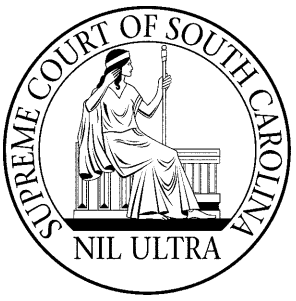

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 37

September 27, 2004

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Victor Missouri, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
H. Dean Hall, Circuit Court Judge

Opinion No. 25874
Heard June 8, 2004 - Filed September 27, 2004

REVERSED

Assistant Appellate Defender Tara S. Taggart, of South Carolina Office of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: This Court granted certiorari to review the court of appeals' decision reversing the trial court, which held that Petitioner

Victor Missouri (Missouri) did not have a reasonable expectation of privacy in another's apartment and therefore could not challenge the search of the apartment under the Fourth Amendment. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

In early 1995, Greenville detectives were investigating a crack-cocaine ring. The police obtained a warrant to search the apartment of Curtis and Laura Sibert (Siberts) for cocaine. Missouri was in the apartment at the time, standing near a quantity of crack cocaine. Missouri was arrested and charged with trafficking in crack cocaine.

At trial, lead detective Eric Cureton (Detective Cureton) admitted that he lied in the affidavit issued in support of the search warrant. In addition, Missouri argued that exculpatory information was omitted from the affidavit. Nonetheless, the trial court denied Missouri's motion to suppress the evidence obtained in the search. In an unpublished opinion, the court of appeals reversed, ruling that the omitted information was necessary for the magistrate's finding of probable cause, and remanded the matter for a hearing to determine whether Missouri had a reasonable expectation of privacy in the Siberts' apartment. *State v. Missouri*, Op. No. 97-UP-448 (S.C. Ct. App. filed September 15, 1997). This Court affirmed the court of appeals' ruling, holding that the search warrant was invalid because it was not supported by probable cause. *State v. Missouri*, 337 S.C. 548, 556-557, 524 S.E.2d 394, 398 (1999).

A hearing was then held to determine, as the court of appeals instructed, whether Missouri had a reasonable expectation of privacy in the Siberts' apartment. Missouri and Curtis Sibert (Curtis) testified that are close friends and have known each other for many years. On occasion, Curtis would give Missouri a key to the Siberts' apartment, allowing Missouri to come and go as he pleased. Even though Missouri lived only a few miles away, he would stay at the Siberts' apartment whenever he wanted to "get away." Missouri testified that the apartment was a place of comfort and solace for him and that he felt a sense of privacy there.

The State presented the testimony of the arresting officer, Detective Cureton. When Detective Cureton conducted surveillance on the Siberts' apartment the day of the arrest, he observed Missouri enter the apartment between 2:30 and 3:00 p.m. Detective Cureton also observed Curtis and his wife Laura purchasing large quantities of baking soda[1] at different locations around town earlier that day. The police searched the Siberts' apartment between 9:30 and 10:00 p.m.

When he entered the apartment, Detective Cureton discovered Missouri in the kitchen standing over several dishes of cooling crack cocaine, while Curtis and Laura sat on the couch watching television. Detective Cureton testified that the police confiscated Missouri's keys and that the key ring held only three keys: two car keys and a key to Missouri's residence. In addition, Detective Cureton recovered a black bag belonging to Missouri that contained scales and packaging paper. Detective Cureton testified that Missouri had no other items in the apartment. But on cross-examination, Detective Cureton admitted that he did not know whether Missouri had a change of clothes in the Siberts' apartment at the time of the search.

Curtis testified that Missouri did not stay over the night before the search took place and could not remember the last time Missouri had spent the night. Curtis testified that at the time of arrest, (1) Missouri had a key to the apartment; (2) he would not have allowed Missouri to use the apartment if he had known Missouri intended to mix drugs there; and (3) Missouri was in the apartment for social reasons only.

After considering the testimony presented at the hearing, the trial judge found Missouri had a reasonable expectation of privacy in the Siberts' apartment. The court of appeals reversed, holding that Missouri did not have "standing"[2] because he did not have a reasonable expectation of privacy in

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[1] Baking soda is used in transforming powdered cocaine into crack cocaine.

[2] The United States Supreme Court has expressly rejected the application of an analysis based on the standing doctrine; instead, the analysis is based on substantive Fourth Amendment law. *Rakas v. Illinois*, 439 U.S. 128, 140, 99

the Siberts' apartment. Missouri was merely a permitted guest conducting business, the court ruled, not an overnight guest entitled to Fourth Amendment protection. *State v. Missouri*, 572 S.E.2d 467, 471, 352 S.C. 121, 130 (Ct. App. 2002).

This Court granted Missouri's petition for writ of certiorari to review the following question:

> Did the court of appeals err in reversing the trial judge's ruling that Missouri had a reasonable expectation of privacy in the Siberts' apartment?

LAW/ANALYSIS

Standard of Review

When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial judge's ruling if there is *any* evidence to support the ruling. *State v. Brockman*, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) (emphasis added). The appellate court will reverse only when there is clear error. *Id.*

Reasonable Expectation of Privacy

Missouri argues that he had a reasonable expectation of privacy in the Siberts' apartment at the time the police searched the apartment. We agree.

The Fourth Amendment guarantees individuals the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; S.C. Const. art. I, § 10. To claim protection under the Fourth Amendment of the U.S. Constitution, defendants must show that they have a legitimate expectation of

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S. Ct. 421, 429 (1978). The use of the term "standing" has created confusion in this context, and therefore "standing" is no longer appropriate to "connote the legitimate expectation of privacy in the evidence seized or the premises searched." *United States v. Bouffard*, 917 F.2d 673, 675 (1st Cir. 1990).

privacy in the place searched. *Rakas v. Illinois,* 439 U.S. 128, 143, 99 S. Ct. 421, 430 (1978). A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable. *Oliver v. United States*, 466 U.S. 170, 177, 104 S. Ct. 1735, 1741 (1984) (citing *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 516 (1967) (Harlan, J., concurring)).

At the "very core" of the Fourth Amendment is a person's right "to retreat into his own home and there be free from unreasonable government intrusions." *Kyllo v. United States*, 533 U.S. 27, 31, 121 S. Ct. 2038, 2041 (2001) (citation omitted). What is less clear is whether a person has a legitimate expectation of privacy in the home of another. Three cases from the United States Supreme Court (USSC) provide guidance in our consideration of this question.

When first presented with this question, the USSC held that a defendant could challenge a search under the Fourth Amendment simply by being "legitimately on the premises." *Jones v. United States*, 362 U.S. 257, 267, 80 S. Ct. 725, 734 (1960), *overruled in part*, *United States v. Salvucci*, 448 U.S. 83, 89, 100 S. Ct. 2547, 2551 (1980) (rejecting the "automatic standing" rule, which conferred standing to any defendant charged with crimes of possession). The standard of simply being "legitimately on the premises" was eventually repudiated as being "too broad a gauge for measurement of Fourth Amendment rights." *Rakas v. Illinois*, 439 U.S. 128, 142, 99 S. Ct. 421, 429 (1978). Nonetheless, the *Rakas* Court did "not question the conclusion of *Jones* that the defendant in that case suffered a violation of his personal Fourth Amendment rights." *Id.* at 141, 99 S. Ct. at 429. In affirming the ultimate conclusion of *Jones*, the Court was persuaded by the following facts: (1) Jones and the owner of the apartment were friends; (2) the owner had given Jones a key to the apartment; (3) Jones had a suit and shirt in the apartment; (4) Jones had slept there at least once before; and (5) Jones was the sole occupant of the apartment at the time it was searched. *Id.* Accordingly, the Court agreed that the defendant was entitled to Fourth Amendment protection. *Id.*

In a subsequent case, the USSC found that an overnight guest had a reasonable expectation of privacy in another's home. *Minnesota v. Olson*, 495 U.S. 91, 110 S. Ct. 1684 (1990). The defendant in *Olson* was suspected of robbing a gas station and fatally wounding the station manager. An investigation led the police to a house where they thought the suspect was hiding. When the police confirmed that the defendant was inside the upper unit of the home, they drew their weapons, entered the duplex without the owner's permission, found the defendant hiding in a closet, and arrested him. The Minnesota Supreme Court held that the defendant had a "sufficient interest" in the home such that he could challenge the legality of the warrantless search and arrest. *Id.* at 94, 110 S. Ct. at 1687.

The USSC affirmed, concluding that the defendant's status as an overnight guest was "alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." *Id.* at 96, 110 S. Ct. at 1688. Although the Court noted that the defendant had been staying at the home, sleeping on the floor for several days before the robbery, and had a change of clothes with him, the Court did not articulate what constitutes an "overnight" guest. *Id.* at 97 n. 6, 110 S. Ct. 1688 n. 6. Instead, the Court supported its holding by speaking generally about the social expectations of privacy recognized by houseguests:

> From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside.
>
> …
>
> The houseguest is there with the permission of his host, who is willing to share his house and *his privacy* with his guest.

Id. at 99, 110 S. Ct. at 1690 (emphasis added). Accordingly, the Court concluded that the defendant's expectation of privacy in the home of another "was rooted in 'understandings that are recognized and permitted by

society,'" and therefore the defendant was permitted to challenge the search. *Id.* at 100, 110 S. Ct. at 1690.

Most recently, the USSC held that the defendants did not have a reasonable expectation of privacy in the home of another when the nature of the defendant's visit was purely commercial, the visit was short, and there was no previous connection between the defendants and the lessee. *Minnesota v. Carter*, 525 U.S. 83, 90, 119 S. Ct. 469, 473 (1998). The defendants in *Carter* lived out-of-state and used the lessee's apartment for the sole purpose of packaging cocaine. The defendants had never visited the apartment before and stayed for two-and-a-half hours. In exchange for use of the apartment, the defendants gave the lessee one-eighth ounce of cocaine. The Court concluded that the defendants did not have a legitimate expectation of privacy because they were "essentially present for a business transaction and were only in the home a matter of hours." *Id.* at 90, 119 S. Ct. at 473. In addition, the Court was persuaded by the fact that the defendants had no "previous relationship" with the lessee and nothing "to suggest a degree of acceptance into the household." *Id.* Accordingly, in a 5-4 decision, the Court held that the defendants were not entitled to Fourth Amendment protection.[3]

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[3] Although the majority in *Carter* held that the defendants were not entitled to Fourth Amendment protection, a "different majority" recognized that social guests present for less than an overnight stay may enjoy a reasonable expectation of privacy in their host's home. In a concurring opinion, Justice Breyer explicitly stated that he agreed with the dissent—which concluded that *all* invited guests are entitled to Fourth Amendment protection, whether present for a business purpose or not—but he agreed with the majority's decision because he thought the search itself was lawful. *Id.* at 104, 119 S. Ct. at 480 (Breyer, J., concurring). In another concurrence, Justice Kennedy stated that, in his view, "*almost all social guests* have a legitimate expectation of privacy … in their host's home." *Id.* at 99, 119 S. Ct. at 478 (Kennedy, J., concurring) (emphasis added). But because the defendants in *Carter* were not "guests," they did not have an expectation of privacy in the owner's home. *Id.* at 102, 119 S. Ct. at 479. Accordingly, it is apparent that at least five members of the Court—the three who dissented and the two who

In the present case, Missouri and Curtis testified that they had grown up together and were "good friends." Missouri had frequently visited the Siberts' apartment in the past and occasionally spent the night. Missouri described the Sibert home as a place to "get away" and as a place to "find comfort." At times, Missouri had a key to the Siberts' apartment and kept a change of clothes there. He paid nothing to use the apartment and was there for at least seven hours on the day of the search.

By choosing to share the privacy of their home with Missouri on several occasions in the past and on the occasion in question, both the Siberts and Missouri demonstrated a subjective expectation of privacy, and that expectation, we hold, is one that society is prepared to recognize as reasonable. *See Oliver*, 466 U.S. at 177, 104 S. Ct. at 1741 (citing *Katz*, 389 U.S. at 361, 88 S. Ct. at 516 (Harlan, J., concurring) (a reasonable expectation of privacy is both subjective and objective in nature)). Moreover, the trial judge's findings of fact support his ruling that Missouri's expectation of privacy in the Sibert home was reasonable. *See Brockman*, 339 S.C. at 66, 528 S.E.2d at 666 (an appellate court must affirm if there is *any evidence* in the record supporting the trial judge's ruling). Therefore, we reverse the court of appeals' decision.

CONCLUSION

For these reasons, we reverse the court of appeals' decision and hold that Missouri had a reasonable expectation of privacy in the Siberts' apartment. Missouri is therefore entitled to challenge the search under the Fourth Amendment. In addition, because we held in a prior decision that the search warrant executed in this case was invalid, the evidence seized must be suppressed and Missouri's conviction vacated.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

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concurred—would be willing to extend protection to guests present for social reasons and present for some time less than an overnight stay.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Elizabeth Darlene Dorrell, Appellant,

v.

South Carolina Department of Transportation, APAC-Carolina, Inc., and APAC-Georgia, Inc., Defendants,

Of whom APAC-Carolina, Inc. is Respondent.

Appeal from Georgetown County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 25875
Heard October 21, 2003 - Filed September 27, 2004

REVERSED AND REMANDED

Frank J. Bryan, of Floyd Law Firm, P.C., of Surfside Beach; and J. Matthew Dove, of Dove Law Firm, of Murrells Inlet, for appellant.

Robert L. Widener, of McNair Law Firm, of Columbia; William W. Doar, Jr., of McNair Law Firm, of Georgetown; and Peter Murnaghan, of Murnaghan & Ferguson, of Tampa; Florida, for respondent.

CHIEF JUSTICE TOAL: Elizabeth Darlene Dorrell (Dorrell) appeals after the circuit court granted summary judgment to respondent APAC-

Carolina, Inc. (APAC). This case was certified from the court of appeals pursuant to Rule 204(b), SCACR. We reverse and remand.

FACTUAL/PROCEDURAL BACKGROUND

Dorrell was injured in a one-car accident on April 16, 1996. Apparently a gust of wind caused Dorrell's car to veer to the right and drop off the road onto the dirt shoulder, which was eleven to twelve inches below the road surface. Due to the drop, Dorrell lost control of her car, the car rolled several times, and she was thrown from her car into a ditch twenty-five to thirty feet away. Dorrell suffered permanent injuries and incurred significant medical bills.

The road had been recently repaved pursuant to a contract between the paving company, APAC, and the South Carolina Department of Transportation (SCDOT). On April 22, 1996, six days after the accident, SCDOT issued an inspection report, accepting APAC's work and returning the highway to SCDOT's control. In its report, SCDOT stated that it had "accepted the highway back for State maintenance as of November 17, 1995."

Dorrell sued APAC and SCDOT[1] on a negligence theory. As to APAC, Dorrell alleged that APAC was negligent for the following: (1) failing to perform the contract according to its specifications; (2) creating a dangerous condition by raising the roadway to a level of eleven to twelve inches above the shoulder; (3) failing to correct the dangerous condition; (4) failing to warn motorists about the dangerous condition; (5) failing to exercise the degree of care that a reasonable and prudent road contractor would have exercised under the circumstances; (6) failing to inspect the road and detect the dangerous condition. As to SCDOT, Dorrell alleged that SCDOT was negligent for the following: (1) failing to warn motorists of the dangerous condition; (2) failing to correct the dangerous condition; and (3) failing to inspect the road upon completion of the resurfacing and detect the dangerous condition which actually and proximately caused Dorrell's injuries.

