Respondents,

In Re: James W. Myrick,
Pinnacle Land & Timber Co.,
Inc., High Bluff Developers,
LLC, and Shoreline
Investments, Plaintiffs,

v.

Nexsen Pruet Jacobs Pollard &
Robinson, LLP, and Neil C.
Robinson, Appellants.

Appeal from Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 26547
Heard May 29, 2008 – Filed September 22, 2008

REVERSED AND REMANDED

G. Trenholm Walker, of Pratt-Thomas Epting & Walker, of Charleston, for Appellants.

William C. Helms, III, John W. Fletcher, and Rodney K.E. Mintz, all of Barnwell Whaley Patterson & Helms, of Charleston, for Respondents.

CHIEF JUSTICE TOAL: This appeal arises out of a claim that two attorneys violated a court order related to discovery and breached a settlement agreement containing a non-disclosure and confidentiality clause. The trial court held that the attorneys had not materially breached the court's order or the settlement agreement, declined to award damages or equitable relief, and declined to hold the attorneys in contempt. This appeal followed.

We reverse the trial court's decision and hold that the attorneys clearly breached the protective order and settlement agreement, and that the trial court therefore erred in declining to hold the attorneys in contempt. We accordingly order the respondents to perform specific actions to cure the breach of the protective order and settlement agreement, and we remand this matter to the trial court to determine the amount of attorneys' fees to be awarded to Nexsen Pruet under the settlement agreement, as well as the appropriate sanction for our finding of contempt.

FACTUAL/PROCEDURAL BACKGROUND

Appellants Neil C. Robinson and the law firm Nexsen Pruet Jacobs Pollard & Robinson (collectively "Nexsen Pruet") brought a motion in the trial court requesting that the court find that the respondents, Eric S. Bland and Ronald L. Richter, Jr., violated a protective order and a settlement agreement entered in litigation between Nexsen Pruet and the plaintiffs captioned in this action. Bland and Richter represented the plaintiffs in the merits phase of the litigation, and in order to provide a complete factual background for this appeal, it is necessary to recap the events leading up to the lawsuit and the settlement.

The litigation underlying this appeal began when the plaintiffs captioned in this action, James W. Myrick, Pinnacle Land & Timber Company, High Bluff Developers, and Shoreline Development (collectively

"Myrick") sued Nexsen Pruet alleging legal malpractice. Myrick's claim was based on a purported conflict of interest in Nexsen Pruet's alleged representation of both Myrick and a competitor in a prospective real estate transaction. In his discovery requests, Myrick sought several of Nexsen Pruet's internal documents such as billing records, financial statements, and policy manuals outlining Nexsen Pruet's procedure for checking for conflicts of interest. As part of its response to this discovery, Nexsen Pruet produced several documents which the parties collectively refer to as a "policy manual" for opening files and checking conflicts. The parties entered into a protective order which provided that all documents marked by the parties as "confidential" would be used "only for purposes of this litigation," and contained a stipulation that all internal materials related to Nexsen Pruet's policies and procedures would be treated as confidential material. Most importantly, the order expressly prohibited the use of confidential material in any other litigation "or for any other purpose," and required that all confidential material be returned upon written demand at the conclusion of the litigation.

The parties eventually settled the case and entered into a consent order of dismissal. The settlement agreement contained a "covenant of strict confidentiality" which provided:

> The parties to this settlement agreement and release agree that the terms and conditions of this settlement agreement and release, including but not limited to the amount of the payment, shall be held in strict confidence and shall not be disclosed to any person . . . . If asked about the settlement, the parties hereto agree that the only affirmative response shall be that the matter was resolved to the mutual satisfaction of the parties.

Additionally, the settlement agreement contained a provision entitled "enforcement of confidentiality." That clause provided:

> The parties to this [settlement agreement] hereto acknowledge and agree:

> (a) that the covenant of confidentiality is a material and essential term of the [settlement agreement] . . .
>
> (b) that a violation of the covenant of confidentiality will necessarily cause damages and injury to the non-breaching party . . . and
>
> (c) that neither monetary damages nor any other remedy at law may be adequate or sufficient to protect the non-breaching parties if there is a breach, and that, because such damages are difficult to calculate, $10,000 shall constitute a reasonable and fair estimate of the minimum damages to be suffered . . . as a result of such breach. If [] an action or motion is brought and a violation of the covenant of confidentiality is demonstrated and supported by affidavit or other proof, the breaching persons shall be liable, at a minimum, for the liquidated damages set forth herein ($10,000), any additional damages as may be proven, and for the attorneys' fees and costs incurred of the non-breaching party bringing the proceeding.

Myrick, Bland, and Richter executed the settlement agreement, and it is instructive to note that the settlement agreement contained an attestation that all materials designated as confidential in the protective order had been either returned to Nexsen Pruet or destroyed.[1]

[1] In publishing large portions of the settlement agreement, we do not overlook the fact that the parties purported to treat the terms of the agreement as confidential. In this vein, we issue a note of advisement: although the court's rules allow litigants to agree to settle and dismiss lawsuits with limited court involvement, *see* Rules 41(a)(1) and 41.1(a), SCRCP, when parties seek to use the court system to enforce the provisions of private settlement agreements, those agreements become publicly available court records absent a properly filed and approved request to seal.

About two years after the parties executed the settlement agreement, Bland and Richter filed a complaint alleging legal malpractice against Nexsen Pruet on behalf of Frank Robertson, another former client of the firm. Bland and Richter again sought discovery of several of Nexsen Pruet's internal documents. During discovery, Bland and Richter apparently grew concerned that although they requested "an entire Nexsen Pruet manual" related to conflicts of interest, they initially received only a few redacted pages and not the full policy manual received in the *Myrick* case. At some point, Bland and Richter discovered that they were in fact still in possession of copies of the policy manual which had been produced in the *Myrick* litigation. Bland and Richer alleged that they had overlooked these copies in their attempts to purge their files of confidential material because the copies were attached as exhibits to depositions in the *Myrick* case.

Bland and Richter notified Nexsen Pruet's counsel in the *Robertson* litigation that they were in possession of "the entire [Nexsen Pruet] manual," and shortly thereafter, Bland and Richter introduced the policy manual as an exhibit during the deposition of Nexsen Pruet's corporate designee for discovery. Nexsen Pruet's then-counsel contacted the Charleston attorney who represented Nexsen Pruet in the *Myrick* litigation and allegedly informed him how discovery had proceeded with respect to the policy manual. Shortly after this contact, Nexsen Pruet filed a motion under the caption of the *Myrick* case to enforce the settlement agreement. Nexsen Pruet alleged that Bland and Richter had violated the terms of the protective order as well as the settlement agreement, and Nexsen Pruet requested damages, attorneys' fees, and a determination of whether Bland and Richter were in contempt.

While Bland and Richter argued that their continued possession of the policy manual was inadvertent, Nexsen Pruet argued that it was calculated and deliberate. In support of their contention, Nexsen Pruet offered printouts from Bland and Richter's firm website which touted the amount of a settlement of "a legal malpractice/breach of fiduciary claim against one of South Carolina's largest firms," as well as e-mails from Bland to Nexsen Pruet's counsel in the *Robertson* litigation containing inflammatory and inappropriate language. Nexsen Pruet additionally offered a picture of a display in Bland and Richter's office. This picture shows Richter holding a

blow-up of a check that is drafted payable to "Bland Law Firm and Richter Law Firm, and their client James W. Myrick." The amount of the check is listed as "$$$$$$$$ Big Money $$$$$$$$." Bland is positioned to one side of the check and is shaking the hand of a person on the opposite of the check. The face of Neil C. Robinson, the Nexsen Pruet attorney whose conduct was primarily at issue in the *Myrick* case, is super-imposed over the face of the person shaking Bland's hand in the display.

The trial court held that Bland and Richter had not materially breached the protective order or the settlement agreement, declined to award any damages or equitable relief, and declined to hold either Bland or Richter in contempt. The trial court specifically held that Bland and Richter's possession of the policy manual was an unintentional oversight, that there was no evidence of an inappropriate intent to harm, and that upon discovering that they were still in possession of the policy manual, Bland and Richter immediately contacted Nexsen Pruet's counsel in the *Robertson* case. Nexsen Pruet appealed.

This Court certified the appeal from the court of appeals pursuant to Rule 204(b), SCACR. Nexsen Pruet presents the following issues for review:

I. Did the trial court err in holding that Bland and Richter did not violate the protective order and the settlement agreement by retaining the policy manual and by introducing the manual in subsequent litigation?

II. Did the trial court err in holding that neither Bland and Richter's website testimonial nor their office display violated the settlement agreement's covenant of confidentiality?

III. Did the trial court err in failing to hold Bland and Richter in contempt?

LAW/ANALYSIS

I. The Policy Manual

Nexsen Pruet argues that the trial court erred in concluding that Bland and Richter's conduct with respect to the policy manual was not a material breach of the settlement agreement and did not warrant any relief. We agree.

Our analysis on this issue must take a rather unusual direction, because as a starting point, Bland and Richter seem to agree that they violated the protective order and the settlement agreement by failing to see that all confidential materials produced by Nexsen Pruet were returned to the firm or destroyed and by using the policy manual in subsequent litigation as a deposition exhibit. Bland and Richter instead argue (1) that Nexsen Pruet waived the right to enforce this provision of the protective order and settlement agreement; (2) that Nexsen Pruet suffered no harm due to Bland and Richter's continued possession of the policy manual; and (3) that because the policy manual was sought as discovery in the *Robertson* litigation, Bland and Richter should be held harmless for their technical breach. After taking these arguments in turn, we find that none of them are persuasive.

Bland and Richter hinge their waiver argument on the conduct of Nexsen Pruet's attorney in the *Robertson* litigation. Bland and Richter allege that they informed Nexsen Pruet's attorney that they were in possession of documents which were the subject of a protective order, that the attorney gave Bland and Richter assurances that Nexsen Pruet would not seek enforcement of the protective order and settlement agreement, and that Bland and Richter were "induced by [Nexsen Pruet's] inactivity" to use the policy manual in the *Robertson* deposition.

