OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 37

September 26, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Hiesha Wright, Respondent,

v.

James H. Dickey, Appellant.

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

Opinion No. 4126
Submitted June 1, 2006 – Filed June 19, 2006
Withdrawn, Substituted, and Refiled September 11, 2006

APPEAL DISMISSED

James H. Dickey, of Atlanta, for Appellant.

Kevin Mitchell Barth, of Florence, for Respondent.

KITTREDGE, J.: We are presented with an appeal from a decision of the Resolution of Fee Disputes Board of the South Carolina Bar. We dismiss

this appeal and hold that this court lacks appellate jurisdiction to review such matters.[1]

I.

Hiesha Wright retained Dickey in February of 2001 to advise her in certain legal matters. She paid Dickey for his services. According to Wright, Dickey failed to perform the work and refused to return the fee. Wright filed an application with the Resolution of Fee Disputes Board of the South Carolina Bar (Board). Having submitted the fee dispute to the Board, Wright bound herself and Dickey (as a member of the South Carolina Bar) to the decision of the Board. See Rule 416, SCACR, Rule 9.

In compliance with Rule 416, SCACR, the matter was referred to the circuit chair and assigned to an investigator. Dickey initially cooperated with the inquiry, but subsequently refused to communicate with the Board's investigator. The investigation yielded a recommendation that Dickey return a portion of the retainer to Wright.

The circuit chair reviewed, and ultimately concurred with, the recommendation. Because the amount in dispute was less than $5,000, the circuit chair's concurrence represented the final decision of the Board. Rule 416, SCACR, Rule 13.

On October 8, 2002, Dickey appealed to the circuit court pursuant to Rule 20 of the Rules of the Board, but set forth no grounds for the appeal. Dickey's notice of appeal stated that the grounds for the appeal would be included in his "forthcoming" brief. Despite repeated requests that he do so, Dickey never filed a brief in regards to this matter, and did not assert any specific grounds for relief. Dickey attempted to state his grounds for appellate review after the matter was heard in the circuit court.

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

After continuances at Dickey's request, the case was called for a hearing on March 2, 2004, before Judge B. Hicks Harwell. Dickey attended this hearing. Because Wright appeared *pro se*, Judge Harwell granted 15 days for Wright to retain counsel. Judge Harwell subsequently recused himself. The Chief Justice of the South Carolina Supreme Court issued an order reassigning the matter to Judge Edward B. Cottingham.

The hearing was rescheduled for April 5, 2004, and Dickey was properly notified by certified mail. Dickey knew of this hearing, for he again requested a continuance. Dickey failed to appear at the hearing. As noted, Dickey failed to file a brief or memorandum specifying the grounds for his appeal. The circuit court entered an order dismissing the appeal with prejudice.

Dickey filed a motion to alter or amend, contending that he did not receive proper notice of the hearing, and that the circuit court judge erred in refusing to recuse himself from the case. The circuit court denied the motion, finding that: (1) Dickey received proper notice and willfully failed to attend the hearing; and (2) Dickey never filed a motion requesting recusal and failed to provide any evidence of a conflict of interest or other reason requiring recusal. This appeal followed.

II.

We find this court lacks jurisdiction to review this appeal. Rule 201(a), SCACR, provides that appeals "may be taken, *as provided by law*, from any final judgment or appealable order." (Emphasis added.) In the civil arena, "[t]he right of appeal arises from and is controlled by statutory law." N.C. Fed. Sav. & Loan Ass'n v. Twin States Dev. Corp., 289 S.C. 480, 481, 347 S.E.2d 97, 97 (1986).

The criteria for determining appealability are set forth in sections 14-3-320 and -330 of the South Carolina Code (Supp. 2005). S.C. Code Ann. § 18-9-10 (Supp. 2005). Section 14-3-320 provides for appellate jurisdiction in

equity cases.[2] Section 14-3-330 provides that appellate courts "shall have appellate jurisdiction for correction of errors of law in law cases . . . ." We are not, however, presented with a typical action at law or equity, but a specialized proceeding before a branch of the South Carolina Bar, which in turn is an administrative arm of the South Carolina Supreme Court.