[1] A third defendant, APAC-Georgia, Inc., was dismissed by stipulation.

Dorrell eventually settled with SCDOT, leaving APAC as the sole defendant. APAC denied liability and subsequently filed a motion for summary judgment. In support of its motion, APAC argued that the contract did not authorize APAC to rebuild, repair, or maintain the shoulder area. Instead, the contract required only that the shoulder area, and particularly areas with surrounding vegetation, be left in a "neat and presentable condition." But because vegetation did not exist in the area where the accident occurred, APAC argued that it complied with the contract's mandate. In addition, APAC described the eleven to twelve inch resulting drop-off as a "patent and obvious defect," which SCDOT should have noticed upon inspecting the completed work. Finally, APAC argued that once SCDOT accepted the resurfacing work, APAC was no longer in control of the roadway and therefore no longer liable for injuries caused by the drop-off.

In response to APAC's motion for summary judgment, Dorrell filed the affidavit of her expert, Peter S. Parsonson, Ph.D, P.E. (Parsonson), who holds a doctorate in engineering and is a licensed professional engineer. In his affidavit, Parsonson directly contravened APAC's interpretation of the contract terms and opined that APAC was responsible for the roadway condition at the time of the accident. Further, Parsonson described the eleven to twelve inch drop as an "intolerable and gross defect," which constituted a "well-known, clear, immediate, and compelling danger to the motoring public." In his opinion, by claiming that it was responsible only for one edge of the pavement to the other, APAC defined the scope of its responsibility under the contract too narrowly. Given the conflicting evidence concerning the scope of APAC's responsibility under the contract, the trial judge denied APAC's motion for summary judgment.

Two months before trial, APAC filed a second summary judgment motion, reiterating the arguments in its initial motion and including two additional pieces of evidence: the deposition testimony of expert Parsonson and SCDOT's responses to APAC's requests for admission. Based on this new evidence, the trial judge—who was not the same judge who heard APAC's initial motion—granted summary judgment to APAC, finding that (1) rebuilding, repairing, or maintaining the highway shoulders was not

within the scope of APAC's responsibility under the contract; (2) APAC's work had been completed and accepted as of November 17, 1995; and therefore (3) SCDOT was solely responsible for the roadway and shoulders at the time of the accident. Additionally, the trial judge found that "APAC did not breach any duty to the plaintiffs which proximately caused the accident."

Dorrell appeals the granting of summary judgment, asking this Court to consider the following issues:

I. Did the contract between SCDOT and APAC limit APAC's liability for negligent injury to third parties?

II. Was the defense of completion and acceptance a valid legal basis for granting summary judgment?

III. Was it an abuse of discretion for the trial judge to hear APAC's renewed motion for summary judgment and use SCDOT's admissions against APAC?

LAW/ANALYSIS

In reviewing a grant of summary judgment, this Court must find summary judgment proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Osborne v. Adams*, 364 S.C. 4, 550 S.E.2d 319 (2001). In reviewing the record, the evidence must be considered in the light most favorable to the non-moving party. *Id.* (citing *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997)).

I. APAC'S LIABILITY TO THIRD PARTIES

Dorrell argues that the APAC-SCDOT contract does not limit APAC's liability for negligent injury to third parties. We agree.

A tortfeasor may be liable for injury to a third party arising out of the tortfeasor's contractual relationship with another, despite the absence of privity between the tortfeasor and the third party. *Barker v. Sauls*, 289 S.C.

121, 122, 345 S.E.2d 244, 244 (1986) (citing *Terlinde v. J.F. Neely*, 275 S.C 395, 399, 271 S.E.2d 768, 770 (1980)). The tortfeasor's liability exists independently of the contract and rests upon the tortfeasor's duty to exercise due care. *Id.* (citing *Edward's of Byrnes Downs v. Charleston Sheet Metal Co.*, 253 S.C. 537, 542, 172 S.E.2d 120, 122 (1970)). This common law duty of due care includes the duty to avoid damage or injury to foreseeable plaintiffs. *See Terlinde*, 275 S.C. at 399, 271 S.E.2d at 770 (stating that the "key inquiry" in determining whether to impose liability is "foreseeability, not privity").

In a negligence action, a plaintiff must show that the (1) defendant owed a duty of care to the plaintiff, (2) defendant breached the duty by a negligent act or omission, (3) defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) plaintiff suffered an injury or damages. *Steinke v. South Carolina Dep't of Labor, Licensing and Reg.*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999) (citations omitted). The Court must determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff. *Id.*

In the present case, we hold that APAC owed a duty of care to the plaintiff, Dorrell, based on (1) the contractual relationship between APAC and SCDOT and (2) a common law duty of care.

APAC's broad duty to the traveling public is established in at least two separate provisions of the contract. First, the section of the contract titled "Required Contract Provisions Federal-Aid Construction Contracts" under the heading "Safety: Accident Prevention" states, in part, the following:

> The contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions as it determines … to be reasonably necessary to protect the life and health of employees on the job and the safety of the public ….

Second, the Red Book,[2] which is part of the contract, includes the following mandate:

> **107.09 Public Convenience and Safety.** The Contractor shall at all times conduct work in such a manner as to provide for and insure the safety and convenience of the traveling public ….

We also note that under the contract, the work was to "be done in accordance with the Specifications and in a good and workmanlike manner." Therefore, based on the plain language of the contract, APAC had a duty to provide for the safety of the traveling public and to perform the work in a "workmanlike manner." This duty arises out of APAC's contractual relationship with SCDOT, and the absence of privity between APAC and motorists such as Dorrell does not eliminate this duty.

In addition to its duties under the contract, APAC owed a common law duty to exercise due care, which existed independently of the contract with SCDOT. *See Kennedy v. Columbia Lumber and Mfg. Co.*, 299 S.C. 335, 346, 384 S.E.2d 730, 737 (1989) (finding a homebuilder owes a legal duty "to refrain from constructing housing that he knows or should know will pose serious risks of physical harm to foreseeable parties"); *Smith v. Fitton and Pittman, Inc.*, 264 S.C. 129, 133, 212 S.E.2d 925, 926 (1975) (finding that an independent contractor had a duty of care to leave the premises in a safe condition, free from any hazards to safety that he may have created); *Rogers v. Scyphers*, 251 S.C. 128, 133, 161 S.E.2d 81, 84 (1968) (finding a building contractor owed a duty of reasonable care that extended to homebuyers and members of the buyer's family); *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 345, 479 S.E.2d 67, 76 (Ct. App. 1996) (stating that it was proper for the trial judge to charge the jury with the elements of common law negligence to determine whether a paving company negligently performed its work, indicating that the paving company owed a duty of care based in common law); *St. Clair v. B.L. Paving Co.*, 411 A.2d 525, 526 (Pa. Super. 1979)

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[2] "Red Book" is the common name for the "South Carolina State Highway Department Standard Specifications for Highway Construction," which is typically incorporated into highway construction contracts. The 1986 edition of the Red Book was part of the contract in this case.

(finding that a paving company, which left a road surface six inches about the shoulder, "owed a duty to third persons over and above compliance with the contract provisions"). This duty of care included, at minimum, a duty to pave the road in a manner that provided for the safety of the traveling public, including Dorrell.

Moreover, at oral argument before this Court, APAC's counsel explained that, in the area where the accident occurred, the road surface was already nine inches above the shoulder. Knowing this, APAC proceeded to lay the asphalt, adding another three inches, and increasing the drop to approximately twelve inches. These facts alone create a jury question as to whether APAC breached its duty of care.

Accordingly, we hold that the APAC-SCDOT contract did not limit APAC's liability for negligent injury to third parties. Like all motorists that traveled the stretch of highway recently repaved by APAC, Dorrell was a foreseeable plaintiff, and APAC's duties to Dorrell stemmed from both the APAC-SCDOT contract and the common law.

II. COMPLETION AND ACCEPTANCE

Dorrell argues that the completion and acceptance defense was not a valid legal basis for granting summary judgment. We agree.

Historically, this Court has found that a contractor is not liable to third parties who have been injured as a result of negligent construction after the work has been completed and accepted by the other party to the contract or the owner. *Clyde v. Sumerel*, 233 S.C. 228, 232-33, 104 S.E.2d 392, 393 (1958); *see also Nichols v. Craven*, 224 S.C. 244, 78 S.E.2d 376 (1953) (holding that a paving company was not liable for failing to place appropriate signs and barricades at construction site once the paving company's work was completed and accepted and the highway department regained sole responsibility for traffic flow). Under this basic rule of tort law, which is commonly referred to as the "completed and accepted rule" or "acceptance rule," a contractor's liability ceases upon a showing that the completed work has been practically, not necessarily formally, accepted. *Id.*

But as early as 1968, the completion and acceptance defense began to fall out of favor in South Carolina. In *Rogers v. Scyphers*, this Court refused to allow a building contractor to use the defense to avoid liability for an injury caused when the plaintiff fell on a negligently constructed stairway. 251 S.C. at 133, 161 S.E.2d at 84. The Court stated:

> the entire weight of modern authority is to the effect that building contractors … are liable for injuries to, or the death of, third persons occurring after the completion of the work and acceptance by the owner, where the work is reasonably certain to endanger third persons if negligently prepared or constructed.

251 S.C. at 132, 161 S.E.2d at 83. Moreover, the Court noted that "we see no rational difference between the duty owed by the manufacturer of a chattel and the duty owed by the builder-vendor of a new structure." *Id.* at 134, 161 S.E.2d at 84. Accordingly, "there was a duty on the defendants as builders to use reasonable care in the construction of the home to avoid unreasonable risk and danger to those who would normally occupy it …." *Id.* Therefore, the Court held that the defendants' motion to dismiss was properly overruled.[3] *Id.* at 137, 161 S.E.2d at 85.

Later, in 1975, this Court affirmed judgment for a person injured from falling into a six-foot-deep hole left by a contractor for the telephone company, who had removed a telephone pole earlier that day. *Smith v. Fitton and Pittman, Inc.*, 264 S.C. 129, 133, 212 S.E.2d 925, 926 (1975). Because the contractor had a duty of care to leave the premises in a safe condition, the Court held that the issue of negligence was properly submitted to the jury. *Id.*

After affirming judgment for the injured plaintiff, the Court addressed the issue of whether the contractor could be relieved of liability based on the theory that the work had been completed and accepted. The Court explained that "[t]o the extent that this doctrine has not been eroded by *Rogers*, it is still

[3] In so holding, the Court "assumed that the defect in the stairway was a latent, concealed one, unknown to plaintiff or her husband prior to plaintiff's injury …." *Id.*

viable." *Id.* at 134, 212 S.E.2d at 926; *see also Henderson v. St. Francis Hosp.*, 295 S.C. 441, 369 S.E.2d 652 (Ct. App. 1988), *reversed on other grounds*, 303 S.C. 177, 399 S.E.2d 767 (1990) (holding that the designer of a parking lot was not liable to a plaintiff who fell on a sweetgum ball in the lot, given that the lot was designed sixteen years before the fall and the defects were neither latent nor concealed). Though viable, the Court found that the doctrine was not available as a defense in this case because the person who "accepted" the work did not have the "actual or apparent authority to do so." *Id.* Apparently the contractors had planned to refill the hole, but an employee from the business occupying the property told the contractors to straddle the hole with the removed pole instead. The Court found the employee's instruction did not constitute acceptance, and the telephone company, as the contracting party, was the appropriate person to accept the completed work. Therefore, the doctrine did not relieve the contractor of liability. *Id.* at 134, 212 S.E.2d at 927.

Although *Smith* suggested that the completion and acceptance doctrine, though eroded, remained viable, South Carolina courts have continued to limit its application. For example, the South Carolina Court of Appeals has explicitly refused to apply the doctrine in products liability cases, finding that the application of the doctrine "would undermine the whole concept of products liability." *Stanley v. Montague Co., Inc.*, 299 S.C. 51, 54, 382 S.E.2d 246, 248 (Ct. App. 1989). In addition to finding that the doctrine did not apply in the products context, the court in *Stanley* addressed the doctrine's overall demise. The court noted that "[p]rinciples governing the liability of contractors for injuries to third parties have followed principles governing the liability of manufacturers for injuries to persons not in privity with the manufacturers." *Id.* at 52, 382 S.E.2d at 247. In fact, the court read *Rogers v. Scyphers* as a case that "specifically repudiated" the doctrine. *Id.* at 55, 382 S.E.2d at 248. Consequently, the *Stanley* court concluded, "the defense of completion and acceptance, like the defense of lack of privity, has fallen into disfavor in South Carolina." *Id.* at 56, 382 S.E.2d at 249.

South Carolina has not been alone in disfavoring the completion and acceptance doctrine.

> As late as the 1950s, the majority of jurisdictions adhered to the "completed and accepted rule." Since then, the "completed and accepted rule" has been severely criticized and repudiated in most states and is now the minority rule while the "modern rule" has become the majority rule.

Emmanuel S. Tipon, *Modern Status of Rules Regarding Tort Liability of Building or Construction Contractor for Injury or Damage to Third Person Occurring After Completion and Acceptance of Work; "Foreseeability" or "Modern" Rule*, 75 A.L.R.5th 413, 437 (2000).[4] The modern rule, or "foreseeability doctrine," may be stated in the following way:

> A building or construction contractor is liable for injury or damage to a third person even after completion of the work and its acceptance by the owner where it was reasonably foreseeable that a third person would be injured by such work on account of the contractor's negligence or failure to disclose a dangerous condition known to such contractor.

Id. at 436. The rule has been applied in multiple contexts, including cases involving the construction of streets and highways. *Id.* at 534-35; *see also Louk v. Isuzu Motors, Inc.*, 479 S.E.2d 911, 921 (W. Va. 1996) (a highway engineer may be held liable for negligence even after the highway plan or design has been accepted and the highway constructed according to the plan); *McFadden v. Ten-T Corp.*, 529 So.2d 192, 200 (Ala. 1988) (paving contractor may be liable for creating a hazardous condition during resurfacing and widening of highway several months after project completed and accepted by highway department); *Johnson v. Oman Constr. Co., Inc.*, 519 S.W.2d 782, 788 (Tenn. 1975) (an independent contractor who left a barricade—which was not striped, painted, or illuminated—on a highway may be held liable for negligence even after project completed and accepted).

The modern view, rejecting the completion and acceptance doctrine, is reflected in the Restatement (Second) of Torts as well:

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[4] We note that this A.L.R. section supersedes the section relied upon by the Court in *Clyde v. Sumerel* and *Nichols v. Craven*.

> One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others.

Restatement (Second) of Torts, § 385 (1965).