But the evidence in the record belies this characterization. Although the record supports Bland and Richter's assertion that they advised Nexsen Pruet's attorney that they were in possession of the policy manual, there is no evidence that Bland and Richter offered this advisement as any sort of cautious notice that they were in possession of documents covered under a

protective order, nor is there evidence Bland and Richter were seeking any advice as to how to proceed and honor that protective order. The record instead reflects that Bland and Richter attempted to use the continued possession of the policy manual as leverage in discovery, and this is exhibited by the dialogue between the parties where Bland and Richter matter-of-factly assert that they "know that [additional] documents exist[,]" that they have "the entire [Nexsen Pruet] manual[,]" that they "obtained [the policy manual] from the *Myrick* case[,]" and that they intend to use the policy manual in the upcoming deposition of Nexsen Pruet's corporate designee for discovery. This bold course of conduct, characterized by the advertisement that they intended to use the materials in discovery, does not evidence a cautious approach to discovery cognizant of the trial court's previous pronouncements regarding how to treat confidential materials. We therefore are not persuaded by Bland and Richter's attempts to characterize their conduct in this manner.

Bland and Richter's argument regarding waiver is further undercut by the response they received after first advising Nexsen Pruet's attorney of their continued possession of the policy manual. Specifically, Nexsen Pruet's attorney responded "[p]lease describe those documents and I will discuss with [Nexsen Pruet]. I understand that there is a protective order in place in *Myrick* and agree that this description/identification will not violate that order. No term or provision of the protective order is being waived or modified."[2] This is strong evidence cutting against Bland and Richter's waiver argument, and in light of the settlement agreement's requirement that all waivers be executed in writing, as well as the court-entered protective order, which no single party could waive, we find that there are simply too many hurdles for Bland and Richter's waiver argument to overcome.

The trial court did not address the issue of waiver but instead focused on the fact that Nexsen Pruet eventually produced the policy manual during

[2] The record reflects that the confusion about what constituted a "full policy manual" may have arisen because Nexsen Pruet engaged different outside counsel for the *Myrick* and *Robertson* matters, had different in-house counsel assigned to the cases, and because Nexsen Pruet contended certain documents were outdated and were not used by attorneys.

discovery in the *Robertson* case without a protective order being issued. The trial court also noted that Nexsen Pruet had not demonstrated how it has been harmed by Bland and Richter's continued possession of the policy manual. In our view, these facts are not instructive.

The "mootness" argument based on the production of the policy manual in the *Robertson* litigation presumes too much. While it is true that there is not currently a protective order in place in the *Robertson* litigation, that litigation is ongoing and the record reflects that at one time, Bland and Richter agreed to enter into a protective order similar to the one entered into in *Myrick*. Although it might have been possible to raise a ripeness question in this appeal given the possibility that the *Robertson* litigation might ultimately conclude without an order or agreement requiring the return or destruction of all Nexsen Pruet's internal documents, neither party addressed this issue and we express no opinion on it. We instead focus on the fact that the circumstances in this case involve the retention of documents in direct violation of a court order and that for no apparent reason, the court system was not asked to make a preliminary call regarding the retention of the policy manual until after the manual had been used in subsequent litigation.

The notion that Nexsen Pruet has an interest in seeing that Bland and Richter do not forever retain copies of internal Nexsen Pruet documents is quite reasonable. For this reason, the fact that the Court might order Bland and Richter to destroy some copies of the policy manual but allow the continued possession of other copies of the same document is not at all inconsistent. This sheds light on an underlying problem of Bland and Richter's argument, which is that at bottom, their position seems to be that subsequent events can render it acceptable for a party to unilaterally decide to violate the terms of a court order. It is undisputed that the protective order required the return of all confidential documents disclosed in discovery. Accordingly, the trial court's characterization of Bland and Richter's action in notifying Nexsen Pruet's counsel "commendably and immediately" after discovering the policy manual, whether correct or incorrect, is irrelevant. Bland and Richter did not return the policy manual after discovering it, and they in fact made the policy manual part of the record in a separate piece of

litigation. For this reason, it is clear that Bland and Richter breached the terms of the protective order and the settlement agreement.

Although we find that they proceeded improperly, Bland and Richter do not bear all of the fault in this situation, because as Bland and Richter point out, this dispute originated with what they felt was Nexsen Pruet's incomplete and misleading production of documents during discovery. But although Nexsen Pruet ultimately stipulated that it should have supplied "the complete policy manual" with its initial discovery responses, there is no information in this record indicating that Nexsen Pruet intended to be misleading or give incomplete information in discovery when it produced a different set of documents in the *Robertson* litigation as it did in the *Myrick* litigation. Again, we recognize that the record evidences confusion about certain documents which might have been outdated and for non-attorney use, and it further appears that in handling the *Robertson* case, Nexsen Pruet engaged in-house and outside counsel who had no knowledge of the intricacies of the *Myrick* litigation. The confusion related to the discovery provided in the two sets of litigation seems more a case of the left and right hands' failure to communicate as opposed to an act of calculated deception. If there were evidence of such an act, our analysis might indeed be different.

We therefore hold that the trial court erred in finding that Bland and Richter's possession of the policy manual did not violate the protective order, breach the settlement agreement, and did not warrant the grant of any relief. We specifically hold that the retention of the policy manual and the introduction of that manual in the *Robertson* litigation violated both the protective order and the settlement agreement, and we order that all copies of the policy manual which were improperly held following the conclusion of the *Myrick* litigation be returned to Nexsen Pruet within ten days of the issuance of the remittitur in this case. This matter is remanded to the trial court for a determination of attorneys' fees to be awarded to Nexsen Pruet under the settlement agreement, and Bland and Richter are ordered to provide

the trial court with affidavits attesting to the return of all improperly retained copies of the policy manual when that return is completed.[3]

II. The Website and Office Display

Nexsen Pruet argues that the trial court erred in determining that Bland and Richter's website testimonial and their office display were not violations of the settlement agreement's covenant of confidentiality. Although we might agree on the merits, this issue is not properly preserved for review.

It is instructive to begin by analyzing how Nexsen Pruet presented the website testimonial and the photograph at trial. In the court below, Nexsen Pruet argued that Bland and Richter violated the protective order and settlement agreement by retaining and using the policy manual, and that

[3] Two points warrant discussion as matters of housekeeping. First, Nexsen Pruet does not contest that the settlement agreement's liquidated damages provision applies only to breaches of the agreement's covenant of confidentiality, and that Bland and Richter's possession and use of the policy manual in no way disclosed confidential terms or conditions of the settlement. The liquidated damages provision is therefore inapplicable to this violation of the agreement.

Second, as a gateway argument on this issue, the parties contest whether the claims for violation of the protective order and breach of the settlement agreement sound in law or equity. Because we find there is no evidence supporting the trial court's conclusion that Bland and Richter did not violate the protective order and settlement agreement, we need not address these arguments. We note, however, that it is well settled that an action for breach of contract seeking money damages is an action at law, *Eldeco v. Charleston County School District*, 372 S.C. 470, 476, 642 S.E.2d 726, 729 (2007), and that in an action for specific performance, an award of "special damages" is typically available only when necessary to make specific performance complete. *O'Shea v. Lesser*, 308 S.C. 10, 14, 416 S.E.2d 629, 631 (1992); *Butler v. Schilletter*, 230 S.C. 552, 96 S.E.2d 661 (1957).

circumstantial evidence demonstrated that this violation was calculated and willful. As circumstantial evidence of willful action, Nexsen Pruet offered e-mails containing inappropriate and inflammatory language, the picture in Bland and Richter's office, and the website testimonial. According to Nexsen Pruet, this evidence demonstrated that Bland and Richter were out to punish Nexsen Pruet and were determined to ignore the letter and spirit of the protective order and settlement agreement.

We agree that these e-mails as well as the picture and testimonial demonstrate animus and vindictiveness towards Nexsen Pruet, but the inescapable fact is that Nexsen Pruet is adopting an argument on appeal which differs significantly from the theory of the case it presented at trial. Nexsen Pruet's motion did not assert the website testimonial or the office display as a basis for finding a violation of the protective order or settlement agreement, and in this regard, Nexsen Pruet's counsel took care to inform the trial court that these were not asserted as violations of the settlement agreement, but were asserted in support of a finding of willfulness which was relevant to Nexsen Pruet's motion for contempt. That this distinction was evident at trial is exhibited by the fact that Bland and Richter's counsel noted that the only grounds offered as violations of the protective order and settlement agreement were the retention and use of the policy manual. Thus, although the trial court expressly ruled that the website and office display did not violate the settlement agreement, the issue was not presented below and is therefore not preserved for appeal. *See Hubbard v. Rowe*, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939) (noting that in order to be preserved, an issue must have been both raised to the trial court and ruled upon by the trial court).

III. Contempt

Nexsen Pruet argues that the trial court erred in failing to hold Bland and Richter in contempt. The thrust of Nexsen Pruet's argument is that the trial court erred in focusing on Bland and Richter's initial possession of the policy manual and in failing to take into account Bland and Richter's conduct after discovering the policy manual. While Nexsen Pruet disputes that Bland and Richter's initial possession of the policy manual was "innocent and inadvertent," Nexsen Pruet argues that leaving initial possession aside, Bland

and Richter's retention of the policy manual and the use of the manual in other litigation demonstrates a willful intent to violate the settlement agreement and the protective order. We agree.

A determination of contempt rests within the sound discretion of the trial court, and this Court will reverse a decision regarding contempt only if the trial court abused its discretion. *Brandt v. Gooding*, 368 S.C. 618, 627, 630 S.E.2d 259, 263 (2006). An abuse of discretion occurs when the trial court's ruling is based upon factual conclusions that are without evidentiary support or when the trial court's decision is based upon an error of law. *Fontaine v. Peitz*, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987).