The case of Kores Nordic (USA) Corp. v. Sinkler, Gibbs & Simons, 284 S.C. 513, 327 S.E.2d 365 (Ct. App. 1985), is instructive. Kores Nordic submitted a fee dispute with the Sinkler law firm to the Resolution of Fee Disputes Board. Id. at 514, 327 S.E.2d at 365. At the time, the applicable rules did not provide for *any* appeal of the Board's decision. Dissatisfied with the decision of the Board, Kores Nordic sought an appeal to the circuit court under the Administrative Procedures Act (APA). The circuit court dismissed the attempted appeal, and this court affirmed. The APA "requires as a prerequisite to judicial review that a final decision in a contested case have been rendered by an 'agency.'" Id. at 515, 327 S.E.2d at 366. We held that the Board, as part of the South Carolina Bar (and hence our supreme court), was not an "agency" within the ambit of the APA. Id. at 516, 327 S.E.2d at 366.

Subsequent to our opinion in Kores Nordic, Rule 416 was amended to provide for a limited right of appeal to the circuit court. The rule (Rule 20 within SCACR Rule 416) provides that a party may appeal a final decision of the Board to the circuit court on certain limited grounds. No mention is made of further appeal. Indeed, further appeal runs contrary to the Board's purpose of expeditious resolution of fee disputes. See Rule 416, SCACR, Rule 2 ("The purpose of the Board is to establish procedures whereby a dispute concerning fees . . . may be resolved expeditiously . . . ."); Byrd v. Irmo High Sch., 321 S.C. 426, 433-34, 468 S.E.2d 861, 865 (1996) (recognizing that where a statute specifically sets forth an appeals procedure, we may not expand our jurisdiction through implication).

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[2] Section 14-3-320 has been declared unconstitutional to the extent it purports to limit the scope of appellate review in domestic cases. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992).

III.

We conclude there is no appeal from a decision of the Resolution of Fee Disputes Board of the South Carolina Bar beyond the circuit court as set forth in Rule 416, SCACR, Rule 20. This appeal is

DISMISSED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State **Respondent,**

v.

Eddie Geiger **Appellant.**

Appeal From Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 4151
Submitted September 1, 2006 – Filed September 25, 2006

AFFIRMED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Deborah R.J. Shupe, and Solicitor Warren B. Giese, all of Columbia, for Respondent.

ANDERSON, J.: Eddie Geiger (Geiger) was convicted of assault with intent to commit first degree sexual conduct (ACSC) and sentenced to life imprisonment without parole. Geiger appeals, arguing the trial court erred in refusing his request to charge the jury with assault and battery of a high and aggravated nature (ABHAN) as a lesser included offense. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

In the early morning hours of January 31, 2003, Annie J. placed a 911 call reporting she had been sexually assaulted in her home. The responding law enforcement officials and emergency medical technicians arrived at the abode to find the nearly seventy-year-old woman recently battered and cut, very frightened and with blood on her face. Geiger's driver's license was found on the coffee table and his clothing was discovered in the bathroom. Before being sent to the hospital, Annie J. identified Geiger as her assailant.

Geiger was arrested and indicted for ACSC. At trial, Annie J. detailed the evening's events, albeit at times she was somewhat difficult to decipher, her speech slurred from an earlier stroke. She testified that Geiger was an acquaintance of her son's and had been in her house on several previous occasions. Although Geiger's appearance at her home was uninvited on this particular evening, she had voluntarily allowed him inside. Annie J. averred that, at his request, she provided Geiger with a liquor drink. She did not imbibe. In recounting her attack, Annie J. said after excusing himself to the bathroom, Geiger returned naked and brandishing her pistol. Although at times in her testimony, Annie J. seemed uncertain as to the exact location and chronology of the events, she unequivocally described Geiger's behavior and acts against her. She stated that Geiger demanded she give him money, slapped her in the head repeatedly, put the gun to her head, put his penis in her mouth, and attempted to force her legs apart to have sexual intercourse with her. She asseverated she was able to prevent him from penetrating her and that, after the physical attack ended, Geiger searched her home for money and then left.