South Carolina cases that have considered and rejected the application of the completion and acceptance doctrine have incorporated foreseeability of harm in the analysis. For example, in *Smith v. Fitton*, the Court explained that given the location of the six-foot-deep hole left by the contractor who removed the telephone pole, "it was certainly inferable that this area would be traversed by invitees as well as the owner." 264 S.C. at 133, 212 S.E.2d at 926. Additionally, in *Rogers v. Scyphers*, the Court stated that contractors are liable, even after completion and acceptance of the work, "where the work is reasonably certain to endanger third persons if negligently prepared or constructed." 251 S.C. at 132, 161 S.E.2d at 83; *see also Prosser and Keeton on Torts* § 104A, 723 (5th ed. 1984) (citing *Rogers v. Scyphers* and stating "[i]t is now the almost universal rule that the contractor is liable to all those who may foreseeably be injured by the structure, not only when he fails to disclose dangerous conditions known to him, but also when the work is negligently done.").

We join the majority of jurisdictions in deciding that a contractor's duty of care is not extinguished upon the completion and acceptance of the contractor's work. Liability should be governed by the same principles that govern ordinary negligence actions, and we see no reason why paving contractors should be treated differently from building contractors and product manufacturers.

Therefore, in light of *Rogers* and its progeny, the completion and acceptance defense was an improper legal basis upon which to grant summary judgment. APAC cannot escape liability simply by completing its

work and having it accepted by SCDOT. APAC had a duty of care that extended above and beyond compliance with the contract, and whether APAC breached that duty of care is a question of fact that must be decided by a jury. Moreover, it is for a jury to decide whether Dorrell's injury was foreseeable. Therefore, the trial court's decision granting summary judgment is reversed.

III. ABUSE OF DISCRETION

Dorrell argues that the trial judge abused his discretion by (1) hearing APAC's renewed motion for summary judgment and (2) using SCDOT's admissions against APAC. We disagree.

The trial judge had the discretionary authority to hear APAC's renewed motion for summary judgment. That a different trial judge previously denied the motion did not preclude APAC from renewing its motion once new evidence came to light. *See Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) (citations omitted) (finding that a denial of a motion for summary judgment does not affect the merits of the case and simply indicates that the case should proceed to trial). Further, "if the first motion for summary judgment is unsuccessful the court has the power to permit a second motion for summary judgment prior to trial." *Croswell Enter., Inc. v. Arnold*, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992).

As to SCDOT's admissions, the trial judge had the discretion to consider the impact of these admissions just as he would any other evidence. Moreover, the trial judge had the discretion to allow such evidence to be admitted outside of the scheduling order. Accordingly, the trial judge did not abuse his discretion.

CONCLUSION

Based on the foregoing analysis, we reverse the order granting summary judgment and remand this case for a jury trial in accordance with this opinion.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

E'Van Frazier, Respondent,

v.

Athaniel Badger, Jr., Petitioner.

ON WRIT OF CERTIORARI

Appeal From Orangeburg County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 25876
Heard January 6, 2004 - Filed September 27, 2004

AFFIRMED

Andrea E. White, of Duff, Turner, White and Boykin, LLC, and Andrew F. Lindemann, of Davidson, Morrison and Lindemann, P.A., both of Columbia, for Petitioner.

Lawrence Keitt, of Keitt and Associates, of Orangeburg, for Respondent.

CHIEF JUSTICE TOAL: This review stems from an action by E'Van Frazier ("Frazier") against Athaniel Badger, Jr. ("Badger") for the tort of outrage. The jury awarded Frazier $400,000 in actual damages and $400,000

in punitive damages. The trial judge reduced the award to $200,000 in actual damages and $200,000 in punitive damages. The Court of Appeals affirmed in an unpublished opinion. *Frazier v. Badger*, Op. No. 2002-UP-513 (Ct. App., filed August 20, 2002). We granted certiorari and affirm the Court of Appeals.

FACTUAL/PROCEDURAL BACKGROUND

During the 1995-96 school year, Frazier was employed to supervise the in-school suspension lab at Clark Middle School. At that time, Badger was the assistant principal of Clark Middle School and was Frazier's direct supervisor. Around the beginning of the school year, Badger began visiting Frazier's classroom and making explicit, sexual advances towards her. When Frazier refused Badger's propositions, he told her that eventually he was going to "break her." As the school year progressed, Badger's visits became more frequent, and his advances became physical. Frazier testified that Badger would grab her legs and breasts and that she had to "fight him off" of her on several occasions.

As part of Badger's duties as assistant principal, he received requests for building repairs. Frazier repeatedly asked Badger to send someone to repair the heating and air conditioning in her classroom. Despite Badger's promises, the heating and air conditioning were never repaired.

At the end of the school year, Badger told Frazier that if she came back to work in the fall, he would move her class into a portion of the basement known as the "dungeon."

As a result of Badger's behavior, Frazier suffered emotionally and physically. She became severely depressed. Her weight plummeted below 100 pounds, and she began having anxiety attacks and losing her hair. Her physician referred her to a psychiatrist who proscribed her medication for depression and insomnia. Frazier also testified that her fiancé left her because of her emotional condition.

On August 1, 1996, Frazier wrote Priscilla Robinson ("Robinson"), Principal of Clark Middle School, about Badger's conduct, which led to a

meeting between Robinson, Badger, and Frazier. After the meeting, Robinson wrote Frazier a letter acknowledging that Badger had admitted to and apologized for making inappropriate comments. She also wrote in her letter that it appeared that Badger had submitted work orders for the heating and air conditioning.

Frazier wrote Robinson another letter because she was dissatisfied with the investigation. As a result, District Superintendent, Dr. Walter Tobin assigned three people to investigate the matter further. The investigators found that (1) Badger made inappropriate comments to Frazier; (2) Badger sent Frazier's requests to the maintenance department, requesting that the heating and air conditioning be repaired, but the units were not repaired in a timely manner; and (3) Robinson, not Badger, decided to move Frazier into the "dungeon."

At the beginning of the next school year, Frazier's class was relocated to the basement, and she was told that her old classroom would be used for a computer lab.[1] Robinson also told Frazier that until her downstairs classroom was ready for use, her classroom would be located on the cafeteria stage. This temporary location made Frazier's job increasingly difficult. Though the stage curtains were drawn, Frazier had a hard time keeping the students in class. It was only after Frazier filed a complaint with the Department of Human Affairs that Frazier was given a regular classroom.

At trial, Badger testified that he was Frazier's basketball coach fifteen years ago, and that their relationship was "playful." He admitted to making inappropriate remarks and inviting her to dinner, but he denied making sexually explicit comments or grabbing her. He also testified that he did not recall refusing to process any work orders to repair the heating and air conditioning in Frazier's classroom. Finally, he denied that he ever threatened to relocate Frazier's classroom to the basement.

The jury found that Badger's sexual advances towards Frazier, combined with his retaliatory conduct, met the elements for the tort of

[1] The school never transformed Frazier's original classroom into a computer lab.

outrage. The Court of Appeals affirmed the trial court's ruling in an unpublished opinion. *Frazier v. Badger*, Op. No. 2002-UP-513 (Ct. App., filed August 20, 2002). Badger now presents the following issues for review on certiorari:

> **I. Did the Court of Appeals err in affirming the trial court's refusal to charge the jury on the law of tort immunity for government employees?**
>
> **II. Did the Court of Appeals err in affirming the trial court's denial of the motion for mistrial?**
>
> **III. Did the Court of Appeals err in affirming the trial court's ruling that Frazier was not barred from bringing an outrage action in lieu of an action for sexual harassment?**
>
> **IV. Did the Court of Appeals err in affirming the trial court's refusal to submit special interrogatories to the jury?**
>
> **V. Did the Court of Appeals err in affirming the punitive damages award?**

LAW/ANALYSIS

I. GOVERNMENTAL IMMUNITY

Badger argues that he is immune from tort actions stemming from conduct within the scope of his official duties pursuant to South Carolina Code Ann. section 15-78-70 (Supp. 2003),[2] and therefore the trial court

[2] Section 15-78-70 is a provision within the South Carolina Tort Claims Act titled, "Liability for act of government employee; requirement that agency or political subdivision be named party defendant; effect of judgment or settlement."

abused its discretion when it refused to charge the jury on the law concerning immunity. We disagree.

South Carolina Code Ann. section 15-78-70 specifically provides that government employees may be liable in tort actions:

> (a) This chapter constitutes the exclusive remedy for any tort committed by an employee of a governmental entity. An employee of a governmental entity who commits a tort while acting within the *scope of his official duty* is not liable therefor except as expressly provided for in subsection (b).
>
> (b) Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the *scope of his official duties* or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.
> …

(Emphasis added).

Immunity under the statute is an affirmative defense that must be proved by the defendant at trial. *Tanner v. Florence City-County Bldg. Comm'n*, 333 S.C. 549, 552, 511 S.E.2d 369, 371 (Ct. App. 1999).

The trial judge is required to charge only the current and correct law of South Carolina. *Cohens v. Atkins*, 333 S.C. 345, 509 S.E.2d 286 (Ct. App. 1998). The law to be charged to the jury is determined by the evidence at trial. *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). In reviewing jury charges for error, appellate courts must consider the charge as a whole in light of the evidence and issues presented at trial. *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 574 (1999).

This Court has held that the term "scope of employment" as used in an insurance policy is broader than the term "scope of official duties" as used in

the Tort Claims Act. *South Carolina State Budget and Control Bd. v. Prince*, 304 S.C. 241, 245, 403 S.E.2d 643, 646 (1991). If "scope of employment" is a broader term than "scope of official duties" – the term used in the governmental immunity statute – it follows that acts not within the "scope of employment" are not within the "scope of official duties."

We recognize that whether an act is within the "scope of employment" may be determined by implication from the circumstances of a particular case. *Hamilton v. Miller*, 301 S.C. 45, 48, 389 S.E.2d 652, 653 (1990); *Wade v. Berkeley County*, 330 S.C. 311, 319, 498 S.E.2d 684, 688 (Ct. App. 1998). In *Prince*, we held that the course of someone's employment requires some "act in furtherance of the employer's business." 304 S.C. at 246, 403 S.E.2d at 647.

Our jurisprudence includes three cases that consider whether sexual advances were within the "scope of an employee's employment." Because the cases did not relate to governmental immunity, the court of appeals declined to apply them. Nonetheless, we find that "scope of employment" is a term of art, and therefore we look to the cases involving insurance policies for guidance.

In the first case, this Court held that a police officer's sexual assaults of women during traffic stops were not within the scope of his official duties, and therefore the acts were not covered under the state's general tort liability policy. *Doe v. South Carolina State Budget and Control Bd.*, 337 S.C. 294, 523 S.E.2d 457 (1999). In the second case, the court of appeals held that a professor was not acting within the scope of his employment when he sexually harassed a student. Therefore, the professor's conduct was not covered under the university's liability insurance policy. *Padgett v. South Carolina Ins. Reserve Fund*, 340 S.C. 250, 253, 531 S.E.2d 305, 307 (Ct. App. 2000). In the third case, the court of appeals held that a sheriff's sexual advances toward three of his female officers was not within the scope of the sheriff's official duties. *Loadholt v. S.C. State Budget and Control Bd*., 339 S.C. 165, 528 S.E.2d 670 (Ct. App. 2000).

According to these cases, sexual harassment by a government employee is not within the employee's "scope of employment." Therefore, in

the present case, we hold that Badger's sexual advances toward Frazier were outside the scope of his official duties or employment.

The more difficult question is whether Badger's *retaliatory conduct* was within the scope of his official duties or employment. Under the particular circumstances of this case, we find no evidence that any of Badger's retaliatory conduct was done in furtherance of his employer's business. This is not to say that a jury charge on the law of governmental immunity is inappropriate in every case where allegations are made against a governmental official for retaliatory conduct. What a plaintiff may call "retaliatory conduct" may be justified by some independent employer interest, warranting a charge on governmental immunity. We find Badger's moving Frazier's class to the school's stage and basement furthered none of the school's legitimate interests because Frazier's old classroom was left unused. In addition, none of the school's legitimate interests were furthered by Badger's failure to repair Frazier's air and heating unit or Badger's repeated threats to fire Frazier.

We find that Badger's retaliatory conduct was a continuation of his improper sexual advances toward Frazier and was a product of personal, not occupational, motives. The principle of governmental immunity is not intended to protect a defendant such as Badger who has used his authority for nothing more than to personally retaliate against an employee. In addition, section 15-78-70(b) denies governmental immunity for defendants whose actions involve actual malice and an intent to harm. We find that Badger's retaliatory conduct involved actual malice and an intention to harm Frazier.

Accordingly, we hold that the trial judge did not err in rejecting Badger's request to charge the jury on the defense of governmental immunity because the evidence did not support such a charge.

II. MOTION FOR MISTRIAL

At pretrial, the trial judge granted a motion in limine excluding evidence of Badger's alleged attempted rape of Frazier approximately fifteen years ago. At trial, Badger testified that he and Frazier had a "playful" relationship when he coached her in basketball. When Frazier took the stand,

she testified that Badger began making sexual advances toward her when he was her high school basketball coach. Badger argues that this evidence was inadmissible, and thus the trial judge should have granted his motion for mistrial. We disagree.

A litigant cannot complain of prejudice by reason of an issue he has placed before the court. *See State v. Brown*, 344 S.C. 70, 543 S.E.2d. 552 (2001) (petitioner cannot complain of prejudice from evidence he has brought before the jury); *State v. Robinson*, 305 S.C. 469, 409 S.E.2d. 404 (1991) (a party will be unsuccessful in opposing the admission of evidence if that party was the one who opened the door).

Whether a motion for mistrial should be granted is within the trial judge's sound discretion, and the trial judge's ruling will not be disturbed unless an abuse of discretion is shown. *Tucker v. Reynolds*, 268 S.C. 330, 334, 233 S.E.2d. 402, 404 (1977).

Badger, not Frazier, first testified that he and Frazier had a "playful" relationship when he was her basketball coach. Once Badger introduced the nature of the relationship, he opened the door, allowing Frazier to testify as to her perspective of the past relationship. According to *Brown*, Frazier's testimony was admissible and non-prejudicial since Badger himself introduced the matter. Therefore, we find that Badger's motion for mistrial was properly denied.

III. OUTRAGE IN LIEU OF SEXUAL HARASSMENT

Badger argues that Frazier should have brought a claim against Badger for sexual harassment, not the tort of outrage, citing *Todd v. South Carolina Farm Bureau Mut. Ins. Co*., 283 S.C. 155, 175, 321 S.E.2d 602, 613 (Ct. App. 1984), *quashed on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985), in which this Court held: "[t]he tort of outrage was designed not as a replacement for the existing tort actions. Rather, it was conceived as a remedy for tortious conduct where no remedy previously existed."

We recognize that Frazier had a statutory right to file a civil rights complaint against Badger for sexual harassment. However, because this is a

right created by statute and not the common law of torts, we find no reason to restrict Frazier's right to sue Badger based upon the common law tort of outrage.

IV. SPECIAL INTERROGATORIES

Badger argues that the Court of Appeals erred in affirming the trial judge's denial of his request to submit special interrogatories to the jury. We disagree.