In the instant case, the trial court's conclusion that Bland and Richter did not willfully violate the protective order is without evidentiary support. Leaving aside the question of whether Bland and Richter's initial possession of the policy manual was intentional, Bland and Richter both testified at trial that upon discovering the wrongfully retained copies of the policy manual, they recalled immediately that there was a protective order in place which required the return or destruction of the documents. Bland and Richter have not disputed that they knew that confidential documents from the *Myrick* litigation were not to be used in any other litigation, and in this vein, the trial court's conclusion that there was no willful violation of the protective order is not supported by the evidence.

We therefore reverse the trial court's determination regarding contempt and remand this matter to the trial court to determine the appropriate sanction. The trial court possesses full discretion in determining the sanction it deems appropriate, but we note that the parties agreed in the settlement agreement that liquidated damages of $10,000 per violation of the settlement agreement's covenant of confidentiality would constitute a reasonable and fair estimate of the minimum damages suffered.

CONCLUSION

For the foregoing reasons, we reverse the trial court's decision and remand this matter for additional proceedings.

MOORE, J., and Acting Justice John W. Kittredge, concur. BEATTY, J., concurring in part and dissenting in part in a separate opinion. PLEICONES, J., dissenting in a separate opinion.

JUSTICE BEATTY: I concur in the opinion on the merits; however I disagree with the inference that $10,000.00 is an appropriate measure of damages for a sanction for contempt of court in this case. Initially, I am reminded that an appropriate sanction for contempt of court is within the trial court's discretion. Secondly, I am reminded that the parties agree that the $10,000.00 liquidated damages provision only applied to the covenant of confidentiality and that there was no breach of confidentiality. Finally, an award of damages would reward Appellants for obvious disingenuous discovery compliance.

In my view, the conduct of both parties is less than desirable and the opinion minimizes Appellants' failure to comply with discovery requests. This case would not be before this court had Appellants not gotten caught providing incomplete documents in discovery. Whether Appellants' conduct was intentional or not is irrelevant. The documents were prepared by them and in their possession.

JUSTICE PLEICONES: I join Justice Beatty's opinion expressing concern about the majority's suggestion that $10,000 might be the appropriate damages award here, and write separately to express my disagreement with the merits of the majority opinion.

In prior litigation, the circuit court had issued a protective order. When that litigation was settled, the Settlement Agreement contained a provision in which the respondents agreed they had returned or destroyed all the material covered by that order. After learning that respondents had apparently not destroyed or returned all the materials, appellants brought this motion seeking a finding that respondents were in contempt of the court's protective order and in breach of the Agreement[4]. Appellants moved for an order denying respondents use of those materials in the other litigation, an award of damages, and of attorneys fees. The circuit court, after an evidentiary hearing, held that respondents' retention of a single copy of the manual was "unintentional" and "innocent" and declined to award relief, holding any technical breach of the protective order and settlement agreement was not material.

Appellants first argue the circuit court erred in declining to specifically enforce the settlement agreement.[5] Whether to grant specific performance is a matter committed to "sound judicial discretion." Sumner v. Bankhead, 119 S.C. 78, 111 S.E. 891 (1922). Here, the trial judge who heard the evidence determined that respondents' retention of the manual was unintentional and inadvertent and therefore declined to grant appellants relief. In my view,

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[4] Appellants did not seek any relief based on respondents' alleged breach of the Agreement's confidentiality clause based upon respondents' emails and advertising, but merely introduced this information as evidentiary support for their contempt claim, asserting that these actions demonstrated respondents acted willfully. At the hearing, appellants based their assertion of breach and contempt solely on the fact respondents retained a copy of the manual, not upon any other conduct. As the majority properly points out in Part I of the opinion, appellants are improperly attempting to raise an issue for the first time before this Court.

[5] This is how appellants repeatedly characterize their theory.

there is no abuse of discretion in denying specific performance where the sole issue before the trial court was whether specific performance was warranted by respondents' retention of the document, not their conduct after discovering they still had a copy of the manual. Furthermore, I can find no abuse of discretion in the trial court's decision to deny appellants' request to hold respondents in contempt for retaining the manual. Rhoad v. State, 372 S.C. 100, 641 S.E.2d 35 (Ct. App. 2007) (contempt finding reviewed under abuse of discretion standard). I disagree with the majority that in deciding the contempt issue we can "leave aside the question of whether [respondents] initial possession of the policy manual was intentional" when the sole basis for the appellants' assertion that respondents were in contempt was their retention. Moreover, I do not agree we can rely upon respondents' use of the manual in the subsequent litigation to reverse the circuit court's order and hold respondents in contempt when the only question before that court was whether the retention itself was contumacious.

For the reasons given above, I would affirm the circuit court judge's order because I can find no abuse of discretion in his finding that respondents' retention was "unintentional" and "innocent" and his consequent denial of appellants' requests for "specific performance" and a finding of contempt. Respondents' conduct in emails, in advertising, and in the subsequent litigation is not relevant to the issues before that court nor are they relevant to the issues properly before this Court.

The Supreme Court of South Carolina

In the Matter of Michael J. Sarratt, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that Chadwick Dean Pye, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Pye shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of

respondent's clients. Mr. Pye may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain 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 respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Chadwick Dean Pye, 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 Chadwick Dean Pye, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Pye's 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

September 12, 2008

The Supreme Court of South Carolina

RE: Amendments to Rule 402, SCACR

ORDER

Pursuant to Article V, §4, of the South Carolina Constitution, Rule 402, SCACR, is amended as follows:

(1) Rule 402(c)(3) is amended to read:

> **(3)** has received a JD or LLB degree from a law school which was approved by the Council of Legal Education of the American Bar Association at the time the degree was conferred. An approved law school includes a school that is provisionally approved by the Council. An applicant who has not provided proof of graduation by July 10th for the July Bar Examination or February 10th for the February Bar Examination shall not be allowed to sit for the examination. An applicant, however, who has not graduated may sit for the examination if the law school certifies in writing that the applicant has completed all requirements for graduation by July 10th for the July Bar Examination or February 10th for the February Bar Examination; the applicant must provide proof of graduation by April 1 following the February Bar Examination or October 1 following the July Bar Examination;

(2) Rule 402(c)(6) is amended to read:

(6) has received a scaled score of at least seventy-seven (77) on the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners. If the score was obtained prior to the filing of the application, the MPRE must have been taken within four (4) years of the date on which the application is filed. While an application can be filed without proof of completion of this requirement, applicants are warned that failure to timely submit proof of completion of this requirement can significantly delay admission as provided by subsection (k) of this rule;

(3) Rule 402(c)(8) is amended to read:

(8) has successfully completed the Bridge the Gap Program sponsored by the South Carolina Bar. While an application can be filed without proof of completion of this requirement, applicants are warned that failure to timely submit proof of completion of this requirement can significantly delay admission as provided by subsection (k) of this rule; and

(4) Rule 402(k) is amended to read:

(k) Admission.

(1) Admission Ceremonies. Admission ceremonies shall be conducted by the Supreme Court in February, May, August and November. Applicants must have submitted proof of completion of all requirements for admission (see subsection (c) of this rule) at least ten (10) days prior to the scheduled date of the ceremony to participate in that ceremony. Applicants who take the February Bar Examination are expected to have all requirements for admission completed for the May ceremony following the examination, and applicants who take the July Bar Examination are expected to have all requirements for admission completed

for the November ceremony following the examination. Applicants will be notified of the date and time of the admission ceremony.

(2) Special Admission Ceremonies. On petition, the Court may schedule applicants for admission on other dates based on compelling circumstances such as illness or irreconcilable conflicts that prevent the applicant from appearing at one of the ceremonies established in (1) above. Applicants who are ineligible to participate in one of the admission ceremonies established in (1) above due to their failure to timely submit proof of completion of Bridge the Gap or the MPRE are not eligible to be admitted at a special admission ceremony.

(3) Fee and Oath. To be admitted, the applicant must pay a fee of $50 and take and subscribe the following oath or affirmation:

Lawyer's Oath

I do solemnly swear (or affirm) that:

I am duly qualified, according to the Constitution of this State, to exercise the duties of the office to which I have been appointed, and that I will, to the best of my ability, discharge those duties and will preserve, protect and defend the Constitution of this State and of the United States;

I will maintain the respect and courtesy due to courts of justice, judicial officers, and those who assist them;

To my clients, I pledge faithfulness, competence, diligence, good judgment and prompt communication;

To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications;

I will not pursue or maintain any suit or proceeding which appears to me to be unjust nor maintain any defenses except those I believe to be honestly debatable under the law of the land, but this obligation shall not prevent me from defending a person charged with a crime;

I will employ for the purpose of maintaining the causes confided to me only such means as are consistent with trust and honor and the principles of professionalism, and will never seek to mislead an opposing party, the judge or jury by a false statement of fact or law;

I will respect and preserve inviolate the confidences of my clients, and will accept no compensation in connection with a client's business except from the client or with the client's knowledge and approval;

I will maintain the dignity of the legal system and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will assist the defenseless or oppressed by ensuring that justice is available to all citizens and will not delay any person's cause for profit or malice;

[So help me God.]

The oath or affirmation shall be administered in open Court and all persons admitted to the Bar shall sign their names in a book, kept for that purpose, in the office of the Clerk of the Supreme Court.

These amendments shall be effective immediately. The monthly admission ceremonies that are currently scheduled through December 2008 shall not be affected by this order.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

September 17, 2008

The Supreme Court of South Carolina

In re: Amendments to Rule 415,
South Carolina Appellate Court Rules

O R D E R

The South Carolina Bar Foundation has filed a petition to amend Rule 415, SCACR, to allow retired or inactive lawyers to provide legal services to organizations which receive IOLTA[1] grants. Currently, retired or inactive lawyers may provide legal services to organizations that receive, or are eligible to receive, funds from the South Carolina Legal Services Corporation, and where the lawyer is working on a case or project through the South Carolina Bar Pro Bono Program. The Bar Foundation's proposed amendment permits retired or inactive lawyers to provide legal services to programs funded in whole or in part by grants from the Bar Foundation using interest and dividends remitted under the procedure established in Rule 412, SCACR.