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

The emergency personnel responding to Annie J.'s telephone call described the victim as being very frightened and upset and recounted that her home was in a state of disarray. The sexual assault nurse who treated her at the hospital opined that Annie J.'s injuries were consistent with her description of the events. DNA tests conclusively indicated the clothes found in the bathroom had been worn by Geiger.

Geiger did not testify in his own defense. He called no witnesses, but limited his defense to cross-examination of the prosecution's witnesses.

At the close of the evidence, Geiger's attorney requested a charge of ABHAN. The circuit court refused the inclusion of the lesser charge, stating the record was devoid of evidence that Geiger committed ABHAN rather than ACSC. The jury found Geiger guilty of ACSC.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003). On appeal, 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. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005); State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004). In order for an error of law to warrant reversal, the error must result in prejudice to the appellant. State v. Patterson, 367 S.C. 219, 625 S.E.2d 239 (Ct. App. 2006); see State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000); State v. Wyatt, 317 S.C. 370, 453 S.E.2d 890 (1995).

This Court is 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); Patterson, 367 S.C. at 224, 625 S.E.2d at 241; State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004). We do not reassess the facts based on our own view of the preponderance of the evidence but simply determine whether the trial judge's ruling is supported by any evidence. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Mattison, 352 S.C. 577,

575 S.E.2d 852 (Ct. App. 2003). This Court should examine the record to determine whether any evidence supports the trial court's ruling. See Wilson, 345 S.C. at 6, 545 S.E.2d at 829; State v. Davis, 364 S.C. 364, 613 S.E.2d 760 (Ct. App. 2005); Mattison, 352 S.C. at 583, 575 S.E.2d at 855.

LAW/ANALYSIS

I. ABHAN as a Lesser Included Offense of ACSC

On appeal, Geiger argues the trial court erred in failing to charge ABHAN as lesser included offense of ACSC. Specifically, Geiger contends the evidence presented at trial supported an inference that he was guilty solely of the lesser included crime. We disagree.

Geiger was convicted of assault with intent to commit criminal sexual conduct. S.C. Code Ann. § 16-3-652 (2003) provides:

> (1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:
>
> > (a) The actor uses aggravated force to accomplish sexual battery.
> >
> > (b) The victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar offense or act.

Sexual battery is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h) (2003).

ABHAN is "an unlawful act of violent injury accompanied by circumstances of aggravation." State v. Primus, 349 S.C. 576, 580, 564 S.E.2d 103, 105 (2002). As an element of ABHAN, circumstances of aggravation include, inter alia, the use of a deadly weapon, intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, difference in gender, taking indecent liberties or familiarities with a female, purposeful infliction of shame and disgrace, and resistance to lawful authority. State v. Frazier, 302 S.C. 500, 397 S.E.2d 93 (1990); State v. Tyndall, 336 S.C. 8, 21, 518 S.E.2d 278, 285 (Ct. App. 1999); State v. Murphy, 322 S.C. 321, 471 S.E.2d 739 (Ct. App. 1996).

ABHAN is a lesser included offense of ACSC, notwithstanding that technically ACSC does not contain all of the elements of ABHAN. State v. Elliot, 346 S.C. 603, 606, 552 S.E.2d 727, 728 (2001), overruled in part on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986). Under the elements test, a crime will only be considered a lesser offense if the greater crime encompasses all of the elements of the lesser. Carter v. State, 329 S.C. 355, 362, 495 S.E.2d. 773, 777 (1998). However, we have recognized limited exceptions where an offense has traditionally been considered a lesser included offense of the greater. Noting that ABHAN was historically considered a lesser included offense to ACSC's predecessor, assault with intent to ravage, the supreme court has expressly held ABHAN to be a lesser included offense of ACSC. Elliot, 346 S.C at 606, 552 S.E.2d at 728; Drafts, 288 S.C. at 30, 340 S.E.2d at 784.