The trial judge has the discretion to determine whether to submit special interrogatories. Rule 49(b) SCRCP; *Constant v. Spartanburg Steel Products, Inc.,* 316 S.C. 86, 90, 447 S.E.2d 194, 196 (1994). To warrant a reversal, a party must show that he was prejudiced by the trial court's refusal to submit special interrogatories. *Steele v. Dillard*, 327 S.C. 340, 343, 486 S.E.2d 278, 279-80 (Ct. App. 1997). In *Anderson v. West*, this Court held "that where a jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed." 270 S.C. 184, 188, 241 S.E.2d 551, 553 (1978).

Here, Badger requested that the trial judge require the jury to make specific findings of fact as to Frazier's allegations of Badger's sexual misconduct and retaliation. Instead, the trial judge gave a general jury charge on the tort of outrage.

We agree with the Court of Appeals' analysis on this issue:

> [t]here was no need to submit special interrogatories to the jury for specific findings of fact, as the two parts of her claim cannot be compartmentalized. As Frazier's only claim before the jury was that of outrage, the jury would have simply found for Badger if the jurors believed the elements of outrage had been met.

Frazier v. Badger, Op. No. 2002-UP-513, page 6 (Ct. App., filed August 20, 2002).

Badger was unable to show that he suffered prejudice from the trial judge's general jury charge on outrage. Further, we find no reason to believe that the jury misunderstood the trial judge's charge on outrage and recognize the existence of evidence warranting Frazier's recovery on this claim. Therefore, we hold that the trial judge did not abuse his discretion in denying Badger's request to submit special interrogatories to the jury.

V. EXCESSIVE PUNITIVE DAMAGES

Badger argues that the Court of Appeals erred in upholding the jury's punitive damage award because Frazier failed to introduce evidence of Badger's ability to pay, which he argues is the most important factor in a constitutional review of an award of punitive damages. We disagree.

First, a defendant's inability to pay does not prohibit a jury from awarding punitive damages. In *Gamble v. Stevenson*, this Court established eight factors for a trial court to apply in a post-verdict review of punitive damages. 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991). The ability of the defendant to pay the punitive damages awarded is only one of eight factors. As part of its holding in *Gamble*, this Court opined, "the trial court shall conduct a **post-trial** review and **may** consider the following…" *Id.* (emphasis added). The word "may" signifies that the *Gamble* factors are to provide guidance, not "hard and fast" requirements. Further, "post-trial" signifies that the *Gamble* factors are to be applied after a verdict, by the judge, not the jury.

Second, this Court has consistently held that an award of punitive damages will not be overturned because a defendant is unable to pay. While a defendant's wealth is a relevant factor in assessing punitive damages, it is not necessarily controlling. *Hicks v. Herring*, 246 S.C. 429, 144 S.E.2d 151 (1965). There is "no requirement that the defendant be a man of means before the jury is justified in awarding punitive damages." *Norton v. Ewaskio*, 241 S.C. 557, 565, 129 S.E.2d 517, 521 (1963). A jury may consider a defendant's financial worth in determining the amount of punitive damages to award, but a jury is not required to make this consideration before it may award punitive damages. *Rogers v. Florence Printing Co.*, 233 S.C. 567, 106 S.E.2d 258 (1958).

Third, the United States Supreme Court recently refused to include the defendant's ability to pay in its due process analysis of punitive damages. *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). Instead, the *Campbell* Court held that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id* at __, 123 S. Ct. at 1521 (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 1598 (1996)).

According to the *Campbell* analysis, the award in this case is constitutional: the award fairly reflects Petitioner's reprehensibility; represents a 1 to 1 ratio to actual damages; and is comparable to punitive damages awards in other cases involving the tort of outrage. *See Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003)(In determining the constitutionality of a punitive damages award, the reviewing court must look to three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.)

Therefore, the punitive damages award in this case does not offend Badger's due process.

CONCLUSION

We **affirm** the ruling of the Court of Appeals, upholding the jury's award of $200,000 actual damages and $200,000 punitive damages for Frazier.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

The Supreme Court of South Carolina

In the Matter of Laurie A. Baker, Respondent.

ORDER

Respondent was suspended on June 14, 2004, for a period of three (3) months. She has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

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

JEAN H. TOAL, CHIEF JUSTICE

BY s/Daniel E. Shearouse
Clerk

Columbia, South Carolina

September 28, 2004

The Supreme Court of South Carolina

In the Matter of Francis A. Humphries, Jr., Petitioner.

ORDER

On June 2, 2003, petitioner was suspended from the practice of law for one year. In the Matter of Humphries, 354 S.C. 567, 582 S.E.2d 728 (2003). Petitioner has now filed a petition for reinstatement. The Committee on Character and Fitness recommends the petition be granted. We grant the petition and reinstate petitioner to the practice of law in South Carolina.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.
Pleicones, J., not participating

Columbia, South Carolina
September 22, 2004

The Supreme Court of South Carolina

RE: Amendments to the South Carolina Appellate Court Rules.

O R D E R

Since the Court has adopted new Lawyer's and Judge's Oaths, it has become necessary to amend the Rules of Lawyer Disciplinary Enforcement, Rule 413, SCACR, the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR, and to add a new Rule 502.1 containing the new Judge's Oath. The attached amendments are effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

September 22, 2004

(1) Rule 7(a)(6), Rule 413, RLDE, SCACR, is amended to read:

violate the Lawyer's Oath of office taken to practice law in this state and contained in Rule 402(k), SCACR;

(2) New Rule 7(a)(9), RJDE, Rule 502, SCACR, is added to read:

violate the Judge's Oath of Office contained in Rule 502.1, SCACR.

(3) the "or" after Rule 7(a)(7) is moved to the end of Rule 7(a)(8), RJDE, Rule 502, SCACR and the period after (8) is replaced by a semi-colon.

(4) New Rule 502.1, SCACR, Judge's Oath, is added to read:

All members of the Unified Judicial System in this state shall take the following oath of office:

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 pledge to uphold the integrity and independence of the judiciary;

I pledge, in the discharge of my duties, to treat all persons who enter the courtroom with civility, fairness, and respect;

I pledge to listen courteously, sit impartially, act promptly, and rule after careful and considerate deliberation;

I pledge to seek justice, and justice alone;

[So help me God.]

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Timothy R. Sponar, Respondent,

v.

South Carolina Department of Public Safety, Appellant.

Appeal From Charleston County
John M. Milling, Circuit Court Judge

Opinion No. 3847
Submitted May 12, 2004 – Filed July 19, 2004
Withdrawn, Substituted, and Refiled September 23, 2004

REVERSED

C. Cliff Rollins, of Blythewood; and Frank L. Valenta, Jr., of Columbia, for Appellant.

Stephan Victor Futeral, of Mt. Pleasant, for Respondent.

HUFF, J.: Following his arrest for driving under the influence, Timothy R. Sponar refused to take a Datamaster test. Pursuant to this refusal, the Department of Public Safety (DPS) revoked Sponar's

driver's license. Sponar requested an implied consent hearing, after which a DPS Administrative Hearing Officer upheld the suspension. Sponar then appealed this decision to the circuit court, which reversed the suspension. DPS now appeals arguing the circuit court erred by (1) improperly applying the standard of review to reverse the hearing officer's decision and (2) considering Sponar's state of mind at the time he refused to take the Datamaster test. We reverse and reinstate the suspension.

FACTUAL/PROCEDURAL BACKGROUND

On August 7, 2000, Officer C. Googe of the Mount Pleasant Police Department observed a vehicle traveling at 78 miles per hour in a 55 mile per hour zone and initiated a traffic stop. During the stop, Officer Googe noticed the driver, Sponar, smelled of alcohol and had glassy, bloodshot eyes and slurred speech.

Accordingly, the officer asked Sponar to exit the vehicle and complete a number of field sobriety tests. As Sponar could not properly perform any of the tests, the officer placed him under arrest, advised him of his Miranda[1] rights, and transported him to the Mount Pleasant Police Department where he then turned Sponar over to Officer Whitcomb for administration of a Datamaster test.[2]

Upon arrival at the police station, Officer Googe turned Sponar over to Officer Whitcomb so that he could administer the Datamaster test to determine if Sponar's blood alcohol level was within the legal limit. Officer Whitcomb explained to Sponar his Miranda rights and then advised him of his implied consent rights, reading them verbatim

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[1]Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

[2]Officer Googe testified Respondent told him he had "a couple of drinks" at a place called Hanahan's. In addition, after the officer found a six-pack with only one beverage remaining, Sponar admitted to consuming the other five.

from the advisement form provided by SLED and providing him with a copy.

During a mandatory twenty-minute waiting period prior to administering the test, Sponar initiated conversation with the officer. Sponar repeatedly asked whether he should take the test or whether he should refuse, and asked the consequences of taking or refusing the test. Officer Whitcomb responded it was not his decision to make and that Respondent would have to decide on his own. Sponar asked whether he would still go to jail if he took the test, and the officer replied that it did not matter if he took the test or not, because he would be going to jail either way. Thereafter, Respondent refused to take the test.

Pursuant to this refusal, Officer Whitcomb completed a Notice of Suspension, and Sponar's driving privileges were suspended. Sponar requested an implied consent hearing and appealed the suspension of his driving privileges to DPS's Office of Administrative Hearings. Sponar argued at the hearing that Officer Whitcomb's statement – he would go to jail whether he took the test or not – had the effect of distorting his implied consent rights. He contended, because his implied consent rights were not properly given, the suspension should be reversed. On March 12, 2001, the administrative hearing officer issued an order sustaining the suspension. She noted the officer had read Sponar his rights verbatim, Sponar indicated he understood his rights, and it was only after that, while waiting during the observation period, that Sponar began questioning the officer about what would happen to him and Officer Whitcomb responded he would be taken to jail as part of their procedure whether he submitted to the test or not.

Respondent then appealed the hearing officer's ruling to the circuit court, which issued an order reversing the decision of the hearing officer. The circuit court judge noted, pursuant to S.C. Code Ann. § 1-23-380(a)(6), the court may reverse the decision of the administrative agency "if substantial rights of the Petitioner have been prejudiced for various reasons, including violations of constitutional or statutory provisions, errors of law, or arbitrariness or capriciousness."

He determined, because § 56-5-2950(b)(1) of the South Carolina Code provides in pertinent part that if the alcohol level at the time of testing is "five one-hundredths of one percent or less, it is conclusively presumed that the person was not under the influence of alcohol," there was no legal basis to support the officer's statement to Sponar that he "was to be jailed 'by law' regardless of his decision to submit to the breath test." S.C. Code Ann. § 56-5-2950(b)(1) (Supp. 2003). He reasoned that if Sponar fell within this provision, the officer would have lacked probable cause to detain him for driving under the influence. Accordingly, the circuit court judge found the officer's instructions were erroneous and unlawfully suggested Sponar's decision to submit to the breath test "would largely be in vain." DPS argues this ruling was in error. We agree.

STANDARD OF REVIEW

Appeals from administrative agencies are governed by the Administrative Procedures Act (APA). Byerly Hosp. v. South Carolina State Health & Human Servs. Fin. Comm'n, 319 S.C. 225, 229, 460 S.E.2d 383, 385 (1995). The standard the circuit court uses to review such decisions is provided by section 1-23-380(6):

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2003). In reviewing a final decision of an administrative agency, the circuit court essentially sits as an appellate court to review alleged errors committed by the agency. Kiawah Resort Assocs. v. South Carolina Tax Comm'n, 318 S.C. 502, 505, 458 S.E.2d 542, 544 (1995). An abuse of discretion occurs when a decision is controlled by an error of law or is without evidentiary support. Mictronics v. South Carolina Dep't of Revenue, 345 S.C. 506, 510, 548 S.E.2d 223, 225 (Ct. App. 2001).

LAW/ANALYSIS

DPS argues the circuit court improperly applied the standard of review under the APA in reversing the decision of the administrative hearing officer. We agree.

> The license to operate a motor vehicle upon the public highways of this state is not a property right, but is a mere privilege subject to reasonable regulations under the police power in the interest of the public safety and welfare. Such privilege is always subject to revocation or suspension for any cause relating to public safety. However, the privilege cannot be revoked arbitrarily or capriciously.

Summersell v. South Carolina Dep't of Pub. Safety, 334 S.C. 357, 366, 513 S.E.2d 619, 624 (Ct. App. 1999) (citations omitted), *vacated in part on other grounds*, 337 S.C. 19, 522 S.E.2d 144 (1999).

At the hearing before the circuit court, Sponar's attorney argued that Sponar was improperly given his implied consent rights such that he was coerced into not taking the breath test. He asserted, had Sponar taken the test and obtained a reading below .05%, the police would

have had no basis to continue his incarceration. Thus, he contended, because Sponar was told he was going to jail regardless of whether he submitted to the test, Sponar was coerced into not taking the test. The attorney for DPS countered that Sponar was not coerced in any way. He contended that some officers take the position that once an individual is arrested for DUI, that person is already under arrest and cannot be "un-arrest[ed]." Thus, this officer merely told Sponar the "truth" about the policy they followed.

In reversing the suspension, the circuit court determined there was no legal basis to support the officer's statement to Sponar that he "was to be jailed 'by law' regardless of his decision to submit to the breath test." It relied on our Supreme Court's opinion in Town of Mount Pleasant v. Shaw, 315 S.C. 111, 432 S.E.2d 450 (1993) in finding the implied consent instructions given to Sponar were erroneous. In that case, Shaw was arrested and charged with DUI. Prior to administration of a breath test, Shaw was informed that if he did not take the test, his privilege to drive in South Carolina would be suspended for a ninety-day period. Shaw took the test, registering a .25% blood alcohol reading. Shaw appealed his subsequent magistrate court conviction and the circuit court reversed holding the implied consent advisory did not adequately inform him of his option to refuse the test. The Supreme Court reversed the circuit court and reinstated Shaw's conviction. In doing so, the court noted a common sense reading of the advisory given to Shaw made clear the consequences of both taking the test and refusing to take the test. Id. at 113, 432 S.E.2d at 451. The court went on to adopt the following rule:

> [I]f the arrested person is reasonably informed of his rights, duties and obligations under our implied consent law and he is neither tricked nor misled into thinking he has no right to refuse the test to determine the alcohol content in his blood, urine or breath, the test will generally be held admissible.

Id. at 113, 432 S.E.2d at 451 (emphasis in original) (citation omitted).

Shortly after the Shaw decision, our Supreme Court addressed the sufficiency of an implied consent advisory following the suspension of the driver's license of an individual who refused a breathalyzer test after his arrest for DUI. In Percy v. South Carolina Dep't of Highways and Pub. Transp., 315 S.C. 383, 434 S.E.2d 264 (1993), Percy, who was licensed to drive in Ohio, was advised Ohio authorities would be advised of any South Carolina suspension for refusal to submit to a breath test. The arresting officer further advised Percy he was unaware of the consequences in Ohio of a refusal to take the test in South Carolina. Percy refused the breathalyzer, resulting in a ninety-day suspension in South Carolina and a one-year suspension in Ohio. Percy had his South Carolina suspension reversed by the circuit court, based on his assertion that the implied consent warning was insufficient in that it did not contain information that Ohio would honor the South Carolina suspension. Our Supreme Court reversed and reinstated Percy's suspension, stating "[t]he statute requires only that an accused be advised that his privilege to drive will be suspended for 90 days if he refuses the breathalyzer." Id. at 385, 434 S.E.2d at 265. Noting the court's recent recognition in Shaw that an implied consent advisory is sufficient if the defendant is reasonably informed of his rights and is neither tricked nor misled into thinking he has no right to refuse the test, the court determined it would be unreasonable to require law enforcement to advise out-of-state motorists of the consequences that refusal to take the test will have in their respective states. Accordingly, the court found Percy was adequately advised pursuant to the implied consent statute. Id. at 385, 434 S.E.2d at 265-66.