. We grant the Bar Foundation's petition. Rule 415 is hereby amended as provided in the attachment to this order.

[1] Interest on Lawyer Trust Accounts. Rule 412, SCACR.

The amendments are effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
September 16, 2008

RULE 415
LIMITED CERTIFICATE OF ADMISSION FOR THE RETIRED AND INACTIVE ATTORNEY PRO BONO PARTICIPATION PROGRAM

(a) The Supreme Court may issue a limited certificate to practice law in South Carolina to any person who:

(1) is or was admitted to practice law in South Carolina or any other state or territory of the United States or the District of Columbia and is retired from the active practice of law or is on inactive status;

(2) has not been retired or on inactive status for more than seven years;

(3) has been a member in good standing in each jurisdiction in which the retired or inactive attorney is or was admitted to practice law;

(4) has not been disciplined for professional misconduct in any jurisdiction within the past fifteen (15) years and is not the subject of any pending disciplinary proceeding;

(5) is associated with an approved legal services organization (Legal Services) which receives, or is eligible to receive, funds from the Legal Services Corporation; is working on a case or project through the South Carolina Bar Pro Bono Program (the Program); or is working with a program funded in whole or in part by a grant from the South Carolina Bar Foundation, Inc. (the Grantee), using interest and dividends remitted under the procedure established in Rule 412, SCACR;

(6) performs all activities authorized by this Rule under the supervision of an attorney who is an active member of the South Carolina Bar employed by, or participating as a

volunteer for, Legal Services, the Program or the Grantee and who assumes professional responsibility for the conduct of the matter, litigation, or administrative proceeding in which the retired or inactive attorney participates and;

(7) agrees to abide by the South Carolina Rules of Professional Conduct and all other rules governing the practice of law in this State and to submit to the jurisdiction of the Supreme Court for disciplinary purposes.

(b) The limited certificate issued under this Rule authorizes the retired or inactive attorney to provide legal services solely to clients approved to receive services from Legal Services, the Program or the Grantee, or to provide other services through the Program such as Ask-A-Lawyer or educational clinics. The retired or inactive attorney issued a limited certificate may:

(1) appear in any court or before any tribunal in this State if the client consents, in writing, to that appearance and the supervising attorney has given written approval for the appearance. The written consent and approval must be filed with the court or tribunal and must be brought to the attention of the judge or presiding officer prior to the appearance;

(2) prepare pleadings and other documents to be filed in any court or before any tribunal in this State on behalf of the client. Such pleadings shall also be signed by the supervising attorney; and

(3) otherwise engage in the practice of law as is necessary for the representation of the client.

(c) An attorney desiring a limited certificate shall file with the Clerk of the Supreme Court an application in duplicate on a form prescribed by the Supreme Court accompanied by:

(1) a certification by Legal Services, the Program or the Grantee stating that;

(A) the retired or inactive attorney is currently associated with Legal Services, the Program or the Grantee;

(B) an active member of the South Carolina Bar employed by, or acting as a volunteer for, Legal Services, the Program or the Grantee will assume the duties of the supervising attorney required by this Rule; and

(C) the retired or inactive attorney meets the requirements of section (a) of this Rule;

(2) a certificate of good standing from each jurisdiction in which the retired or inactive attorney is or was admitted to practice law; and

(3) a sworn statement by the retired or inactive attorney that the retired or inactive attorney:

(A) has read and is familiar with the South Carolina Rules of Professional Conduct and all rules relating to the practice of law in this State and will abide by the provisions thereof; and

(B) will neither ask for nor receive compensation of any kind for the legal services rendered under this Rule.

(d) Any questions concerning the fitness or qualifications of the retired or inactive attorney may be referred by the Supreme Court to the Committee on Character and Fitness for a hearing and recommendation.

(e) The limited certificate shall be revoked immediately upon:

(1) notice by Legal Services, the Program or the Grantee stating that the retired or inactive attorney has ceased to be associated with Legal Services, the Program or the Grantee. Such notice must be sent to the retired or inactive attorney and must be filed with the Clerk of the Supreme Court within five (5) days after the association has ceased. The notice need not state a reason for the cessation of the association; or

(2) a determination by the Supreme Court, in its discretion, that the limited certificate should be revoked. Notice of the revocation shall be sent to the retired or inactive attorney and Legal Services, the Program or the Grantee within five (5) days of the revocation.

(f) Upon the revocation of the limited certificate, the supervising attorney shall immediately file notice of the revocation in the official file of each matter pending before any court or tribunal in which the retired or inactive attorney was involved.

(g) The confidentiality provisions of Rule 402(i), SCACR, shall apply to all files and records of the Board of Law Examiners, the Committee on Character and Fitness, and the Clerk of the Supreme Court relating to a limited certificate to practice law under this rule.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Transportation, Defendant,

v.

M & T Enterprises of Mt. Pleasant, LLC., Wells Fargo Bank of Minnesota, N.A., Assignee, and Walgreen Company, Lessee, Plaintiffs,

Of whom Walgreen Company is Appellant,

and M & T Enterprises of Mt. Pleasant, LLC., is Respondent,

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

Opinion No. 4435
Heard April 10, 2008 – Filed September 12, 2008

AFFIRMED AS MODIFIED

Richard D. Bybee, of Mount Pleasant, for Appellant

Randall S. Hiller, of Greenville, for Respondent.

PIEPER, J.: This appeal involves a dispute between a landlord and tenant over the division of a compensation award from a partial taking of leased property by condemnation. Walgreen Company (Tenant) appeals the master-in-equity's decision to give the entire $100,000 award to M & T Enterprises of Mt. Pleasant, LLC (Landlord). Since we may affirm for any reason in the record, we affirm as modified.

FACTS

In 2001, Tenant entered into a lease (Lease) with MD/CP-Mount Pleasant, LLC (MD/CP). The Lease clause titled "Delivery of Possession" provided Landlord would complete construction of the building and deliver exclusive possession to Tenant in April 2002, or as soon thereafter as possible, but no later than January 2003. The Lease was for seventy-five years, but Tenant had the option of terminating it early at specified times. The leased premises specifically included "the [b]uilding, real estate and other improvements to be constructed thereon . . . ." In August 2004, Landlord was assigned MD/CP's interest under the Lease. Tenant was in possession of the property before the filing of a condemnation notice on October 29, 2004.

Article 4 (Condemnation Disclosure) in the Lease stated, "Landlord, after due inquiry, warrants and represents to Tenant that, other than the condemnation of a strip of land approximately five (5) feet wide along Hwy. 21, Landlord has no knowledge of any pending or threatened condemnation actions which will affect the Leased Premises."[1] The Lease also contained a site plan depicting an area labeled "20' Future R/W Per Town" abutting Highway 17. Additionally, the Lease contained a section on condemnation

[1] The reference to Highway 21, rather than Highway 17, was apparently a clerical error.

(Condemnation Clause), which was divided into two parts, 32(a) and 32(b). Section 32(a) of the Condemnation Clause provided in part:

> If prior to Landlord's delivery of possession of the Leased Premises to Tenant in accordance with Article 4, any portion of the Leased Premises or the Driveway shall be taken by reason of condemnation or under eminent domain proceedings, or if as a result of such a condemnation, eminent domain proceeding or of modifications to adjacent public roadways, any curb-cut providing access to the Leased Premises will be closed, then Tenant may terminate this Lease at Tenant's option, to be exercised by notice to Landlord within sixty (60) days of such event, if in the opinion of Tenant, reasonably exercised, the remainder of the Leased Premises and/or access points thereto are or shall no longer be suitable for Tenant's business.

Section 32(b) provided in part:

> If subsequent to Landlord's delivery of possession of the Leased Premises to Tenant in accordance with Article 4, a portion of the Leased Premises and/or the Driveway shall be taken under eminent domain or by reason of condemnation and if in the opinion of Tenant, reasonably exercised, the remainder of the Leased Premises and/or Driveway is/are no longer suitable for Tenant's business, this Lease, at Tenant's option, to be exercised by notice to Landlord within sixty (60) days of such taking shall terminate; any unearned rents paid or credited in advance shall be refunded to Tenant. If this Lease is not so terminated, Landlord forthwith and with due diligence, shall restore the Leased Premises and/or Driveway to a proper and usable condition. Until so restored, fixed rent shall abate to the extent that Tenant shall not be able to conduct business, and thereafter, fixed rent for the remaining portion of the term shall be proportionately reduced.
>
> Tenant shall be entitled to the award in connection with any condemnation insofar as the same represents compensation for or

> damage to Tenant's fixtures, equipment, non-permanent leasehold improvements and other property of Tenant, moving expenses as well as the loss of leasehold estate (i.e. the unexpired balance of the lease term immediately prior to such taking); Landlord shall be entitled to the award insofar as same represents compensation for or damage to the fee remainder (including damage to the Building structure, and other permanent leasehold improvements made at the expense of Landlord under Article 5 hereof).