II. Charging Lesser Included Offenses

While upon indictment for a greater offense a trial court has the requisite jurisdiction to charge and convict a defendant of any lesser included offense, see Browning v. State, 320 S.C. 366, 465 S.E.2d 358 (1995), overruled in part on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999); Tyndall, 336 S.C. at 21, 518 S.E.2d at 285, a lesser included offense instruction is required only when the evidence warrants such

an instruction. State v. Mitchell, 362 S.C. 289, 301, 608 S.E.2d 140, 143 (Ct. App. 2005); State v. Coleman, 342 S.C. 172, 175 536 S.E.2d 387, 389 (Ct. App. 2000). "The law to be charged is determined by the evidence **presented** at trial." State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241 (1996) (emphasis added); accord, State v. Brown, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004); State v. Todd; 290 S.C. 212, 214, 349 S.E.2d 339, 341 (1986). To justify charging the lesser crime, the evidence presented must allow a rational inference the defendant was guilty only of the lesser offense. See Tyndall, 336 S.C. at 22, 518 S.E.2d at 285. The court looks to the totality of evidence in evaluating whether such an inference has been created. See id. (in deciding whether the evidence tended to show the defendant was guilty of the lesser included offense, the court looked at the "reasonable inference[s] to be drawn from the totality of the evidence"). The trial court should refuse to charge the lesser included offense when there has been no evidence tending to show the defendant may have committed solely the lesser offense. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994).

Geiger recites the well established rule that, "[t]he trial judge is to charge a jury on a lesser included offense if there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed." State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); Gourdine, 322 S.C. at 398, 472 S.E.2d at 241; accord Brighton v. State, 336 S.C. 348, 350-351, 520 S.E.2d 614 615 (1999); State v. Mathis, 287 S.C. 589, 594, 340 S.E.2d 538, 541 (1986). Conversely, "[a] lesser included offense instruction is required only when the evidence warrants such an instruction, and it is not error to refuse to charge the lesser included offense unless there is evidence tending to show the defendant was guilty only of the lesser offense." Tyndall, 336 S.C. at 21, 518 S.E. 2d 278, 285; accord State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 543 (2004); State v. Cooney (320 S.C. 107, 112, 463 S.E.2d 597, 600 (1995); Murphy, 322 S.C. at 326, 471 S.E.2d at 741.

In State v. Patterson, 337 S.C. at 233, 522 S.E.2d at 854, the court edified: "[i]n order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts." See Tyndall, 336 S.C. at 21-22,

518 S.E.2d at 285; State v. Small, 307 S.C. 92, 94, 413 S.E.2d 870, 871 (Ct. App. 1992). The rule is articulated with exactitude in Dempsey v. State: "A judge is required to charge a jury on a lesser-included offense 'if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed.'" 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005) (emphasis omitted from the original) (quoting Gourdine, 322 S.C. at 398, 472 S.E.2d at 242).

III. Application in the Case Sub Judice

Geiger contends the evidence presented at trial was sufficient to support an ABHAN instruction. In furtherance of this position, he professes that the victim's testimony was "curious," opining it would be unlikely for Annie J. to have invited him into her home for late night "Biblical talk" and a drink of vodka. Implicitly, he asserts: (1) her age and medical history may have impaired her ability to recount the events of the evening in question and (2) Annie J.'s testimony exposed some confusion as to the chronological order and exact room where certain events during the attack occurred. Geiger admits the state presented considerable evidence showing that he was in Annie J.'s home at the time she was assailed; however, he advances the position that no forensic evidence of sexual assault was ever produced.

The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty only of the lesser offense. See State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976) ("the [p]resence of evidence to sustain the crime of a lesser degree determines whether it should be submitted to the jury and the 'mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice.'") (quoting State v. Hicks, 241 N.C. 156, 159-160, 84 S.E.2d 545, 547 (1954)); see also Tyndall, at 22, 518 S.E.2d at 285 (possibility that the jury might have disbelieved the State's evidence as to the circumstances of aggravation and on the remaining evidence found the defendant guilty of simple assault and battery did not entitle the defendant to have the lesser offense submitted to the jury where there was no evidence tending to show defendant was guilty only of simple assault and battery); State v. Rucker, 319