We find the officer's statement to Sponar that he would be going to jail regardless of his decision on whether to submit to the breath test did not inadequately advise Sponar pursuant to the implied consent statute. First, § 56-5-2950(b)(1) provides that one is conclusively presumed to not be under the influence of alcohol if his or her breath test registers .05% or lower. Such a result does not rule out the possibility that the individual is under the influence of some other intoxicant, or a combination of alcohol and another intoxicant. Indeed, an individual may fail field sobriety tests and/or exhibit other signs of

being under the influence of an intoxicant regardless of whether the individual does not have enough alcohol in his or her system to register as being under the influence of alcohol.

Second, the attorney for DPS represented to the court that different officers and law enforcement agencies take different approaches, but that once an individual is arrested for DUI, some officers and agencies continue to detain the person, regardless of whether they blow below .05 on a breath test. Further, the record shows that at the administrative hearing, Officer Whitcomb testified, "Even if [Sponar] blew below a zero point five, he was still under arrest and would be taken (sic) the county jail." Thus, it appears that as a matter of policy, officers often do not release an individual, regardless of whether the breath test results show an individual is conclusively presumed to not be under the influence of alcohol. Even if we assumed for the sake of argument that it is improper for authorities to continue to detain an individual after they have registered below a .05% on a breath test, this is irrelevant to an individual's decision on whether to submit to a breath test.[3] Officer Whitcomb's statement to Sponar in this regard was simply a truthful explanation of what would happen to him next, and it is irrelevant as to whether continued detention in such a situation would be lawful.

Finally, the statements made by Officer Whitcomb to Sponar did not "trick or mislead" Sponar into refusing the breath test. Such a statement indicated that his decision, either way, would be of no consequence to his subsequent immediate incarceration. Officer Whitcomb explicitly indicated to Sponar that his decision on whether to take the breath test would have no impact on whether he would be jailed. Indeed, the only statement made by the officer to Sponar that could reasonably be said to have affected Sponar's decision on whether or not to take the breath test was that his license would be suspended

[3]As noted by Sponar's attorney in argument before the circuit court, if the authorities continued to incarcerate an individual for DUI under such circumstances, that individual's recourse may be a civil action for false imprisonment or false arrest.

for a ninety-day period if he refused the test. The authorities are required by law to inform an individual of this consequence before they may administer such a test.[4] A common sense reading of the advisory given to Sponar made clear the consequences of both taking the test and refusing to take the test. He was reasonably informed of his rights, duties and obligations, and was not tricked or misled into thinking he had no right to refuse the test. Shaw, 315 S.C. at 113, 432 S.E.2d at 451. Neither was he tricked or misled into refusing the test.

Because we reverse the trial court's decision on this ground, DPS's remaining argument need not be addressed. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not address remaining issues when disposition of prior issue is dispositive).

Accordingly, the circuit court's decision is reversed and the suspension is reinstated.

REVERSED.

ANDERSON and KITTREDGE, JJ., concur.

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[4]See S.C. Code Ann. § 56-5-2950(a)(1) (Supp. 2003) ("No tests may be administered or samples obtained unless the person has been informed in writing that: (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least ninety days if he refuses to submit to the tests and that his refusal may be used against him in court.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

N. David DuRant, Appellant,

v.

South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, Brookgreen Gardens, and South Carolina Department of Parks, Recreation, and Tourism, Respondents.

Appeal From Georgetown County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 3865
Heard April 7, 2004 – Filed September 20, 2004

AFFIRMED

Connie C. Harness, III, of Mt. Pleasant, for Appellant.

Betty J. Willoughby and M. Craig Garner, Jr., both of Columbia and Leslie West Stidham, of Charleston, for Respondents.

CURETON, A.J.: N. David DuRant filed an administrative appeal of a decision by the South Carolina Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management which denied him a permit to construct a private dock. After Brookgreen Gardens and the South Carolina Department of Parks, Recreation, and Tourism intervened in the appeal, the administrative law judge affirmed the denial of the permit. On appeal to the circuit court, the findings of the administrative law judge were affirmed. DuRant appeals. We affirm.

FACTS

DuRant and another individual are co-owners of two lots located across from Huntington Beach State Park and bounded by Oaks Creek and a marsh. The deed to this property does not reference the high water mark of the marsh. DuRant applied to the Office of Ocean and Coastal Resource Management (Resource Management) for a permit to construct a private walkway from one of the lots to a fixed pier head and a floating dock.[1] There are no private docks or piers located along Oaks Creek.

The South Carolina Department of Parks, Recreation, and Tourism (Department) – through Huntington Beach State Park – conducts kayak excursions along Oaks Creek and the marsh. The Department also has a bird-watching program that conducts tours in this marsh area, as it is a habitat for many birds.

The Department has leased the land upon which Huntington Beach State Park is located from Brookgreen Gardens (Brookgreen) since 1960. Because Oaks Creek is a boundary of this leased property, it abuts DuRant's

[1] The lots' co-owner was not listed on this application.

lots. Brookgreen has record title to the marsh around Oaks Creek from a deed recorded in 1938. The deed specifically conveyed to Brookgreen "all right, title and interest of the grantors of, in and to the beds of . . . Main or Oaks Creek . . . and the marshes, mud flats and bodies of water not herein specifically named." By 1942, the South Carolina General Assembly had designated Brookgreen's lands – including all waters entering those lands – as a wildlife sanctuary. See S.C. Code Ann. § 50-11-950 (Supp. 2003) ("The lands owned by Brookgreen Gardens . . . and all streams, creeks, and waters, fresh, salt or mixed, entering into the lands are established as a sanctuary for the protection of game, other birds, and animals. . . .").

Regardless of the legislature's designation of Brookgreen's lands as a wildlife sanctuary, the marsh area at issue is located in a 990-acre plot that is part of the State Heritage Trust Program. This designation was accomplished by a registration agreement executed in 1985 by the Department, Brookgreen, and the South Carolina Wildlife and Marine Resources Department.[2] The agreement provides that this property, like all Heritage Trust sites, is to be maintained "in its essential natural state."

Based on all of this information, Resource Management denied DuRant's dock and permit application, finding the marsh area at issue was a Geographical Area of Particular Concern (GAPC) under the Coastal Zone Management Act, and thus entitled to heightened protection.[3] This decision to find the property was a GAPC was supported by two findings: (1) the marsh area is a portion of the property managed by the Department as a State Park, and (2) the marsh area is part of the property included in the Heritage

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[2] This department was eventually succeeded by the South Carolina Department of Natural Resources.

[3] GAPCs are areas within the state's coastal zone "which have been identified in the State's Coastal Management Program as being of such importance as to merit special consideration during Department review of permit applications." 23A S.C. Code Ann. Regs. 30-1 (D)(22) (Supp. 2003). GAPCs include areas: (1) of "unique natural resource value;" (2) where "activities, development, or facilities depend on proximity to coastal waters, in terms of use or access;" and (3) of "special historical, archeological or cultural significance." Id.

Trust Program.

DuRant appealed Resource Management's denial to the Administrative Law Judge Division. The Department and Brookgreen were subsequently permitted to intervene.[4] The administrative law judge (ALJ) affirmed Resource Management's denial of the permit application. DuRant then appealed this decision to the Coastal Zone Management Appellate Panel (Appellate Panel). After a hearing based upon the record presented to the ALJ, the Appellate Panel adopted and affirmed the ALJ's order. DuRant appealed the Appellate Panel's decision to the circuit court. After a hearing based upon the record presented to the court, the circuit court judge affirmed the Appellate Panel's order. This appeal followed.

STANDARD OF REVIEW

In an appeal of the final decision of an administrative agency pursuant to the Administrative Procedures Act, the standard for appellate review to the Appellate Panel is whether the ALJ's findings are supported by substantial evidence under section 1-23-610(D). S.C. Code Ann. § 1-23-610(D) (Supp. 2003); Dorman v. S.C. Dep't of Health & Envtl. Control, 350 S.C. 159, 165, 565 S.E.2d 119, 122 (Ct. App. 2002). In determining whether the ALJ's decision was supported by substantial evidence, this court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the administrative agency reached. Grant v. S.C. Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995). The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. Id. (citation omitted).

[4] Resource Management, the Department, and Brookgreen shall be referred to collectively as Respondents.

LAW/ANALYSIS

I.

DuRant argues the circuit court erred in finding Respondents – specifically Resource Management – followed proper legal procedure in denying the dock permit application and declaring the marsh area at issue a GAPC. DuRant argues Resource Management could not declare the marsh a GAPC unless Brookgreen established title to the marsh and challenged the dock permit application. We do not agree.

Initially, we address DuRant's apparent contention that Resource Management should have been able to somehow discount or void both the Heritage Trust registration agreement and the lease of the Huntington Beach State Park property from Brookgreen to the Department. Clearly, Resource Management, as an office within the state agency of the Department of Health and Environmental Control (DHEC), must act only within the authority granted to it by the legislature. See, e.g., City of Rock Hill v. S.C. Dep't of Health & Envtl. Control, 302 S.C. 161, 165, 394 S.E.2d 327, 330 (1990) ("As creatures of statute, regulatory bodies such as DHEC possess only those powers which are specifically delineated.") (citation omitted). Resource Management's authority is set out in the Coastal Zone Management Act (the Act). S.C. Code Ann. §§ 48-39-10 to -360 (Supp. 2003). The Act does not mention, however, any power vested in Resource Management to void, discount, or overlook a contract. This is especially relevant in the instant case as Resource Management was not a party to either the registration agreement or the lease.

Regardless, we find Resource Management followed proper procedure in denying DuRant's dock permit application. The Act specifically defines "critical areas" to include marshes contiguous or adjacent to coastal waters. S.C. Code Ann. §§ 48-39-10(G), (J)(2) (Supp. 2003). The Act further states that one cannot "utilize a critical area for a use other than the use the critical area was devoted to" without getting approval from Resource Management. S.C. Code Ann. § 48-39-130(A) (Supp. 2003). The Act then sets forth several considerations to be taken into account by Resource Management in

determining whether to grant such approval. S.C. Code Ann. § 48-39-150 (Supp. 2003). Two such considerations are the extent to which development could affect existing public access and the extent to which the proposed use could affect the adjacent owners. S.C. Code Ann. §§ 48-39-150(A)(5), (10). (Supp. 2003).

In reviewing DuRant's permit application, Resource Management necessarily had to determine whether the area is a GAPC. In fact, with regard to issues involving "critical areas" such as marshes, Resource Management must be guided by "[t]he extent and significance of negative impacts" on GAPCs. 23A S.C. Code Ann. Regs. 30-11(C)(3) (Supp. 2003). Moreover, Resource Management's Coastal Management Program (CMP) document[5] lists eight specific types of properties that are GAPCs – two of these properties are Heritage Trust sites and State Parks.

We find Resource Management properly reviewed all of these statutory considerations in determining the marsh area in question was a "critical area" and a GAPC. First, it is clear the marsh abutting DuRant's property was a "critical area" under section 48-39-10. As such, any alteration to this area – such as the construction of a dock – required Resource Management approval

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[5] The Act specifically states Resource Management must formulate a Coastal Management Program. However, the CMP is neither codified nor a part of a DHEC regulation.

> The CMP was published as a special edition of the State Register, 2 State Register (No. 26, Oct. 1978), and is reflected in the 'CMP document.' 'Refinements' to the CMP document appear in the State Register. See 17 State Register, Issue 5, Part I, pp. 155-56 (May 1993); 17 State Register, Issue 6, pp. 55-56 (June 1993). These refinements were approved by the General Assembly and Governor.

Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 517, 560 S.E.2d 410, 415 (2002).

under section 48-39-150. Accordingly, Resource Management examined the considerations set forth in that section. The Department regularly used the Oaks Creek area – including the marshes – for kayak excursions and bird-watching trips from Huntington Beach State Park. It is clear the construction of a dock would affect both public access to the marsh and the adjacent landowners.

Second, we find it is equally clear the subject marsh qualifies as a GAPC. Regulation 30-1(D)(22) defines GAPCs as consisting of "areas where activities, development, or facilities depend on proximity to coastal waters, in terms of use or access." 23A S.C. Code Ann. Regs. 30-1(D)(22) (Supp. 2003). The marsh on Oaks Creek certainly satisfies this definition. The Department's activities conducted on the creek and in the marshes clearly depend upon the proximity to coastal waters and to the State Park. In addition, the designation of the State Park property (including the marshes along Oaks Creek) as Heritage Trust property would arguably classify the land as an area of "cultural significance," which is another description of a GAPC under Regulation 30-1(D)(22). Furthermore, it was noted by Resource Managment, the ALJ, the Appellate Panel, and the circuit court judge that the Coastal Management Program document states both Heritage Trust properties and State Parks qualify as GAPCs. Thus, as the marsh in question is along Oaks Creek, and Oaks Creek is a border of a State Park, that marsh can be brought in under the GAPC status. In any case, as the CMP specifies that Heritage Trust sites and State Parks are GAPCs – and Huntington Beach State Park undoubtedly qualifies as both – the marsh along Oaks Creek would be part of that GAPC.

Therefore, at a minimum, the land abutting Oaks Creek that is managed by the Department as Huntington Beach State Park qualifies as a GAPC. The Coastal Management Program document clearly states that "when a project overlaps with, is adjacent to, or significantly affects a GAPC, [Resource Management] will carefully evaluate" the project, and the project would be prohibited if it would "permanently disrupt the use of priority for the

designated area."[6] As the subject marshes are adjacent to the State Park, it was within Resource Management's authority to prohibit DuRant's proposed dock. Resource Management concluded the construction of the dock would permanently disrupt the ability of the Department to utilize the State Park for recreational and educational opportunities along the Oaks Creek marsh. As such, Resource Management found the marshes along DuRant's property were a part of the GAPC designated as Huntington Beach State Park.

We further find that both Respondents and DuRant followed all application and notice provisions. The Act specifies that, prior to any construction in a "critical area," notice must be published to the adjoining landowners. 23A S.C. Code Ann. Regs. 30-2(B)(5), (B)(7), (I)(2) (Supp. 2003). These landowners can then file written comments about the project. 23A S.C. Code Ann. Regs. 30-2(E) (Supp. 2003). If an adjoining landowner objects based upon an ownership dispute, the landowner may file an action against the State. See S.C. Code Ann. § 48-39-220(A) (Supp. 2003) ("Any person claiming an interest in the tidelands . . . may institute an action against the State of South Carolina for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State."). If neither written objection is received, nor action instituted pursuant to section 48-39-220(A), "the permit will be processed pursuant to law." 23A S.C. Code Ann. Regs. 30-2(I)(3) (Supp. 2003).