On October 29, 2004, the South Carolina Department of Transportation (SCDOT) filed a condemnation notice. The notice involved a strip of land along Highway 17 varying in width from one to fourteen feet for a length of approximately three hundred feet, totaling 4,245 square feet of land. Prior to the condemnation, the leased premises encompassed 100,493 square feet or 2.31 acres. Tenant did not terminate the Lease after the taking and continued paying $31,083.33 in monthly rent as provided by the Lease. Tenant, Landlord, and SCDOT agreed to a condemnation award of $100,000. Tenant and Landlord did not agree on the division of the award, and their dispute was referred to the master-in-equity.[2]

At the hearing before the master-in-equity, Tenant's expert witness testified that Tenant was entitled to a rent reduction of $491.07 per month under the Condemnation Clause.[3] First, the expert used the 2004 report generated by SCDOT's appraiser as a baseline to determine the fair market value of the property itself (not the leasehold) before and after the taking; he concurred with both the difference in value to the property in fee and the acreage differential caused by the taking. Using the income approach, he then appraised Tenant's interest in the award at $81,400, resulting from the reduction in rent over the life of the Lease. The expert witness arrived at this figure by determining the land in the Lease was 37.4% of the total value of

[2] The order of reference specifically directed the master-in-equity to "determine the proportional share the Landowner and Tenant should receive" from the condemnation award. No other issues were referred to the master-in-equity.

[3] Tenant's expert was the only witness to give testimony.

the property. He determined the taken land was 4.22% of the total land. Next, because the taking only involved land and not the building, the expert determined that it represented 1.58% of the total value of the property. Accordingly, 1.58% of the monthly rent Tenant paid of $31,083.33 amounted to $491.07 per month. The expert then calculated the present value of the monthly reduction over the life of the lease and determined the value as either $91,200 or $81,400, depending upon the capitalization rate he applied. The expert ultimately selected the $81,400 value.

The master-in-equity relied upon the contract between the parties and found that Tenant "has offered absolutely no evidence that the leasehold estate today is worth less than the leasehold estate that it held" on the date the Lease was either executed or delivered. The master-in-equity further stated that Tenant is "only entitled to the difference between what they pay in rent and what the property could be leased for." As additional sustaining grounds, the master-in-equity found: (1) that the leased premises "excluded the first 20-feet of the subject premises as a future right of way and within which the condemnation actually occurred"; and (2) that, for purposes of the Lease, the condemnation action commenced when Landlord notified Tenant of the threatened condemnation in Article 4 of the Lease, which occurred prior to Tenant's possession. Thus, the only alternative under the terms of the Lease would have been to terminate the Lease. Since the master-in-equity determined that Tenant did not prove damages to the leasehold interest, he awarded the full $100,000 to Landlord. This appeal followed.

ISSUES

Tenant raises the following issues on appeal:

I. Whether the trial court erred in applying the common law standard to measure a tenant's portion of a condemnation award instead of applying the condemnation provisions of the lease;

II. Whether the trial court erred in ignoring the terms of a rent reduction condemnation clause in a condemnation allocation proceeding;

III. Whether a condemnation clause is controlling between a tenant and its landlord in an allocation dispute under the South Carolina Eminent Domain Procedures Act;

IV. Whether the trial court erred in determining that a clause giving notice of a possible condemnation affected Tenant's possible right to a proportionate rent reduction under the lease's condemnation clause;

V. Whether the trial court erred in holding, as a matter of law, that the lease excluded an area described as a future right of way;

VI. Whether the trial court erred in holding, as a matter of law, that Tenant's only remedy in the event of a partial condemnation was termination of the lease;

VII. Whether the trial court erred in finding that the condemnation action commenced prior to Tenant's possession of the property; and

VIII. Whether award of the entire amount of the condemnation settlement to landlord M & T is inequitable?

STANDARD OF REVIEW

A proceeding to allocate any condemnation funds is by statute a proceeding in equity. S.C. Code Ann. § 28-2-460 (2007). In an equitable proceeding, we may find facts in accordance with our own view of the preponderance of the evidence. See Murrells Inlet Corp. v. Ward, 378 S.C. 225, 231, 662 S.E.2d 452, 455 (Ct. App. 2008); see also Friarsgate, Inc. v. First Fed. Sav. & Loan Ass'n of South Carolina, 317 S.C. 452, 456, 454 S.E.2d 901, 904 (Ct. App. 1995). However, our broad scope of review does not require this court to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility. Sloan v. Greenville County, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003).

Moreover, a case with both legal and equitable issues presents a divided scope of review. Thus, "a legal question in an equity case receives

review as in law." Sloan v. Greenville County, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003) (citing Gunter v. Fallow, 78 S.C. 457, 59 S.E. 70 (1907)). Questions of law may be decided with no particular deference to the trial court. Doe ex rel. Legal Guardian v. Barnwell School Dist. 45, 369 S.C. 659, 662, 633 S.E.2d 518, 519 (Ct. App. 2006) (citing Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000)). This court may correct errors of law in both legal and equity actions. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Code Ann. § 14-8-200 (Supp.1998)).

LAW/ANALYSIS

Tenant contends that this case is one of contract interpretation and that the contractual agreement controls the allocation of the condemnation award.[4] As such, Tenant claims that the Lease provides two remedies in the event of condemnation of the leased premises: (1) to have its rent proportionately reduced for the remaining portion of the lease term; and (2) to share in the condemnation award to the extent of any loss of its leasehold estate.

Lease provisions are construed under rules of contract interpretation. See United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 105-07, 413 S.E.2d 866, 868-69 (Ct. App. 1992) (applying the rules of contract construction to interpret the lease of a shopping center). One cardinal rule of contract interpretation is to 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. South Carolina Health and Human Servs. Fin. Comm'n, 296 S.C. 373, 377,

[4] We recognize the condemnation statute indicates that any funds be held pending final order of the court of common pleas in an equity proceeding. S.C. Code § 28-2-460 (2007). However, the case was presented to the master-in-equity as one of contract interpretation. Although the issues raised by Tenant at trial were of a contractual nature, our consideration of the legal question presented as to the law governing the valuation of a partial taking would be the same under a legal or equitable standard of review.

373 S.E.2d 584, 586 (1988). The construction of a clear and unambiguous contract presents a question of law for the court. Ward v. West Oil Co., Inc., Op. No. 4389 (S.C. Ct. App. filed May 12, 2008) (Davis Adv. Sh. No. 29 at 18); see also Pruitt v. S. C. Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001).

It is also a question of law whether the language of a contract is ambiguous. South Carolina Dep't of Natural Res. v. Town of McClellanville, 345 S.C 617, 623, 550 S.E.2d 299, 302-03 (2001). When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense. C.A.N. Enters., Inc., 296 S.C at 377, 373 S.E.2d at 586. Where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it. Ebert v. Ebert, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct. App. 1995). We are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. C.A.N. Enters., Inc., 296 S.C. at 378, 373 S.E.2d at 587. A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully. Lindsay v. Lindsay, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct. App. 1997). Tenant concedes in its reply brief that the Lease is not ambiguous.

I. Rent Abatement

Tenant argues in several of its issues on appeal that the master-in-equity ignored the terms of the Lease's Condemnation Clause calling for rent reduction in a condemnation allocation proceeding (addressing issues I-III). We disagree.

As noted, the Lease's Condemnation Clause under Article 32 is divided into two sections, 32(a) and 32(b). Article 32(a) applies only when all or part of the leased premises is taken by condemnation prior to the tenant's possession. Contrary to the trial court's findings, this event occurred after

Tenant took possession of the property.[5] Thus, according to its terms, Article 32(a) does not apply here.

Article 32(b) of the Lease addresses the rights and duties of the parties if part or all of the leased premises is taken subsequent to Tenant's possession. Because we view the condemnation to have occurred after Tenant took possession of the property, we find this article applicable.

Article 32(b) is subdivided into two distinct paragraphs. The first applies in the event of a partial or total taking by condemnation: Tenant may either (1) terminate the Lease; or (2) if not terminated, may claim restoration of the leased premises by Landlord. An entitlement to rent abatement and a proportional reduction in rent is separate and distinct from the subject of the second paragraph, which is the allocation of any portion of the condemnation award under the Lease.

As our supreme court has indicated, "[w]hen a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense." C.A.N. Enters., Inc., 296 S.C at 377, 373 S.E.2d at 586. Moreover, leases are construed in the same manner as contracts:

> The terms of a lease, like the terms of any contract, are construed to achieve the intent of the parties at the time the lease was entered into. The courts must construe and enforce contracts as written, in order to preserve the fundamental right of freedom of

[5] Tenant contends the master-in-equity erred in his alternative finding that the condemnation action commenced prior to its possession of the property, thereby leaving Tenant with the sole remedy of terminating the Lease (addressing issues VI and VII). We agree. Both articles in the Lease's Condemnation Clause are triggered by an actual taking by condemnation or eminent domain. Thus, by written agreement of the parties to the contract, the Landlord and Tenant had already decided that the date upon which the land was "taken," in part or whole, would govern. Accordingly, by the terms of the Lease, the condemnation action commenced at the time SCDOT filed the Condemnation Notice.

> contract. In general, therefore, parties may bind themselves as they see fit by contract, unless the contract would violate the law or is contrary to public policy.

Lexington Ins. Co. v. Tires Into Recycled Energy and Supplies, Inc., 552 S.E.2d 798, 800 (N.C. Ct. App. 1999) (internal citations omitted). As such, it is generally held that parties may agree in the lease to a method or formula of valuation or compensation in the event of condemnation. See City and County of Honolulu v. Mkt. Place, Ltd., 517 P.2d 7, 15 (Haw. 1973) ("Where a landlord and tenant have contractually agreed as to the disposition of compensation in the event of condemnation, such an agreement is generally held binding."); City of Manhattan v. Galbraith, 945 P.2d 10, 12-13 (Kan. Ct. App. 1997) ("[I]f the lease itself includes a provision in respect of the rights of the parties in the event of the condemnation of the leased premises, such provision is controlling, if applicable to the particular case.") (citations omitted); City of Kansas City v. Manfield, 926 S.W.2d 51, 53-54 (Mo. Ct. App. 1996) ("[S]pecific provisions in a lease spelling out the respective rights of the parties to that lease are valid and controlling in the event the property is condemned. Such lease provisions have uniformly been upheld.") (citations omitted).