S.C. 95, 98-99, 459 S.E.2d 858, 860 (Ct. App. 1995) (contention that the jury might have disbelieved the State's evidence as to the circumstances of aggravation and on the remaining evidence found appellant guilty of the lesser offense of simple assault and battery did not entitle her to have the lesser offense submitted to the jury where appellant presented no evidence she committed some act that could be viewed by the jury as a simple assault); State v. Hartley, 307 S.C. 239, 241-42, 414 S.E.2d 182, 184 (Ct. App. 1992) (where there was no evidence that showed defendant killed victim without malice, trial judge did not err in refusing to charge the jury on the crime of manslaughter as a lesser-included offense of the crime of murder); State v. Foxworth, 269 S.C. 496, 499, 238 S.E.2d 172, 173 (1977) (possibility that the jury might have disbelieved the State's evidence as to the circumstances of aggravation in ABHAN trial and on the remaining evidence found defendant guilty of the lesser offense of simple assault and battery did not entitle him to have the lesser offense submitted to the jury where all the evidence admitted at trial pointed to the appellant's guilt of assault and battery of a high and aggravated nature).

The supreme court's analysis in Dempsey v. State is particularly instructive. 363 S.C. 365, 610 S.E.2d 812 (2005). In appealing his conviction for sexually assaulting his stepson, Dempsey asserted, inter alia, that the evidence warranted having ABHAN charged to the jury. At trial, the victim testified that on multiple occasions Dempsey forced him to perform various sexual acts. Additionally, the victim and his aunt both gave testimony as to occasions when Dempsey acted violently toward the victim. In holding an ABHAN charge was not required, the supreme court found there was no evidence from which it could be inferred that ABHAN rather than ACSC was committed. The court reasoned that while there was evidence of conduct that could be construed as ABHAN, none of the incidents was alleged to have occurred instead of the sexual batteries. Id.

In State v. Fields our court addressed a similar factual and legal scenario with academic precision. 356 S.C. 517, 589 S.E.2d 792 (Ct. App. 2003). The victim testified that Fields used a combination of trickery, threats, and physical force to get her into an abandoned house, where, once inside, he threw her about the structure, ordered her to perform sexual acts, and forced her to have intercourse. In addition to the victim's testimony, the

prosecution presented expert testimony that her injuries were consistent with someone who had been sexually assaulted and that semen found in her underwear matched that of the defendant. Fields, who did not testify or present any evidence on his own behalf, was convicted of criminal sexual conduct. On appeal he argued the jury could reasonably have found the sex consensual by disbelieving a portion of the victim's testimony and that he was therefore entitled to jury instructions on ABHAN. The court concluded the mere contention the jury might have disbelieved the State's evidence that the sex was forced and on the remaining evidence found him guilty of ABHAN did not entitle Fields to have the lesser charge submitted to the jury. Although recognizing that at trial the defense counsel suggested the sex was willful, the court nonetheless found the record devoid of any evidence tending to show Fields guilty only of ABHAN, noting that both the victim's testimony of her assault and the attending physician's opinion that her injuries indicated nonconsensual sex were uncontested. Id.

Geiger relies upon two cases, State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996), and State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986), which can be clearly distinguished from the case at hand. In Mathis, the defendant was charged with the crime of criminal sexual conduct (CSC) in the first degree for engaging in sexual battery with a victim less than eleven years old (assault with intent to commit CSC was not charged). At trial, the victim testified the defendant touched her with his penis, but also stated she could not remember if he ever put it inside her. The greater crime, CSC, required some "intrusion, however slight" of the victim. See S.C. Code Ann. § 16-3-651(h) (2003). Thus, the victim's uncertainly on this issue served as evidence on which a jury could find the defendant committed the lesser, rather the greater, offense. In Gourdine, the greater crime at issue, armed robbery, required use of a deadly weapon. At trial, three different witnesses testified that a BB gun, water gun, toy, or fake gun was used in the commission of the robbery, which the court held was sufficient evidence from which the jury could have found the lesser crime of strong arm robbery had been committed.