In the instant case, Brookgreen, as the owner of the land leased to the Department, was an adjoining landowner to DuRant's proposed dock. Brookgreen was notified and objected with written comments. Brookgreen, however, did not institute an action to establish title under section 48-39-220(A), and DuRant's dock permit application was processed by Resource Management. While DuRant argues that Brookgreen's failure to file suit against the State is an admission that it does not have a title interest in the

[6] The CMP lists the following as the priority of uses for a State Park: (1) varied recreational activities open to the public; (2) non-intensive uses which require minimal feasible alteration and maintain the natural function of the area; and (3) provision of educational opportunities to visitors of the parks. 2 S.C. Reg. Issue 26, Part IV-17.

property, we find this argument is without merit. DHEC regulations clearly state that, without written proof of filing a court action, a permit application will be processed. That is precisely what happened in this case.

Thus we find that, whether or not Brookgreen has record title to the subject marsh abutting DuRant's property, Resource Management properly determined the area had GAPC status as both a Heritage Trust site and a state park. Further, at a minimum, we note Brookgreen has colorable title to the area in question. See S.C. Dep't of Parks, Recreation, & Tourism v. Brookgreen Gardens, 309 S.C. 388, 394, 424 S.E.2d 465, 468 (1992) (concluding Brookgreen "possesses title in the land, known as Huntington Beach, in fee simple absolute").

Accordingly, the circuit court did not err in finding Respondents followed proper procedure in denying the dock permit application and declaring the marsh area was a GAPC.

II.

DuRant argues the circuit court erred in finding Respondents' actions did not violate DuRant's rights of due process and equal protection. We do not agree.

While DuRant made vague comments about "some Constitutional claims" to the ALJ, he did not raise the specific issues of either due process or equal protection at that time. In fact, DuRant informed the ALJ that, with regard to these Constitutional issues, he would "reserve [them] for circuit court." However, these issues were never raised or ruled upon by the ALJ, the Appellate Panel, or the circuit court. Accordingly, DuRant's issues concerning the violation of his due process and equal protection rights are not preserved for review by this court. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

CONCLUSION

Reviewing the evidence in the record, it is apparent that Resource Management followed all applicable procedures in reviewing and denying DuRant's permit application. Resource Management determined that the marsh was a GAPC, entitled to heightened protection, because it was a Heritage Trust property and a state park. The substantial evidence in the record supports this finding. Accordingly, the circuit court's order affirming the decision of the Coastal Zone Management Appellate Panel is

AFFIRMED.

HUFF and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael Dunbar, Appellant.

Appeal From Lexington County
Rodney A. Peeples, Circuit Court Judge

Opinion No. 3866
Submitted February 9, 2004 – Filed September 27, 2004

REVERSED AND REMANDED

Assistant Appellate Defender Tara Taggart, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General N.

Mark Rapoport, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

CURETON, A.J.: Michael Dunbar was convicted of one count each of: trafficking in cocaine (100-200 grams), trafficking in cocaine (200-400 grams), and trafficking in crack cocaine (200-400 grams). He received an aggregate sentence of forty years imprisonment. Dunbar appealed, arguing the trial judge erred in refusing to suppress cocaine evidence found as a result of a warrantless search of a vehicle. He also argued the trial judge erred in failing to suppress evidence found as a result of the search warrant because it violated both federal and state constitutions in that: (1) the affiant was not the person who provided the information; (2) the magistrate was not detached and neutral; and (3) there was no information in the affidavit that attested to the informant's reliability.

This court affirmed the trial judge's refusal to suppress the evidence obtained in the warrantless search of the vehicle. We reversed the trial judge's refusal to suppress the evidence obtained from the motel room as a result of a search warrant supported by a faulty affidavit. State v. Dunbar, 354 S.C. 479, 581 S.E.2d 840 (Ct. App. 2003). Our supreme court vacated that portion of our opinion dealing with the search warrant and remanded for a determination of the issue based solely upon Dunbar's constitutional issues on appeal. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003). Upon remand, we reverse[1] the trial judge's refusal to suppress the evidence found in the motel pursuant to the search warrant and remand for a new trial.[2]

FACTS

The Lexington County Sheriff's Department worked with a

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

[2] The portion of our prior opinion in which we upheld the trial judge's refusal to suppress evidence obtained as a result of a warrantless search of the car remains unaffected.

confidential informant to set up an undercover drug transaction.[3] The targets of the operation were Dunbar and his associate, Jonathan Small.[4] The informant arranged to purchase five ounces of cocaine from Dunbar and Small at a pre-arranged location. Deputies approached the car after the informant signaled that drugs were in the car. Small fled on foot and Dunbar remained in the passenger seat. Officers found a paper bag containing five ounces of cocaine on the floorboard of Small's car. After officers also found a motel key in the car, Dunbar told Officer Jerry Rainwater that he and Small were staying at the motel.

Officer Rainwater decided to obtain a search warrant for the motel room. Rainwater called the magistrate and discussed "the warrant and the probable cause over the telephone." However, Rainwater did not draft the search warrant nor go to the magistrate's office to sign the affidavit in support of the search warrant. Instead, Rainwater sent Officer Keith O'Quinn to obtain the search warrant. O'Quinn was part of Rainwater's investigative team but knew only that a drug deal had occurred and five ounces of cocaine had been found. He did not witness the search of Small's car, speak to Dunbar, or speak with the informant.

When O'Quinn arrived, the magistrate was talking on the telephone with Rainwater. O'Quinn did not relay any information in support of the search warrant to the magistrate. Instead, the magistrate drafted the search warrant based on information Rainwater relayed over the telephone. The search warrant contained the following language under the section entitled "Reason for Affiant's Belief that the Property Sought is on the Subject Premises:"

> That a confidential informant stated that the subject stays at motel while in the area, that Co Def stated that the subject left Ramada Inn at I-26 @ 378 after Co-Def called subject in that room, that Co Def saw subject leave location to pick him up at location

[3] We recite the facts, as we understand them, from our reading of the record.

[4] Dunbar's co-defendant is alternately referred to as "Small" and "Smalls" throughout the transcript.

> across from Ramada, that subject had on [sic] his possession a key to said room, that subject delivered approx 5 oz. of cocaine to undercover agents.

O'Quinn was sworn and signed as the affiant on the search warrant, even though he later testified that the only information he had was that five ounces of cocaine was discovered at the drug bust. He had no personal knowledge of the other facts in the affidavit. The magistrate issued the search warrant after O'Quinn signed as the affiant. Deputies discovered a bag of cocaine, a bag of crack cocaine, $3,795 in cash, two digital scales, and a handgun in the motel room.

At trial, Dunbar moved to suppress the evidence obtained as a result of the search warrant because it was issued in violation of the Fourth Amendment and the South Carolina Constitution. Dunbar argued the evidence seized in the motel room should be suppressed because: (1) the search warrant was not issued by a neutral and detached magistrate; (2) the warrant lacked probable cause because it was signed by an affiant without personal knowledge and there was no indication the information was given under oath or affirmation; and (3) the credibility of the confidential informant was not established. The trial judge denied the motions, and Dunbar was convicted. Dunbar appealed.

LAW/ANALYSIS

A.

Dunbar argues the trial judge erred in denying his motion to suppress the search warrant because it was not based upon probable cause where the affiant had no personal knowledge of the case. We agree.

The Fourth Amendment to the United States Constitution and Article I, § 10 of the South Carolina Constitution protect citizens from unreasonable searches and seizures. Both state and federal constitutions provide that search warrants may not be issued except upon "probable cause, supported by

oath or affirmation," and particularly describing the place to be searched and the persons or things to be seized. U.S. Const. amend. IV; S.C. Const. art. I, § 10; see also State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997) ("A search warrant may issue only upon a finding of probable cause.").

"The magistrate's task in determining whether to issue a search warrant is to make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in the particular place to be searched." State v. Tench, 353 S.C. 531, 534, 579 S.E.2d 314, 316 (2003) (citations omitted). A reviewing court should give substantial deference to a magistrate's determination of probable cause. State v. Crane, 296 S.C. 336, 339, 372 S.E.2d 587, 588 (1988) (citation omitted); see State v. Pressley, 288 S.C. 128, 131, 341 S.E.2d 626, 628 (1986) ("Determination of probable cause to search made by a neutral and detached magistrate is entitled to substantial deference.") (citing Illinois v. Gates, 462 U.S. 213 (1983)).

Both federal and state constitutions require that the search warrant be issued upon probable cause supported by "oath or affirmation." An "oath" is a solemn pledge, swearing to a higher power, that one's statement is true and subjects one to penalties for perjury if the statement is false. See Black's Law Dictionary 1099 (7th ed. 1999). An "affirmation" is a pledge that one's statement is true and subjects the person to the penalties of perjury, but does not require the swearing to a higher power. Black's Law Dictionary 59. Neither federal nor state constitutions proscribe a particular method to be used in obtaining an "oath or affirmation."

A sworn oral statement may be sufficient to satisfy the "oath or affirmation" requirement of both federal and state constitutions. See State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 472 (1987) (noting that a "sworn, oral statement may be sufficient to satisfy the requirement for oath or affirmation"); see also U.S. v. Clyburn, 806 F.Supp. 1247, 1249-50 (D.S.C. 1992), aff'd by 24 F.3d 613 (4th Cir. 1994) (noting that it is constitutionally permissible for a magistrate to consider unrecorded sworn oral testimony in determining whether probable cause exists to issue a search warrant). An

affidavit, which would satisfy the stricter requirements for a finding of probable cause found in our state statute[5], also satisfies the minimal constitutional requirements that probable cause be supported by an "oath or affirmation." See McKnight, 291 S.C. at 113, 352 S.E.2d at 472 ("An affidavit is a voluntary ex parte statement reduced to writing and sworn to or affirmed before some person legally authorized to administer an oath or affirmation . . . It differs from an oath in that an affidavit consists of statements of fact which is sworn to as the truth, while an oath is a pledge . . . ."); State v. White, 275 S.C. 500, 502, 272 S.E.2d 800, 801 (1980) (holding that a search warrant issued upon affidavit or affirmation does not offend the Constitution); State v. York, 250 S.C. 30, 36-37, 156 S.E.2d 326, 329 (1967) (noting that an affidavit complies with the minimum constitutional standards for the issuance of a warrant upon probable cause supported by oath or affirmation). "Generally, affidavits must be made on the affiant's personal knowledge of the facts alleged in the petition. The affidavit must in some way show that the affiant is personally familiar with the facts so that he could personally testify as a witness." 3 Am.Jur. 2d Affidavits § 14 (2002).

It is not disputed by the State that the affiant in this case, Officer O'Quinn, did not have any firsthand knowledge of the events leading to Dunbar's arrest. O'Quinn characterized his involvement as "merely" signing for the warrant, without speaking to either Dunbar or the confidential informant and without relaying any information to the magistrate himself. An affiant is by definition an individual who makes "a voluntary declaration of facts written down and sworn to" before the magistrate. See Black's Law Dictionary 58 (7th ed. 1999) (defining "affiant" and "affidavit"). When O'Quinn signed the affidavit to the search warrant, he swore "that there is

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[5] See S.C. Code Ann. § 17-13-140 (1985) (requiring that a search warrant only be issued "upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant."); see also State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000) (noting that the General Assembly has "imposed stricter requirements than federal law for issuing a search warrant . . . the South Carolina Code mandates that a search warrant 'shall be issued only upon affidavit sworn to before the magistrate . . . .'") (quoting S.C. Code Ann. § 17-13-140).

probable cause to believe that certain property subject to seizure" was located in the motel room. Because O'Quinn admitted he had no knowledge of the facts of this case, we hold he could not make such an oath. Thus, although O'Quinn was placed under "oath" when he signed the affidavit, he did not relay any information that would support probable cause.

Although sworn oral statements will comply with constitutional requirements that a search warrant be supported by "oath or affirmation," the defects in the search warrant in this case cannot be cured by Rainwater's oral statements to the magistrate. Rainwater testified that he "spoke with the judge about the warrant and the probable cause over the telephone." He did not testify that he was ever placed under oath, and there is no evidence in the record that he was under oath when speaking with the magistrate on the telephone. Because there is no evidence that the information was given under oath, the search warrant issued in this case offends the constitutional requirement that it be supported by "oath or affirmation." See York, 250 S.C. at 36, 156 S.E.2d at 328 (finding a sheriff's testimony that he had a "conversation" with a magistrate was insufficient to establish that the sheriff furnished information under oath or affirmation); State v. Wimbush, 9 S.C. 309, 316 (1877) (finding a warrant illegal where the information on which the warrant was founded was not given upon oath).

The State asserts, however, that there is no reversible error because an affiant may attest to information supplied to him by another officer. Certainly, magistrates can issue search warrants based upon hearsay information that is not a result of direct personal observations of the affiant. See generally State v. Sullivan, 267 S.C. 610, 614-15, 230 S.E.2d 621, 623 (1976) (finding a search warrant affidavit may be based on hearsay information). Probable cause for a search warrant can be supported by information given to the affiant by other officers. U.S. v. Ventresca, 380 U.S. 102, 108 (1965).

The law regarding using hearsay information to support probable cause for a search warrant is inapplicable in the present case. O'Quinn testified that the only facts he knew concerning the case was that five ounces of cocaine had been found in Small's car. This fact alone is insufficient to support

probable cause to search the motel room. Also, there is no evidence in the record that O'Quinn had any knowledge, either from personal observation or from hearsay statements of Rainwater, regarding the other facts in the affidavit that would support probable cause to search the motel room. Further, there is no evidence O'Quinn relayed any information to the magistrate, much less whether he relayed information learned from Rainwater, before he signed the affidavit. Because there is no evidence O'Quinn relayed hearsay information to the magistrate before signing the affidavit, the State cannot avail itself of this hearsay exception.

Inasmuch as O'Quinn did not have any knowledge, either from personal observation or from hearsay, that would support the facts in the affidavit and the evidence does not show that Rainwater was placed under oath, the search warrant for the motel room lacked probable cause and the trial judge erred in denying Dunbar's motion to suppress.

B.

Dunbar argues the trial judge erred in failing to suppress the evidence obtained as a result of the search warrant because the issuing magistrate was not neutral and detached. We agree.[6]

A search warrant may only be issued upon a finding of probable cause by a neutral and detached judge. U.S. v. Leon, 468 U.S. 897, 914 (1984). The Fourth Amendment requires that magistrates be impartial and severed from and disengaged from the activities of law enforcement such that independent judgment is not distorted. Shadwick v. City of Tampa, 407 U.S. 345, 350-51 (1972). In reviewing an application for a search warrant, a magistrate must make an independent determination of probable cause and not serve as a "rubber stamp for the police." Leon, 468 U.S. at 914. Further, a magistrate must not wholly abandon his or her judicial function and essentially perform a police function. Lo-Ji Sales, Inc., v. New York, 442

[6] Although our finding that the search warrant lacked probable cause because the facts were not given under oath is sufficient grounds to reverse, we address the remaining issues out of an abundance of caution.