Here, according to the Lease's clear, explicit and unambiguous language, no right to an abatement of rent out of the condemnation award exists. Moreover, under these circumstances, whether Tenant is entitled to an abatement of rent is an issue beyond the limited scope of the matter referred to the master-in-equity; his sole duty was to determine the proportional share the landowner (Landlord) and Tenant should receive from the condemnation award. Bunkum v. Manor Props., 321 S.C. 95, 98, 467 S.E.2d 758, 760 (Ct. App. 1996) ("Pursuant to Rule 53, SCRCP, a master has no power or authority except that which is given to him by the order of reference.") (citing Smith v. Ocean Lakes Family Campground, 315 S.C. 379, 381, 433 S.E.2d 909, 910 (Ct. App. 1993)). Any entitlement to rent abatement would be the subject of a separate contract action between Landlord and Tenant and is

beyond the scope of the order of reference. Accordingly, we agree the award should not be allocated to Tenant on the basis of contractual rent abatement.[6]

II. Preservation of Grounds of Appeal Other Than Alternative Findings

Having disposed of the rent abatement argument, we next question whether Tenant has preserved any other grounds of appeal relating to the condemnation award beyond asserting that the terms of the contract should govern apportionment of the award rather than the common law rule, and beyond the challenge to the alternative findings. A reading of Tenant's briefs to this court suggests the gravamen of Tenant's position is that the contractual provisions of the Lease control and that Tenant is entitled to rent abatement.

It is well settled that an issue must have been raised to and ruled upon by the trial court to be preserved for appellate review. Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). Additionally,

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[6] Tenant also argues the master-in-equity erred in his alternative finding that the Condemnation Disclosure in the Lease acted to exclude the area taken by condemnation from the leased premises, and thus from the terms of the Condemnation Clause (addressing issues IV and V). We agree. Under the terms of the Lease, the leased premises for which Tenant paid rent included the twenty foot right-of-way area, within which the taking by condemnation occurred. The description of leased premises included all 100,493 square feet of real estate on the plot. While a twenty foot future right-of-way was indicated in both an exhibit attached to the document, as well as the Condemnation Disclosure, the area was still included within the total amount of property leased. Additionally, the area actually taken was less than that demarcated on the site plan. Thus, the unambiguous language of the Lease shows that the parties did not intend for the twenty foot right of way area, from which a portion was condemned, to be excluded from the leased premises or exempt from the Condemnation Clause. Accordingly, the master-in-equity erred in determining the Condemnation Clause did not apply to the area of condemned property. Since this was an alternative ruling by the master-in-equity, it does not affect our disposition herein.

"[i]f the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 24 n.4, 602 S.E.2d 722, 780 n.4 (2004). Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error. Staubes, 339 S.C. at 412, 529 S.E.2d at 546. Furthermore, even if an issue is preserved at the trial court level, it must still be properly raised and argued to the appellate court. See Fields v. Fields, 342 S.C. 182, 191, 536 S.E.2d 684, 689 (Ct. App. 2000) (stating "issues not argued in the brief are deemed abandoned and will not be considered on appeal.") (citing First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994)); See also Glasscock, Inc. v. U.S. Fid. and Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (stating "a one sentence paragraph raised in an appellants brief was insufficient to preserve the argument for review.").

Tenant asserted that Hamilton v. Martin, 270 S.C. 223, 225, 241 S.E.2d 569, 570 (1978) does not apply where a contract contains a condemnation clause and that Hamilton was a total taking case, but only raised this argument in the context of its contract analysis. Notwithstanding, Tenant agreed in its brief that where the terms of a lease are silent pertaining to the method of allocation, the common law is controlling. Since the master-in-equity did not address whether Hamilton was the appropriate common law method of valuation governing a partial taking instead of a total taking, Tenant had an obligation to preserve the issue pursuant to Rule 59(e), SCRCP. Elam, 361 S.C. at 24 n.4, 602 S.E.2d at 780 n.4. Moreover, although Tenant arguably made this assertion before the master-in-equity, it has now been abandoned on appeal as it has not been argued outside the applicability of the Lease.

Tenant's remaining grounds on appeal address either the master-in-equity's alternative findings or the alleged inequity of the allocation decision. Since we have addressed the alternative findings, and since we find the equity argument not preserved,[7] we conclude Tenant is not entitled to a portion of

[7] Tenant asserts the master-in-equity erred in allocating the entire condemnation award to Landlord since that award is inequitable (addressing

the condemnation award based upon contractual rent abatement; any entitlement to rent abatement would be the subject of a separate contract action as previously indicated.

III. Leasehold Valuations for Total Takings and Partial Takings

While our preservation concerns are significant, we recognize, at a minimum, Tenant argued that the Lease controlled, not Hamilton, and we note that the Lease indicates Tenant was entitled to a portion of the condemnation award for "loss of leasehold." We also recognize the statutory mandate in the condemnation context to engage in an equitable analysis of the apportionment of a condemnation award. As such, we analyze, for equitable and fairness purposes, Tenant's colorable assertion that the master-in-equity improperly relied upon the Hamilton method; pursuant to our equitable review under the statute, we nonetheless would affirm since we may do so for any reason in the record, whether or not raised and preserved.

Paragraph two under Article 32(b) directly addresses allocation of a condemnation award between the parties as compensation for expressly defined categories of damages. Tenant argues on appeal that this paragraph entitles it to compensation for any loss of its leasehold estate and that the master-in-equity erred in denying a portion of the award.

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issue VIII). We find this issue not preserved for review. The master-in-equity applied a contract analysis to the case, not an equity analysis. However, although arguably raised in its proposed order submitted in lieu of a brief to the trial court, Tenant never filed a motion under Rule 59, SCRCP, asking the court to address the issue. Elam, 361 S.C. at 24 n.4, 602 S.E.2d at 780 n.4. While we recognize the statutory mandate to determine the issue of allocation in an equitable proceeding, the master-in-equity was never asked to address that equitable apportionment argument after issuance of his order; moreover, it would not change our result because the same law of partial taking would apply in both a legal and equitable proceeding. Notwithstanding, we note the basis of Tenant's argument at trial was that the provisions of the Lease controlled the disposition of the proceeds, not the statute. Therefore, we find no prejudice.

Specifically, the award allocation paragraph states:

> Tenant shall be entitled to the award in connection with any condemnation insofar as the same represents compensation for or damage to Tenant's fixtures, equipment, non-permanent leasehold improvements and other property of Tenant, moving expenses as well as the loss of leasehold estate (i.e. the unexpired balance of the lease term immediately prior to such taking). Landlord shall be entitled to the award insofar as same represents compensation for or damage to the fee remainder. . . .

This section delineates the manner in which any condemnation award shall be allocated.

As indicated, the Lease specifically provides the items for which Tenant is to be compensated in the event of condemnation. Tenant asserts a "loss of leasehold estate" entitles it to a portion of the condemnation award. Because the manner in which "loss of leasehold estate" is calculated is not delineated by the Lease, the master-in-equity relied upon what he considered to be the common law standard for valuing a leasehold estate when considering the allocation of the condemnation award. See Farr v. Williams, 232 S.C. 208, 212, 101 S.E.2d 483, 485 (1957) (finding when a lease contains no provision as to the effect upon it of condemnation, the court looks to the common law rule).[8]

[8] The applicable Lease provision and parenthetical indicates as follows: "the loss of leasehold estate (i.e. the unexpired balance of the lease term immediately prior to such taking)." Neither of the parties at trial or on appeal have argued that this parenthetical language indicates the parties clearly intended to limit the meaning of "loss of leasehold" to a total taking situation by referencing the unexpired balance of the lease term prior to the taking. The term "i.e." is a common abbreviation meaning "that is." Black's Law Dictionary 762 (8th ed. 2004). Since the parties failed to argue this issue, we do not consider it on appeal.

As previously noted, the master-in-equity here applied the same method of valuing a leasehold estate as used in Hamilton. In that case, there was a conflict between a landlord and tenant over the allocation of an award from the condemnation of leased premises. Hamilton, 270 S.C. at 225, 241 S.E.2d at 570. The master-in-equity there measured the leasehold estate as "the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew the lease, less the agreed rent which the tenant would pay for such use and occupancy." Id. In short, the leasehold value in a total condemnation is the difference between the market value rent and the rent paid by the tenant over the full course of the lease including renewal options. However, it is important to note that the South Carolina Supreme Court merely relied upon the unappealed Hamilton formula as the law of that case procedurally, not as the law of this state governing all leasehold estate valuations.[9] Id. Moreover, the taking was total in Hamilton, not partial, as in the case at bar. Id.

The Hamilton formula was later cited in Gray v. South Carolina Department of Highways and Public Transportation, which was an inverse condemnation case. 311 S.C. 144, 153, 427 S.E.2d 899, 904 (Ct. App. 1992) (rejecting the capitalization of business earnings method as not conforming with the Hamilton formula for valuation of a leasehold estate) overruled by, Hardin v. South Carolina Dep't of Transp., 371 S.C. 598, 607-08, 641 S.E.2d 437, 442-44 (2007). In Gray, this court utilized Hamilton as a valid method for measuring the value of a leasehold interest in a case where "there was no physical taking of a portion of property in which [sublessee] had a leasehold interest," but where the "property was no longer valuable as a service station after the [abutting] intersection was closed." Gray, 311 S.C. at 153-54, 427 S.E.2d at 904. In short, this court applied the Hamilton formula to measure a leasehold interest where the damages (special injuries) from the closing of an intersection effectively resulted in a total taking of the sublessee's leasehold (it closed its business).[10] Id.

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[9] Since no appeal was taken from the formula used by the master-in-equity and circuit court, the supreme court did not disturb the method applied in Hamilton. Id. 270 S.C. at 225-26, 241 S.E.2d at 570-71.