The trial record in the case at bar contains no evidence tending to show Geiger may have assaulted Annie J. but not attempted a sexual battery. The victim's undisputed testimony recounting Geiger's efforts to sexually assault

her supports only an ACSC instruction, not one of ABHAN. Barring some confusion as to the precise location where the events transpired, Annie J. consistently reported exactly what occurred. She verified, without contradiction, that Geiger came out of the bathroom naked, put a gun to her head, hit her repeatedly on the head, forced his penis into her mouth, and tried to force her legs open to have intercourse with her. Her testimony was further corroborated by the discovery of Geiger's clothes in her bathroom, her physical injuries, and the testimony of witnesses as to her mental state and demeanor immediately following the incident. It is inconsequential that there was no forensic evidence of sexual assault. The medical examiner testified that Annie J.'s injuries were consistent with the victim's narrative of the events and that the lack of direct evidence of a sexual assault conformed with Annie J.'s testimony that Geiger was never able to penetrate her.

The trial judge did not err in denying Geiger's request to charge the lesser included offense of ABHAN. There is no evidence tending to show Geiger was guilty solely of the lesser crime. The only reasonable inference to be drawn from the totality of the evidence was that Geiger either did or did not commit ACSC. The mere contestation that the jury might have disbelieved Annie J.'s testimony as to the sexual acts and nature of Geiger's assault does not entitle him to have the jury charged with the lesser offense of ABHAN.

CONCLUSION

Because the record is devoid of evidence that Geiger was guilty only of the lesser included offense, the trial court did not err by refusing to charge the jury with ABHAN. Accordingly, the trial court's decision is

AFFIRMED.

KITTREDGE and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kenneth E. Bennett, Richard K. Bennett, James M. Hendershot, and Robert N. Parker, III, **Appellants,**

v.

Investors Title Insurance Company, **Respondent,**

Investors Title Insurance Company, **Respondent,**

v.

Crescent Resources, LLC, Bristol, LLC and CBS Surveying & Mapping, Inc., **Respondents.**

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

Opinion No. 4152
Heard September 12, 2006 – Filed September 25, 2006

AFFIRMED

Randall S. Hiller, of Greenville, for Appellants.

Louis H. Lang, of Columbia, for Respondent Investors Title Insurance Company.

V. Clark Price, of Greenville and Benjamin A. Johnson, both of Rock Hill, for Respondent Crescent Resources, LLC.

Warren C. Powell, Jr., of Columbia, for Respondent CBS Surveying and Mapping, Inc.

ANDERSON, J.: In this dispute over liability for a surveying error, Kenneth E. Bennett, Richard K. Bennett, James M. Hendershot, and Robert N. Parker, III, (collectively Appellants), appeal the circuit court's orders granting summary judgment to Crescent Resources, LLC and Investors Title Insurance Company. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On December 28, 2001, Crescent conveyed 47.82 acres of real property in Oconee County (the Property) to Bristol, LLC for $2.5 million. Crescent's deed to Bristol (the Deed), entitled "Special Warranty Deed," contains a granting clause referring to an attached property description, which, in turn, incorporates a plat (the Plat). CBS Surveying and Mapping, Inc. prepared the Plat for Crescent on December 22, 2000. The Plat shows a sixty-six foot right-of-way easement, entitled "SC 188 KEOWEE SCHOOL RD (66' R/W)," on the western boundary of the Property.

The habendum clause of the Deed reads, in pertinent part:

> **TO HAVE AND TO HOLD** all and singular the Property, unto the said Grantee and Grantee's heirs, successors and assigns forever, except:
>
> . . . .
>
> (5) matters affecting title to the Property as shown on the Plat or which would be shown on a current and accurate survey of the Property (including any encroachments);
>
> (6) easements, covenants, restrictions and conditions of record, and rights-of-way of public and private streets and roads, including, but not limited to, the road shown on the Plat as "old road bed" and the sixty-six (66) foot wide road right-of-way shown on the Plat as "SC 188 Keowee School Road (66' R/W)"
>
> . . . .

The Deed further provides that Crescent "covenants to warrant specially the title to the Property against the lawful claims of any person claiming from, through, or under it."