U.S. 319, 326-27 (1979) (holding that a judge who issued a search warrant abandoned his judicial function and was not neutral and detached when he led police in search). "The nucleus of the neutrality requirement is that the issuing officer not be functioning in a capacity charged with the duty of investigating or prosecuting crimes." State v. Sachs, 264 S.C. 541, 553-54, 216 S.E.2d 501, 507 (1975).

The parties do not dispute that the magistrate was the party responsible for drafting the fact section of the affidavit. Though Officer Rainwater relayed certain facts, the magistrate himself filled in the facts in the affidavit. Despite O'Quinn's testimony that he believed the magistrate to be neutral and detached, there is no showing in the record that Rainwater's conversation with the magistrate was under oath or that the magistrate accurately transcribed their conversation. We do not know if the magistrate inadvertently interposed his own interpretation of the facts into the affidavit in support of the search warrant.

Certainly, this practice is one that should not be indulged in by magistrates. If the magistrate had merely drafted the affidavit upon the sworn oral information of the affiant and then the affiant read over and signed the affidavit, the magistrate would have performed more of a clerical function and the question before us would not be nearly so troubling. See U.S. v. Steed, 465 F.2d 1310, 1315 (9th Cir. 1972) (holding that no prejudice had been shown by the defendant where the Commissioner prepared and typed an affidavit including the information orally supplied to him by the affiant, after which the affidavit was read over by the affiant and signed and sworn to by him, because there was nothing in the record to suggest the affidavit included any allegation or fact not orally supplied to the Commissioner by the affiant); see also Johnson v. U.S., 333 U.S. 10, 14 (1948) (holding that assistance by the magistrate in preparing the affidavit did not detract from his neutrality, but demonstrated it, because the magistrate's duty is to require adequate factual details or underlying circumstances to support probable cause).

The magistrate's act of recording facts supplied to him by Rainwater was not merely a clerical function. Moreover, it was compounded by the lack of evidence that he ever placed Rainwater under oath or that he ever

determined whether O'Quinn had any knowledge of the facts to which he was swearing. Because the magistrate interpreted the facts, as he believed them to be, and then summarily determined probable cause existed to issue a search warrant without further inquiry, we hold he abandoned his neutral and detached role and became actively involved in a function of law enforcement.

C.

Dunbar next asserts the evidence obtained as a result of the search warrant should have been suppressed because the reliability of the confidential informant was not established, and thus, probable cause to issue the search warrant did not exist.[7] Inasmuch as we have found the search warrant lacked probable cause because it was not supported by information given under oath and because it was issued by a magistrate that was not neutral and detached, we decline to address the credibility issues.

CONCLUSION

There is no indication that the information in support of the search warrant in this case was provided under oath. The person signing the affidavit had no knowledge of the facts alleged in the affidavit. The magistrate abandoned his neutral and detached role when he became involved in drafting the affidavit in support of the search warrant without placing the person providing the information under oath and without determining that the person signing the affidavit had knowledge of the facts. Accordingly, the trial judge erred in failing to suppress the evidence obtained as a result of the search warrant.

Based upon the foregoing, Dunbar's convictions and sentences resulting from the search of the motel room are reversed and the case is remanded for a new trial.

REVERSED AND REMANDED.

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[7] At best, this argument is underdeveloped in Dunbar's brief.

STILWELL, J., concurs and ANDERSON, J., dissents in a separate opinion.

ANDERSON, J. (dissenting): I respectfully dissent. The majority concludes the trial court erred in failing to suppress the evidence obtained as a result of the search of the motel room because the search warrant was based on an affidavit signed by a law enforcement officer who had no direct knowledge of the information contained in the affidavit. I disagree. I vote to affirm.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). We are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. On review, we are limited to determining whether the trial judge abused his discretion. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998); State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990). This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; see also State v. Corey D., 339 S.C. 107, 529 S.E.2d 20 (2000) (an abuse of discretion is a conclusion with no reasonable factual support).

An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding probable cause existed. State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App 2002). This review, like the determination by the magistrate, is governed by the "totality of the circumstances" test. State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000); King, 349 S.C. at 148, 561 S.E.2d at 643. The task of the issuing magistrate is simply to make a practical, common sense decision

whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The appellate court should give great deference to a magistrate's determination of probable cause. State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997); see also State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976) (magistrate's determination of probable cause should be paid great deference by reviewing court).

LAW/ANALYSIS

I. Requirement of Sworn Affidavit

"Both the Fourth Amendment of the United States Constitution and Article I, § 10 of the South Carolina Constitution require an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued." State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000). The Fourth Amendment to the United States Constitution elucidates:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, **supported by oath or affirmation**, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV (emphasis added). Article I, section 10 of the South Carolina Constitution edifies:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall

> issue but upon probable cause, **supported by oath or affirmation**, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

S.C. Const. art. I, § 10 (emphasis added).

II. Sufficiency of Affidavit Supporting Search Warrant

An affidavit in support of a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant. State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976); see also Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), overruled on other grounds by United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980) (affidavit for search warrant which sets out personal observations relating to existence of cause to search is not to be deemed insufficient by virtue of fact that it sets out not the affiant's observations but those of another, so long as a substantial basis for crediting the hearsay is presented). An affidavit can show probable cause even when based on hearsay statements. Sullivan, 267 S.C. at 614, 230 S.E.2d at 623; see also Morris v. State, 62 S.W.3d 817 (Tex. App. 2001) (information with which magistrate is supplied, in affidavit for search warrant, may be hearsay).

Hearsay, even second hearsay, may provide a legal basis for a search warrant. United States v. Welebir, 498 F.2d 346 (4th Cir. 1974); see also State v. York, 250 S.C. 30, 156 S.E.2d 326 (1967) (affidavit for search warrant may be based on hearsay information); State v. Elkhill, 715 So. 2d 327 (Fla. Dist. Ct. App. 1998) (finding affidavit established probable cause to search defendant's residence for drugs, even though affiant did not continuously observe confidential informant during controlled buy; informant was under almost constant supervision of one of two officers during buy, and what affiant did not see, the other officer did; as long as specific facts are set forth to justify finding of probable cause to issue search warrant, those facts may be based on hearsay information).

The fact that the information provided is double hearsay is relevant to its value in determining probable cause, but hearsay testimony will not per se invalidate a judge's determination of probable cause. State v. Taylor, 612 N.E.2d 728 (Ohio Ct. App. 1992). The fact that the affiant's knowledge may be the result of double or multiple levels of hearsay does not, per se, invalidate the resulting search warrant. United States v. Jenkins, 525 F.2d 819 (6th Cir. 1975); see also United States v. One Hundred Forty-Nine Thousand Four Hundred Forty-Two and 43/100 Dollars ($149,442.43) in U.S. Currency, 965 F.2d 868 (10th Cir. 1992) (hearsay, even multiple hearsay, may be used to establish probable cause for a search warrant); United States v. McCoy, 478 F.2d 176 (10th Cir. 1973) (fact that affidavit in support of search warrant contains some double hearsay and perhaps even a bit of triple hearsay does not in and of itself render the affidavit insufficient).

The fact that there is hearsay upon hearsay involved in a case, as far as the information upon which the affidavit is based, does not preclude a finding of probable cause. Lewis v. State, 508 S.E.2d 218 (Ga. Ct. App. 1998); see also Hennessy v. State, 660 S.W.2d 87 (Tex. Crim. App. 1983) (when viewing the affidavit, hearsay upon hearsay will support issuance of warrant as long as underlying circumstances indicate there is a substantial basis for crediting hearsay at each level).

III. Direct Knowledge of Affiant Officer Not Required

The propriety of an affiant attesting to information supplied him by a fellow officer has been judicially endorsed. State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976). It is well settled that an affiant seeking a search warrant can base his information on information in turn supplied him by fellow officers. United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); United States v. Welebir, 498 F.2d 346 (4th Cir. 1974). Observations by fellow law enforcement officers engaged in a common investigation with the search warrant affiant are a reliable basis for a warrant applied for by one of their number. Ventresca, 380 U.S. at 111, 85 S.Ct. at 747, 13 L.Ed.2d at 690; State v. Hage, 568 N.W.2d 741 (N.D. 1997). See also United States v. Morales, 238 F.3d 952 (8th Cir. 2001) (probable cause may be based on collective knowledge of all law enforcement officers involved in an investigation and need not be based solely on information

within knowledge of officer on scene if there is some degree of communication).

Probable cause is to be evaluated by the collective information of the police as reflected in the affidavit and is not limited to the firsthand knowledge of the officer who executes the affidavit. State v. Stickelman, 299 N.W.2d 520 (Neb. 1980); see also Iddings v. State, 772 N.E.2d 1006 (Ind. Ct. App. 2002) (probable cause for a search warrant may be based upon information known to the law enforcement organization as a whole). A police officer making the affidavit for issuance of a warrant may do so in reliance upon information reported to him by other officers in the performance of their duties. State v. Pearson, 566 S.E.2d 50 (N.C. 2002).

It is not unusual for an affidavit of a law enforcement officer to contain hearsay information from another, which, in turn, is based on other information gathered by that person. Sullivan, 267 S.C. at 615, 230 S.E.2d at 623. Hence, when a magistrate receives an affidavit which contains hearsay upon hearsay, he need not categorically reject this double hearsay information. Sullivan, 267 S.C. at 615, 230 S.E.2d at 623. Rather, he is called upon to evaluate this information as well as all other information in the affidavit in order to determine whether it can be reasonably inferred that the information was gained in a reliable way. Sullivan, 267 S.C. at 615, 230 S.E.2d at 623-24.

IV. Efficacy of Affidavit in Present Case

The affidavit in the present case clearly justified the issuance of the warrant. Officer Keith O'Quinn was "part of the initial responding units for the take-down of the operation" and was at the scene of the arrest. O'Quinn testified that he had "personal knowledge . . . that a narcotics deal had been performed at the Exxon station on Bush River Road" and that two subjects had been arrested. Officer O'Quinn had knowledge there was cocaine in the car. He declared that, "[b]ased on [his] conversation in dealing with Investigator Rainwater," he obtained a search warrant. O'Quinn signed an affidavit based on information which was obtained through a joint investigation. When asked "[w]as there a reason for the belief contained in the affidavit that there was cocaine in Sheraton (sic) room 158," Officer

O'Quinn responded: "From the information that I gathered that was told to Investigator Rainwater by the C.I., yes, sir, there was." Moreover, although Officer Rainwater actually communicated the information to the magistrate, Officer O'Quinn read over and reviewed the affidavit for accuracy before he signed it.

I find the affidavit was properly executed. The affidavit included information Officer O'Quinn learned through his participation in the investigation, as well as hearsay information. Thus, the affidavit justified the issuance of the search warrant. Under the totality of the circumstances, the magistrate had a substantial basis for concluding probable cause existed. I would affirm the trial court's decision to allow the evidence obtained as a result of the search of the motel room.

CONCLUSION

The opinion of the majority acknowledges the viability of the rule that hearsay is admissible to show probable cause. This declaration rings hollow because the majority opinion neglects to give any efficacy to the rule.

With etymological precision, the majority in cathartic verbiage concludes the rule should not be applied. The statement is made that the magistrate never heard the "hearsay." The record belies this averment.

The judicial embargo countenanced by the majority flies in the face of the universal rule of evidence allowing "hearsay, even second hearsay" to determine probable cause in the magisterial warrant scenario.

Without question, the appellate entity will "rue the day" of the rule adopted in this case. This "court created albatross" in search warrant proceedings is anathema to the law extant in the field of criminal law.

I VOTE TO AFFIRM.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Raymond C. Campbell,

Respondent,

v.

Martha M. Carr and Ruth Riley Glover,

Appellants.

Appeal From Richland County
Joseph M. Strickland, Master-In-Equity

Opinion No. 3867
Submitted September 14, 2004 – Filed September 27, 2004

REVERSED

H. Ronald Stanley, of Columbia, for Appellants.

Thomas G. Earle, of Columbia, for Respondent.

ANDERSON, J.: Martha M. Carr and Ruth Riley Glover appeal the master-in-equity's ruling of specific performance. We reverse.[1]

[1] This case was decided without oral argument pursuant to Rule 215, SCACR.

FACTUAL/PROCEDURAL BACKGROUND

In 1996, Carr, a resident of New York, inherited from her mother a 108-acre tract of unimproved land. In 1998, Carr contacted the Campbells, who had leased the property for thirty years, about selling the property to them. Carr had telephone discussions with Betty Campbell. Carr asked Betty Campbell "how much the property went for." Betty Campbell told her the Tax Assessor's agricultural assessed value of the property was $54,000. On August 6, 1998, Carr and Raymond Campbell entered into a written contract for $54,000, which averaged $500 an acre. Raymond Campbell paid an earnest money deposit of $1000. Carr did not attend the closing because she felt the sales price was unfair. Carr returned the earnest money, but it was refused and returned to her. On February 9, 1999, Carr conveyed an undivided one-half interest in the property to her cousin, Ruth Riley Glover.

In 1998, the Richland County Tax Assessor had computed the fair market value of the property at $103,700. Raymond Campbell admitted he had probably seen the Tax Assessor's fair market value of the property:

> [Appellants' counsel]: Do you know what the tax office is carrying as the market value of this property?
>
> [Raymond Campbell]: Not right offhand, I don't.
>
> [Appellants' counsel]: Have you ever seen that number?
>
> [Raymond Campbell]: I probably have.
>
> [Appellants' counsel]: Does a hundred and three thousand, seven hundred ($103,700) dollars sound right to you as what the tax offices carry?
>
> [Raymond Campbell]: That might be.
>
> [Appellants' counsel]: Did you tell Ms. Carr about the fair market value of the property that the tax office was carrying on that?

[Raymond Campbell]: I think my wife told her the agricultural value.

[Appellants' counsel]: Didn't tell her the fair market value?

[Raymond Campbell]: Not at the time, I don't think.

The opinion expressed in the lender's Collateral I.D. Report was that the property would have sold for twenty-five percent to forty percent higher than the Tax Assessor's fair market value in 1998. This would give the property an expected sell-value of $129,625 to $145,180.

Boston McClain, who was qualified by the trial court as an expert real estate appraiser, found that the property had a fair market value of $162,000, or $1500 an acre, when the contract was executed.

Prior to entering into the contract, Carr had only seen the property once when she was a child: "I had seen it as a child, and it was a long time ago. My parents drove down to South Carolina." Carr was diagnosed as having schizophrenia and depression in 1986. She has been on Haldol and Cogentin for her mental illnesses since 1986. At the time she entered into the contract, she was taking ten milligrams of Haldol and five milligrams of Cogentin. She has been hospitalized five or six times for depression and schizophrenia.