[10] The South Carolina Supreme Court overruled the "special injury" analysis used in Gray and similar cases, holding "that our focus in these cases is on

The formula used in Hamilton is widely recognized as the proper method to measure a leasehold estate when the leased premises are deemed entirely condemned and taken. See, e.g., U.S. v. Petty Motor Co., 327 U.S. 372, 381 (1946) ("The measure of damages is the difference between the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew in the lease . . . , less the agreed rent which the tenant would pay for such use and occupancy."); Pepsi-Cola Metro. Bottling Co., Inc. v. Romley, 578 P.2d 994, 1001 (Ariz. Ct. App. 1978) (holding the "proper measure of that value is the difference between the market value of the unexpired term of the lease over and above the rent stipulated to be paid to the lessor under the lease, reduced to present value."); Ellis v. Dep't of Transp., 333 S.E.2d 6, 7 (Ga. App. 1985) (measuring loss of leasehold as "diminution in the market value of the leasehold during the remainder of the unexpired term of the lease, less any rents to be paid by the lessee."); Dep't of Public Works and Bldgs. v. Blackberry Union Cemetery, 335 N.E.2d 577, 580 (Ill. App. Ct. 1975) (stating proper award to lessee for total condemnation is "the fair rental value of the leasehold interest minus the actual rent paid. The difference or the advantage lessee enjoys by paying less rent than others would pay, is the amount lessee should be awarded for his loss."); New Jersey Highway Auth. v. J. & F. Holding Co., 123 A.2d 25, 29 (N.J. Super. Ct. App. Div. 1956) ("The burden descends upon the tenant to disclose by a fair preponderance of the evidence that the fair market value of his lease was greater than the rent reserved."); Texas Fruit Palace, Inc. v. City of Palestine, 842 S.W.2d 319, 323 (Tex. App. 1992) (holding the "measure of value of a leasehold estate is the value of the use and occupancy of the leasehold for the remainder of the tenant's term, less the agreed rent; the values are determined by the usual willing buyer, willing seller rule."); Exxon Corp. v. M & Q Holding Corp., 269 S.E.2d 371, 376-77 (Va. 1980).

Therefore, in a total taking, the tenant is usually entitled to the lease advantage, or "bonus value." Simply stated, the "bonus value" is "the difference between the economic rental, which is the fair market value of the

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how any road re-configuration affects a property owner's easements. An easement is either taken or it is not." Hardin, 371 S.C. at 609, 641 S.E.2d at 443.

leasehold interest, and the contract rental, which is the actual rent paid according to the terms of the lease agreement, discounted to present value." City of Riverside v. Progressive Inv. Club of Kan. City, Inc., 45 S.W.3d 905, 911 (Mo. Ct. App. 2001).

A different method of valuation is commonly used where, as here, only a partial taking by condemnation of the leased premises occurs. This particular issue has not yet been addressed by the South Carolina Supreme Court. While there is a split of authority on the matter, the general rule in other jurisdictions is that, "where only a portion of the leasehold is condemned, the measure of damages is the difference between the fair market value of the lease before and after the taking." Mobile Oil Corp. v. Phoenix Cent. Christian Church, 675 P.2d 284, 287-88 (Ariz. Ct. App. 1983) (holding also that this measure of damages "will accurately reflect the lessee's damages even if there was no before condemnation bonus value" in the leasehold estate); accord Batcheller v. Iowa State Highway Comm'n, 101 N.W.2d 30, 33 (Iowa 1960) (holding the proper measure of damages as "the value of the use of the premises before the appropriation less what it is worth afterwards."); Veirs v. State Roads Comm'n, 143 A.2d 613, 616 (Md. 1958) (stating that where the "evidence in the record extract is not sufficient to show a complete taking of the leasehold interest. . . . The measure of damages to the lessee would, therefore, seem to be the difference in market value of the lessee's interest before and after the taking."); Kafka v. Davidson, 160 N.W. 1021, 1023 (Minn. 1917); In re Com., Dep't of Transp., 447 A.2d 342, 345 (Pa. 1982) (holding the proper measure of damages as the "difference between the fair market value of its leasehold interest immediately before the partial taking and the fair market value of the leasehold interest remaining immediately after the taking, projected over the remaining term of its lease and discounted to its present worth," and that "the fair market value of the lease is the amount a willing and fully informed buyer would pay for the leasehold interest, and the sum for which a willing and fully informed seller would sell the leasehold interest."); see also Annotation, Eminent Domain: measure and elements of lessee's compensation for condemnor's taking or damaging of leasehold, 17 A.L.R.4th 337, 372 §5 (1982).

The fundamental rationale driving this view is two-fold. First, "it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing. . . ." U.S. v. General Motors Corp., 323 U.S. 373, 380 (1945). Additionally, "[t]he right to occupy, for a day, a month, a year, or a series of years, in and of itself and without reference to the actual use, needs, or collateral arrangements of the occupier, has a value." Id. Thus, a lessee, as temporary holder of these rights upon the leased premises, possesses a thing of value which must be compensated if taken unless the parties agreed otherwise. Second, if the lessee was paying exactly the fair market value of the leasehold prior to the partial condemnation, then there is no bonus value; as such, "if the condemnation reduces the value of the leasehold while the lessee is still required to pay the same amount of monthly rent, damages result to the extent that the lessee now pays a rent greater than the fair market value of the property." Mobile Oil Corp., 675 P.2d at 288. Under such circumstances, it is this value for which the lessee is normally compensated in a partial taking situation. In its simplest form, "the measure of damages of a tenant is the market value of what is lost." Id.

Therefore, even though Tenant did not actually occupy or use the strip of condemned property in the case at bar, it still paid rent for the total leased premises, which included the condemned area, and had dominion over it until taken. Furthermore, Tenant continues to pay the same monthly rent now as it did before the taking. Consequently, absent an agreement otherwise, Tenant normally would be compensated in accordance with the general common law rule for a partial taking upon proof of such damage, which is the difference between the fair market value of the lease before the taking, and the fair market value of the lease after the taking, projected over the remaining term of its lease and discounted to its present worth.

As to damages, "the burden is on a party pleading a fact to prove it." Landbank Fund VII, LLC. v. Dickerson, 369 S.C. 621, 628, 632 S.E.2d 882, 886 (quoting Jackson v. Frier, 146 S.C. 322, 329, 144 S.E.2d 66, 68 (1928)) (internal quotation marks omitted). This general principle of litigation has been applied to disputes concerning apportionment of condemnation awards in other jurisdictions, and we apply it here as well. See, e.g., Mobile Oil Corp., 675 P.2d at 286 ("The owner of the leasehold estate bears the burden

of establishing the damages sustained to its leasehold estate as a result of the partial taking of the land."); Santa Fe Trail Neighborhood Redev. Corp. v. Coehn & Co., 154 S.W.3d 432, 444 (Mo. Ct. App. 2005) (stating the lessee has the burden to show any damages attributable to the loss of leasehold interest, and the balance of damages, if any, belong to the reversionary interest of landowners); J. & F. Holding Co., 123 A.2d at 29; State ex rel. State Highway Comm'n v. Sherman, 481 P.2d 104 (N.M. 1971) (holding that, during the apportionment trial, "[t]he burden was on [lessee] to establish her damages."); City of Sioux Falls v. Naused, 218 N.W.2d 536, 539 (S.D. 1974) ("Proof of tenancy in the condemned premises is not necessarily proof of compensable loss."); Colley v. Carleton, 571 S.W.2d 572, 574 (Tex. App. 1978) ("[T]he lessee has the burden to show the amount of the damages attributable to his leasehold interest, if any. . . . The balance of the damages, if any, would belong to the reversionary interest of the landowners.").

The imposition of the burden of proof upon the lessee merely reflects the significant property interest of the landowner as fee simple owner, and recognizes that what is not proven as damages by a tenant belongs, or reverts, to the owner. Because of the strong policy of our State in favor of the ownership rights of the landowner, a rule allocating the burden of proof to a tenant not only is consistent with this policy, but also is fair since the landowner has permanently lost part of the property and would otherwise be entitled to the award. Moreover, the burden imposed upon a tenant to prove damages remains the same whether the allocation proceeding is in equity or law.

Here, the master-in-equity utilized an improper method of valuation for a partial taking. However, the record does not include all of the essential components of the appropriate valuation process in a partial taking situation. In estimating the economic rent, Tenant's expert stated the gross potential income was $373,000 per year. The expert calculated Tenant's damages using two alternative approaches, one using a 6.4 capitalization rate ($91,200) and the other using a 7.2 percent capitalization rate ($81,400).[11]

[11] We note the existence of criticism of the capitalization method as a basis for apportioning an award between a lessor and lessee, since there is not necessarily a relationship between the loss a lessee suffered and the amount

On direct examination, he also agreed that $81,400 represented the fair market value loss to the value of Tenant's leasehold estate; however, this figure was solely and improperly based upon the original gross potential rental income prior to condemnation, not on the difference between the fair market value of the leasehold before and after the taking. The expert utilized a percentage based upon the land taken and applied it in part to the starting figure of economic rent. Thus, the expert's calculation for the loss to Tenant was individually based on the initial economic rent analysis and was not representative of the difference in the fair market values, i.e. the difference between what a willing and fully informed buyer would pay for the leasehold interest and the sum for which a willing and fully informed seller would sell the leasehold interest before and after the taking. The determination of this difference in fair market value is critical to a partial taking analysis because the damages suffered to a leasehold interest after a partial condemnation may not bear a direct correlation to the percent of the area condemned. See Great Atl. & Pac. Tea Co. v. State, 238 N.E.2d 705, 711 (N.Y. 1968) (holding the trial court's computation and award of lessee's damages linked directly to the percentage of property taken was in error). While there was evidence of the fair market value of the property in fee itself before and after the taking, the fair market value of the leasehold after the taking does not appear in the record. In support of our conclusion, Tenant even acknowledges in its brief that the expert "did not offer an opinion of what the rental value of the entire property was worth in the after condition."