Later on the same day, Bristol conveyed the Property by general warranty deed to Appellants. Anticipating this conveyance, Investors issued a title insurance commitment to Executive Properties, LLC. This commitment agreed to provide an owner's title insurance policy to Executive.[1] On January 4, 2002, Appellants procured from Investors an owner's title insurance policy (the Policy) covering the Property. The Policy expressly "does not insure against loss or damage (and [Investors] will not pay costs, attorneys' fees or expenses) which arise by reason of . . . [s]uch

[1] Investors later referred to this commitment as one made to Appellants. Appellants deeded the Property to Executive on June 10, 2002. During a hearing, Appellants' attorney indicated they had formed Executive "for the purposes of developing the Property." Executive is not a party to the circuit court proceedings or this appeal.

state of facts as would be disclosed by a current and accurate survey of said premises."

Subsequently, Appellants built two brick walls within forty-one feet of the centerline of South Carolina Highway 188. On April 25, 2002, the South Carolina Department of Transportation (SCDOT) wrote Appellants, informing them SCDOT had a 200 foot right-of-way easement over the Property. This right-of-way easement, dated August 1, 1968, and recorded at SCDOT shows Crescent granted the 200 foot right-of-way to SCDOT.[2] See S.C. Code Ann. § 57-5-550 (2006) (directing all rights-of-way for state highways be filed at SCDOT).

Presumably, Appellants notified Investors of this problem and demanded payment for their loss. Investors alleged Appellants offered to settle the claim for $85,225. Investors explained Appellants arrived at this number by appraising the Property, dividing that number by the total number of acres included in the Property, and applying that per acre value to the acreage mistakenly assumed to be unencumbered. Investors further claimed it rejected this demand because the eastern portion of the Property bordered a lake, and this acreage would be valued higher than the portion bordering Highway 188. Investors additionally asserted it hired the same appraiser Appellants used to value the specific acreage lost. This appraiser valued the lost acreage at $64,000.

As a result, Investors sent Appellants a settlement check in the amount of $64,000 and a settlement agreement, which Appellants never executed. Investors explained Appellants hired a different attorney, who rejected the settlement offer and demanded $196,800 to settle the claim, including the "value of the improvements that were required to be relocated and/or destroyed due to the title defect . . . ." Investors refused to pay this amount,

[2] Crescent Resources, LLC conveyed the Property to Bristol. The Deed indicates Crescent Resources, LLC is "a successor by merger and conversion to Crescent Resources, Inc., whose name was changed from Crescent Land and Timber Corp." Crescent Land and Timber Corp. granted the easement to SCDOT.

claiming the title policy excluded consequential damages. Appellants eventually agreed to settle the claim for the lost value of the Property for $64,000 but retained its consequential damages claim.

On June 26, 2003, Appellants filed a complaint against Investors, alleging breach of the title insurance contract and bad faith. Investors answered and eventually filed an amended answer, including a third-party complaint against Crescent, Bristol, and CBS. Appellants then filed an amended complaint, alleging a breach of deed warranty by Crescent and Bristol and negligence by CBS. Crescent filed separate answers to Appellants' amended complaint and Investors' third-party complaint.[3]

In June 2004, Investors moved for summary judgment against Appellants, explaining it attempted to settle the claim and Appellants had not answered its settlement offer. According to Investors, the circuit court held a hearing on this motion, at which the parties discovered they possessed two different title insurance policy jackets with identical policy inserts. The jacket relied upon by Investors excepted claims for consequential damages. The circuit court allowed the parties time to supplement their arguments and Investors time to amend its motion.

In August, Investors filed an amended motion for summary judgment against Appellants. On January 11, 2005, Crescent moved for summary judgment against both Appellants and Investors. In February 2005, Investors again amended its motion for summary judgment.

The circuit court granted Crescent's motion for summary judgment against both Appellants and Investors, holding exceptions (5) and (6) in the Deed's habendum clause limited Crescent's special warranty. Furthermore,

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[3] Although our case caption lists CBS and Bristol as Respondents, the record does not include any pleadings, motions, or orders from these parties, except the transcript of a motion to compel heard by the circuit court. CBS and Bristol did not submit briefs on appeal and were not parties to the circuit court's orders. Additionally, the record does not disclose the procedural position of either party at the time of this appeal.

the circuit court applied this ruling to Investors, finding Investors could not recover more than Appellants could recover. Although not included in the record, Appellants and Investors filed motions to reconsider this order, which the circuit court denied. However, the court entered an amended order, correcting minor factual errors.