Schizophrenia is a psychotic disorder, which is characterized by disturbances in perception, inferential thinking, language and communication, behavioral monitoring, affect, fluency and productivity of thought and speech, hedonic capacity, volition and drive, and affection. Diagnostic and Statistical Manual of Mental Disorders: DSM-IV 274 (4th ed. 1994). The symptoms of schizophrenia are delusions, hallucinations, and grossly disorganized or catatonic behavior. Id. at 275. "Disorganized thinking ('formal thought disorder,' 'loosening of associations') has been argued by some (Bleuler, in particular) to be the single most important feature of Schizophrenia." Id. at 276. Depression is characterized by altered mood in which there is a loss of interest in all usually pleasurable outlets. Taber's Cyclopedic Medical Dictionary 478 (16th ed. 1989). Some of the

symptoms of depression are: loss of interest or pleasure in usual activities, feelings of worthlessness, self-reproach, or excessive or inappropriate guilt, and complaints of or evidence of diminished ability to think or concentrate. Id.

Raymond Campbell brought this action against Martha Carr and Ruth Riley Glover seeking specific performance of a land contract entered into between Campbell and Carr. The master-in-equity tried the case without a jury and ordered specific performance of the contract.

STANDARD OF REVIEW

An action for specific performance is one in equity. Lewis v. Premium Inv. Corp., 351 S.C. 167, 170 n.2, 568 S.E.2d 361, 362 n.2 (2002); Wright v. Trask, 329 S.C. 170, 176, 495 S.E.2d 222, 225 (Ct. App. 1997). In an action in equity, tried by the judge alone, without a reference, on appeal the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. Townes Assocs., LTD v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "It is now well settled that this court has jurisdiction in appeals in equity cases to find the facts in accord with our view of the preponderance or greater weight of the evidence, in the absence of a verdict by a jury; and may reverse a factual finding by the lower court in such cases when the appellant satisfies this court that the finding is against the preponderance of the evidence." Crowder v. Crowder, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965).

LAW/ANALYSIS

Carr and Glover argue that the master-in-equity should not have ordered specific performance of the contract.

"Specific performance should be granted only if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties." Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000). Equity will not decree specific performance unless the contract is fair, just, and equitable. Anthony v. Eve, 109 S.C. 255, 263, 95 S.E. 513,

515 (1918); McChesney v. Smith, 105 S.C. 171, 176, 89 S.E. 639, 641 (1916). "The discretion to grant or refuse specific performance is a judicial discretion to be exercised in accordance with special rules of equity and with regard to the facts and circumstances of each case." Guignard v. Atkins, 282 S.C. 61, 64, 317 S.E.2d 137, 140 (Ct. App. 1984); accord Bishop v. Tolbert, 249 S.C. 289, 298, 153 S.E.2d 912, 917 (1967) ("The rule is well settled that the granting of specific performance is not a matter of absolute right, but rests in the sound or judicial discretion of the Court, guided by established principles, and exercised on a consideration of all the circumstances of each particular case."). "Specific performance will not be ordered unless the contract expresses the true intent of the parties and is fair, just and equitable." Amick v. Hagler, 286 S.C. 481, 484, 334 S.E.2d 525, 527 (Ct. App. 1985). "[S]pecific performance . . . is only available to enforce a contract that is fair, just, and equitable." Hodge v. Shea, 252 S.C. 601, 612, 168 S.E.2d 82, 87 (1969). "In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract." Ingram, 340 S.C. at 106, 531 S.E.2d at 291. "Mere inadequacy of consideration is not a ground for refusing the remedy of specific performance; in order to be a defense, the inadequacy must either be accompanied by other inequitable incidents, or must be so gross as to show fraud." Id.

> When the accompanying incidents are inequitable and show bad faith, such as concealment, misrepresentations, undue advantage, oppression on the part of the one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of the other,--these circumstances, combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative.

Holly Hill Lumber Co. v. McCoy, 201 S.C. 427, 442, 23 S.E.2d 372, 378 (1942). When a grossly inadequate consideration is combined with weakness of mind on the part of the seller, a denial of specific performance is warranted. Craven v. Williams, 302 F.Supp. 885, 893-94 (D.S.C. 1969);

accord 81 C.J.S. Specific Performance § 47 (1977) (stating that inadequacy of price combined with mental weakness tend to make a decree of specific performance inequitable). The inadequacy of price is determined at the date the contract was entered. Adams v. Willis, 225 S.C. 518, 527, 83 S.E.2d 171, 175 (1954); Holly Hill Lumber Co., 201 S.C. at 445, 23 S.E.2d at 380; Shannon v. Freeman, 117 S.C. 480, 489, 109 S.E. 406, 409 (1921); 81 C.J.S. Specific Performance § 47 (1977).

> The rule as to inadequacy of price as a basis for a denial of specific performance was early stated in the leading case of Gasque v. Small, (1848) 2 Strob.Eq. (21 S.C.Eq.) 72, 80, in these words: 'The inadequacy must not be measured by grains, but it ought to be palpably disproportioned to the real and market value of the property, so as to constitute a hard, unreasonable, and unconscionable contract; but it is not necessary that it should be so gross as to excite an exclamation or to indicate imposition, oppression or fraud, for this would be sufficient ground not only for refusing a specific performance but for rescinding the contract.'

Craven, 302 F.Supp. at 892-93.

> [I]t has been held that to warrant denial of specific performance, the consideration must be palpably disproportioned to the real and market value of the property so as to constitute a hard, unreasonable, and unconscionable contract, or so disproportionate to value as to offend the normal sense of fair dealing, but it is not necessary that the disparity be so gross as to excite an exclamation or indicate imposition, oppression, or fraud.

81 C.J.S. Specific Performance § 47 (1977).

In Craven, the judge found the value of the property was three times the amount stated in the contract.

> The [prospective purchaser] was a lawyer of ability, with great knowledge of real estate values in the Lincolnville area based on extensive experience in that field, and in the full possession of his faculties. The [prospective seller], on the other hand, was advanced in years, living remote from the property involved, with access to no reliable information on value in the Lincolnville neighborhood, without any knowledgeable adviser so far as the record shows, and but shortly released from a mental institution, after some six or eight years of confinement.

Id. at 893. The judge concluded the prospective buyer was not entitled to specific performance because of the gross inadequacy of price coupled with the prospective seller's weakness of mind. Id. at 894.

The consideration stated in the contract between Carr and the Campbells was inadequate. The $54,000 sales price in the contract was significantly below the appraised value of $162,000, the Collateral I.D. report's expected sell value of $129,625 to $145,180, and the Richland County Tax Assessor's fair market value of $103,700. This inadequate consideration combined with Carr's weakness of mind, due to her schizophrenia and depression, makes it inequitable to order specific performance. As in Craven, the Campbells, as the prospective purchasers, had greater knowledge of the real estate value of the land, having leased the land for thirty years for personal hunting and farming purposes, compared with Carr, who lived in New York, had not visited the property since she was a child, and had no knowledge of the fair market value of the property. Additionally, Carr suffers from mental illness as the prospective seller did in Craven.

We find the contract price of $54,000 is inadequate consideration for the 108-acre tract of land. The inadequacy of consideration in addition to Carr's mental illnesses, make it inequitable to order specific performance.

CONCLUSION

Accordingly, the decision of the master-in-equity is

REVERSED.

WILLIAMS, J., concurs.

GOOLSBY, J., concurs in a separate opinion.

GOOLSBY, J.: (concurring): Although I question whether the appellants Martha M. Carr and Ruth Riley Glover proved that, at the time the respondent Raymond C. Campbell contracted with Carr to purchase the land in question, Carr's mental illness affected her legal capacity to enter into that contract, I concur in the majority's decision to reverse the judgment below.

Rule 208(a)(4), SCACR, provides in part: "Upon the failure of the respondent to timely file a brief, the appellate court may take such action as it deems proper." This action includes reversing the judgment below. Wierszewski v. Tokarick, 308 S.C. 441, 418 S.E.2d 557 (Ct. App. 1992).

Here, Campbell did not file a respondent's brief, notwithstanding substantial questions of fact and of law are involved, no small amount of money is at stake, and the case is one in which this court, because it is an action in equity, may take its own view of the preponderance of the evidence. Townes Assocs. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). In short, Campbell offers us nothing.

As in Wierszewski, this court should not be inclined to do what Campbell neglected to do, i.e., "search the record for reasons to affirm." 308 S.C. at 444 n.2; 418 S.E.2d at 559 n.2; cf. Smith v. South Carolina Dep't of Soc. Servs., 284 S.C. 469, 327 S.E.2d 348 (1985) (holding, under prior appellate court rules, the supreme court would not "grope in the dark" in order to identify errors).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

B & B Liquors, Inc., Respondent,

v.

Jeffery O'Neil, Appellant.

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

Opinion No. 3868
Heard September 9, 2004 – Filed September 27, 2004

VACATED and REMANDED

Melvin Richardson Hyman, Jr., of Charleston, for Appellant.

James Earle Reeves, of Summerville, for Respondent.

ANDERSON, J.: B & B Liquors, Inc., (B&B) brought this breach of contract action against Jeffery O'Neil (O'Neil). The trial court granted B&B summary judgment in a one-sentence form order. We vacate the order and remand to the circuit court.

FACTUAL/PROCEDURAL BACKGROUND

On February 27, 2000, O'Neil contracted with B&B through its sole officer and shareholder, Bruce Meadows (Meadows), to purchase a liquor business. The contract called for an up-front payment of $30,000, thirty-six monthly payments of $2,566, and a balloon payment of $102,136 due at the end of the thirty-six months. The contract further provided that if a monthly payment was more than ten days overdue, the interest rate would increase from nine and one-half percent to fourteen percent. If payment was more than thirty days late, the entire balance would become due.

From April 1, 2000 through September 1, 2000, O'Neil made the required monthly payments. Meadows died in September of 2000. As a result, O'Neil missed the October 2000 installment but resumed the monthly payments once he received notice of where they were to be sent. After missing the October installment, O'Neil fulfilled his obligations from November 2000 through April 2001. However, in May 2001, he stopped making payments.

B&B initiated this action on March 8, 2002 to recover the balance due under the contract plus prejudgment interest. O'Neil answered and counterclaimed alleging mistake, negligent misrepresentation, and fraud.

B&B filed a motion for summary judgment contending the amount owed was not contested and there was no genuine issue of material fact in the case. A summary judgment hearing was set for May 27, 2003, but O'Neil was not given proper notice of the hearing. However, counsel for B&B informed O'Neil's attorney of the hearing a few hours before it was to take place. O'Neil's counsel attended in order to avoid delay, requesting only that

he be given time to submit affidavits and memoranda pursuant to Rule 56, SCRCP.

After hearing the arguments, the trial judge allowed O'Neil ten days—or until June 6, 2003—to file documents in opposition to the summary judgment motion. On June 4, 2003, O'Neil filed by mail a memorandum and an accompanying affidavit. Copies were mailed to the judge on the same day. The clerk of court received and filed the documents on June 6, 2003.

O'Neil's affidavit included his testimony that Meadows provided him incorrect sales and income figures. O'Neil attached a tax return for the year 1998 and a sales report for that same year which reveal discrepant sales, costs, and profit accounts. According to the affidavit, Meadows gave O'Neil the sales report before the sale. Not until after O'Neil took over the business did he discover the tax return. He stated Meadows gave him other incorrect documents which had been lost. O'Neil averred his accountant could attest to the lost documents, but he did not provide an affidavit by his accountant. Finally, he testified that Meadows made a number of false statements to him in connection with the sale of the business.

On June 4, 2003—presumably prior to receipt of the memorandum and affidavit from O'Neil—the trial judge signed the form order granting summary judgment to B&B. The clerk of court filed the order on June 6, 2003, the day the documents were due. The court's form order stated: "Plaintiff's motion for summary judgment is granted." This appeal follows.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP. White v. J.M. Brown Amusement Co., Inc., Op. No. 25849 (S.C. Sup. Ct. Filed August 9, 2004) (Shearhouse Adv. Sh. No. 31 at 19); Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 468, 581 S.E.2d 496, 501 (Ct. App. 2003), cert. denied (March 18, 2004) (citation omitted). Summary judgment is proper when there is no genuine issue of material fact

and the moving party is entitled to judgment as a matter of law. White at *19; Redwend at 467, 581 S.E.2d at 501.

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Redwend at 467-68, 581 S.E.2d at 501. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). "Once the moving party carries its initial burden, the opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing there is a **genuine issue for trial**." Hedgepath v. American Te. & Tel. Co., 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001) (internal quotation marks omitted).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Vermeer at 59, 518 S.E.2d at 305. Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Hall v. Fedor, 349 S.C. 169, 173-174, 561 S.E.2d 654, 656 (Ct. App. 2002). "Moreover, summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." Redwend at 469, 581 S.E.2d at 501 (citations omitted). "However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Hedgepath at 355, 559 S.E.2d at 336.

LAW/ANALYSIS

As a threshold consideration, the trial court's order fails to set forth findings of fact and conclusions of law. By filing a form order with no analysis, the court does not provide us an order we can fully review. In

Bowen v. Lee Process Systems Co., 342 S.C. 232, 536 S.E.2d 86 (Ct. App. 2000), we explained:

> On appeal from the grant of summary judgment, an appellate court must determine whether the trial court's stated grounds for its decision are supported by the record. It is our duty to undertake a thorough and meaningful review of the trial court's order and the entire record on appeal. Where, as here, the trial court fails to articulate the reasons for its action on the record or enter a written order outlining its rationale, we simply cannot perform our designated function.

Id. at 235-36, 536 S.E.2d at 87-88 (footnotes omitted).

In its memorandum in support of summary judgment, B&B claims O'Neil could not rely on any representations due to a clause in the contract. Additionally, B&B contends the statements allegedly made by Meadows are barred by the Dead Man's Statute, S.C. Code Ann. § 19-11-20 (1985). Due to the perfunctory and conclusory nature of the trial judge's form order, we cannot determine the weight given to these arguments as juxtaposed to O'Neil's claims of mistake, misrepresentation, and fraud outlined in his memorandum and affidavit.

Indeed, based on the dates of the judge's signature and the filing of the order, we cannot determine whether he even considered the memorandum, affidavit, and exhibits filed by O'Neil. Although the order was not final until the clerk of court filed it on June 6, this filing took place the same day the clerk filed O'Neil's affidavit and memorandum. Moreover, the form order is dated "6/4/03"—two days before O'Neil's document submission deadline and the same day the documents were mailed to the court and the judge. Without a more detailed order, it is left purely to our conjecture whether the court considered the filings in making its decision.

As stated in Bowen, "the trial court should provide clear notice to all parties and the reviewing court as to the rationale applied in granting . . . summary judgment." Id. at 237-38, 536 S.E.2d at 89 (citations and footnotes

omitted). "**It is imperative, then, that the trial court state the material facts it found undisputed and the applicable law supporting its grant of summary judgment"** in order for this court to properly review its decision. Id. at 241, 536 S.E.2d at 90-91 (emphasis added).

CONCLUSION

As the trial court has failed to provide this Court with an adequate order for review, we vacate the grant of summary judgment and remand to the trial court for a written order identifying the facts and accompanying legal analysis upon which it relied in granting B&B's summary judgment motion. Because we decide this case on the issue of the written order granting summary judgment, we decline to address any other issues. The trial court's order is

VACATED and the case is REMANDED to the circuit court.

GOOLSBY and WILLIAMS, JJ., concur.