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of any allocation received. "The capitalization approach is generally based upon the capitalization of the rental income of the property." Mobile Oil Corp., 675 P.2d at 287 n.2. "The sum of the values of the leasehold and the reversion, as independently determined, is often less than the market value of a fee simple estate in the land. Application of the capitalization approach in such cases confers a windfall upon the lessee, who receives the balance of the award after computation of the value of the lessor's interest. Conversely, where the aggregate value of leasehold and reversion exceeds the value of a fee simple estate, one of the condemnees will be undercompensated. Id. at 287. Thus, "[i]t is neither a measure of the damages suffered by the lessee nor an approximation of the market value of the lease." Id. at 288 (quoting Boyer and Wilcox, An Economic Appraisal of Leasehold Valuation in Condemnation Proceedings, 17 U.Miami L.Rev. 245, 273 (1963)).

While we agree the master-in-equity erred in applying a total taking analysis as opposed to a partial taking analysis, we find no prejudice since the appellant failed to develop the record as to an essential component of the partial taking analysis. Similarly, if the supreme court were to adopt a method of valuation based on any "bonus value" in the lease akin to that reflected by the Hamilton method, the record fails to establish the "bonus value" claimed in this case. Significantly, the expert admitted on cross examination that as of the date of his appraisal, the actual rent was the same as the gross income of the Lease. In short, no "bonus value" was shown by Tenant prior to arriving at its stated damages to such an interest.[12] Thus, Tenant would not prevail even under a "bonus value" theory based upon this record.

Therefore, we need not decide with finality which method the supreme court would adopt because under either method, the record supports the determination by the master-in-equity that Tenant failed to meet its burden of proof. Accordingly, we find no prejudice and no reversible error. See Upchurch v. New York Times, 314 S.C. 531, 538, 431 S.E.2d 558, 562 (1993) ("We may affirm the trial judge for any reason appearing in the record.") (citing Rule 220(c), SCACR).

[12] We further note that, while certainly not controlling, the master-in-equity as trier of fact was free to accept or reject any or all of a witness's testimony, including that of an expert witness. See Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 181, 463 S.E.2d 636, 640 (Ct. App. 1995) ("The fact finder must determine the weight to be accorded the testimony of the witnesses, and accept or reject their valuations."); see also Bray v. Head, 311 S.C. 490, 497-98, 429 S.E.2d 842, 846 (Ct. App. 1993) (upholding the special master's decision to decline defendant's expert testimony, even though opposing party did not offer expert testimony); Miller on Behalf of Grand Strand Diversified, Inc. v. Gandee, 285 S.C. 174, 178, 328 S.E.2d 482, 484 (Ct. App. 1985) ("The master correctly disregarded the [appraiser's] testimony on the 1.51 acre tract because it relates to a fee simple interest instead of a leasehold interest.").

The dissent contends we have reached beyond a preserved issue in our discussion of the proper method of valuation, yet also contends the statutory mandate of an equitable allocation proceeding need not be raised and preserved in light of our scope of review. Tenant clearly and consistently asserted to the trial court and in its briefs to this court that the contract controlled this dispute. Only on appeal, after arguing at trial that only the contract controls the entire dispute, does the Tenant ask this court to find the decision inequitable. Thus, our preservation concern is not addressed to our standard of review; rather, our preservation concern focuses solely on the arguments Tenant presented to the trial court. If Tenant contends it had properly asserted to the trial court that the award must be equitably allocated, separate and apart from its consistent contractual method of allocation argument, then Tenant should have requested the trial court to address that argument after issuance of its final order. See Langehans v. Smith, 347 S.C. 348, 353, 554 S.E.2d 681, 684 (Ct. App. 2001) (wherein issue of equitable subrogation was not preserved for appeal since the only issue litigated before the trial court was the effect of contractual assignment).

Notwithstanding, we respectfully recognize and the dissent appropriately notes our broad scope of review in an equity proceeding. We further recognize a small portion of the leased premises was taken and have considered the appropriateness of a remand. However, even pursuant to our scope of review, we normally would not turn our attention away from appellate preservation rules. Tenant had the burden of proof and failed to meet its burden under either a legal or equitable standard of review. Utilizing our right to make factual findings pursuant to an equitable standard of review is of no avail since the record does not present evidence allowing us to find missing facts to meet even the erroneous standard of Hamilton, or any other standard we propose. Moreover, pursuant to an equitable standard of review, we are not bound to accept, and we specifically reject, the testimony of the expert based upon our previous discussion.

Consequently, we affirm the decision of the master-in-equity. While this conclusion may appear harsh, we are again reminded by the Lease that Tenant may still seek a separate contractual claim against Landlord for rent abatement if necessary, which in part, gives efficacy to Tenant's position that the contract is controlling over this dispute. In fact, not only does Landlord

acknowledge this possibility of contractual rent abatement in its brief to the court, but also Tenant admits in its reply brief that it is not entitled to recovery for both rent reduction and loss of leasehold. Thus, we are not convinced a remand is appropriate, especially in light of Tenant's contractual agreement. Quite simply, equity would not lend itself to both an outright award of the condemnation proceeds as well as contractual rent reduction.

CONCLUSION

We conclude Tenant is not entitled to a portion of the condemnation award based upon contractual rent abatement; any entitlement to rent abatement would be the subject of a separate contract action. Furthermore, even if Tenant properly preserved the argument that the master-in-equity utilized an improper method of valuation or in the event we were to employ an equitable review, we nonetheless conclude the master-in-equity did not err in finding Tenant failed to meet its burden of proof.

Therefore, the decision of the master-in-equity is accordingly

AFFIRMED AS MODIFIED.

GOOLSBY, A.J., concurs.

HEARN, C.J., concurring in part and dissenting in part:

Respectfully, I concur in part, and dissent in part. I would reverse and hold that the long-term Tenant is entitled to the portion of the condemnation award which is supported by the only evidence adduced at trial, or, in the alternative, I would reverse and remand to allow the introduction of evidence under the correct method of valuation for a partial taking.

I agree with the majority that only Article 32(b) of the Lease's Condemnation Clause applies here, as Tenant had taken possession of the property prior to the institution of the condemnation proceeding. Additionally, the order of reference limited the scope of the Master's findings to the proper apportionment of the condemnation award; therefore, any prayer for rent abatement under the Condemnation Clause must be the subject

of a separate action. I also agree the Master erred in his alternative findings that Tenant's sole remedy was to terminate the lease, and that the Condemnation Disclosure operated to exclude the condemned area from analysis under the Condemnation Clause.

However, notwithstanding the interpretation of the contractual Condemnation Clause, I find that the main purpose of this proceeding was to apportion the condemnation award, which sounds in equity, as specifically prescribed by Section 28-2-460 of the South Carolina Code (2007) ("The payment of the [condemnation] funds so awarded must be held by the clerk of court pending the final order of the court of common pleas in an equity proceeding to which all persons served with the Condemnation Notice must be necessary parties."). See also Gordon v. Drews, 358 S.C. 598, 604, 595 S.E.2d 864, 867 (Ct. App. 2004) ("To determine whether this suit is legal or equitable, we must look to the 'main purpose' of the action as reflected by the nature of the pleadings and proof, and the character of relief sought under them."). Accordingly, although we must apply the "any evidence" standard of review to the legal question of whether the parties' lease permitted Tenant to share in the condemnation award, once that is determined, we are free to make findings according to our own view of the preponderance of the evidence to determine how to equitably apportion the award. Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 391 S.E.2d 538 (1990); Townes Assocs., Ltd. V. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). The majority holds any argument that the Master failed to equitably apportion the award is not preserved for review; however, I view the standard of review not as an argument that must be raised before a trial judge in order to be preserved, but rather as the lens through which we are required to view the arguments on appeal.

Generally, a lessee, as the holder of a constitutional property interest, or as an "owner" under eminent domain statutes, is entitled to just compensation when all or part of the leasehold interest is lost by condemnation. South Carolina State Highway Dept. v. Hammond, 238 S.C. 317, 120 S.E.2d 21 (1961). Moreover here, the Condemnation Clause specifically provides Tenant is entitled to a portion of any condemnation award for a loss of its leasehold estate. At the time the property was partially condemned, Tenant had over seventy-three years remaining on its seventy-five year lease and

presented expert testimony explaining the extent to which the condemnation diminished its interest. Conversely, Landlord presented no evidence Tenant's leasehold interest was not adversely affected, nor did it object to the method of valuation used by Tenant's expert. Despite this, the majority finds Tenant is not entitled to any portion of the condemnation award, a result the majority acknowledges "may appear harsh." Based on our standard of review, I believe this result is not only harsh, but inequitable. I would reverse and award Tenant the sum of $81, 400, the amount testified to by Tenant's expert and the only figure supported in the record. See Hough v. Hough, 312 S.C. 344, 440 S.E.2d 387 (1994) (finding a party cannot complain about the valuation of an asset by a court where the party fails to present any evidence on the issue).

The majority posits, without actually adopting, a new rule in this jurisdiction for the valuation of a leasehold in the case of a partial taking. While the scholarship inherent in the majority's opinion is undeniable, this issue is not before us. No argument was advanced to the Master or before us on appeal that a different method of valuation should be applied where the take is partial. See Langley v. Boyter, 284 S.C. 162, 181, 325 S.E.2d 550 (Ct. App. 1984) rev'd on other grounds, 286 S.C. 85, 332 S.E.2d 100 (1985) ("[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked."). Moreover, while I agree with the majority's conclusion that the Master erred in the method he used to value the Tenant's interest, were I to adopt a new method of valuation, I would reverse and remand. I believe it is highly inequitable in this statutorily-mandated equity proceeding, not to afford Tenant the benefit of a remand in order to develop the record under a method of valuation which has heretofore never been recognized in South Carolina. See Mobil Oil Corp. v. Phoenix Cent. Christian Church, 675 P.2d 284 (Ariz. Ct. App. 1983) (reversing and remanding under similar circumstances where the appellate court disagreed with the valuation method applied by the lower court in a partial condemnation proceeding).

Accordingly, I concur in part and dissent in part.