Summary judgment was granted to Investors with respect to Appellants' breach of contract and bad faith claims. The circuit court held the Policy specifically excluded all matters a current and accurate survey would disclose, including the claim asserted here. Appellants appealed both summary judgment orders.[4]

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: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006); Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corrections, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); Eagle Container Co., LLC v. County of Newberry, 366 S.C. 611, 620, 622 S.E.2d 733, 737 (Ct. App. 2005). If triable issues exist, those issues must go the jury. Mulherin-Howell v. Cobb, 362 S.E.2d 588, 595, 608 S.E.2d 587, 591 (Ct. App. 2005). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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; Law, 323 S.C. at 434, 629 S.E.2d at 648; BPS, Inc. v. Worthy, 362

[4] Investors separately appealed the circuit court's grant of summary judgment to Crescent. See Court of Appeals Docket No. 14360, Bennett v. Investors (2).

S.C. 319, 325, 608 S.E.2d 155, 159 (Ct.App.2005). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006); see also Schmidt v. Courtney, 357 S.C. 310, 317, 592 S.E.2d 326, 330 (Ct.App.2003) (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Gadson v. Hembree, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005); Miller, 365 S.C. at 220, 616 S.E.2d at 729; Montgomery v. CSX Transp., Inc., 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004). 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. Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct.App.2004). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Rife v. Hitachi Const. Mach. Co., Ltd., 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005); Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 228, 612 S.E.2d 719, 722 (Ct. App. 2005). The moving party may discharge the burden of demonstrating the absence of a genuine issue of material fact by pointing out the absence of evidence to support the nonmoving party's case. Lanham v. Blue Cross and Blue Shield of South Carolina, Inc., 349 S.E. 256, 361, 563 S.E.2d 331, 333 (2002). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Wogan v. Kunze, 366, S.C. 583, 591, 623, S.E.2d 107, 112 (Ct. App. 2005). The nonmoving party must come forward with specific facts

showing there is a genuine issue for trial. Rife, 363 S.C. at 214, 609 S.E.2d at 568.

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003); Eagle Container, 366 S.C. at 621, 622 S.E.2d at 738; Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 393, 593 S.E.2d 183, 186 (Ct.App.2004). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004); Wogan, 366, S.C. at 592, 623, S.E.2d at 112; B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004).

LAW/ANALYSIS

I. Appellants v. Crescent

Appellants contend the circuit court erred in holding exceptions (5) and (6) in the habendum clause of the Deed limited Crescent's special warranty. Appellants argue (1) the granting clause and its incorporation of the Plat created a representation or covenant of the width of SCDOT's right-of-way; (2) Crescent failed to convey 47.82 acres of real property, as provided in the property description of the Deed; (3) the habendum clause was ambiguous; and (4) the Deed's special warranty clause automatically protects Bristol and subsequent purchasers against claims created by Crescent; otherwise, the Deed would be a quitclaim deed. We disagree.

A. Construction of the Deed

The construction of a clear and unambiguous deed is a question of law for the court. Hammond v. Lindsay, 277 S.C. 182, 184, 284 S.E.2d 581, 582 (1981); Hunt v. Forestry Comm'n, 358 S.C. 564, 568, 595 S.E.2d 846, 848 (Ct. App. 2004); see also Vause v. Mikell, 290 S.C. 65, 68, 348 S.E.2d 187, 189 (Ct. App. 1986) ("The construction of an unambiguous deed is a question of law, not fact."). " '[I]t is the duty of the court to construe deeds

and determine their legal effect, where there is no such ambiguity as requires parol proof and submission to the jury.' " Hunt, 358 S.C. at 569, 595 S.E.2d at 848 (quoting 26A C.J.S. Deeds § 168 (2001)).

"One of the first canons of construction of a deed is that the intention of the grantor must be ascertained and effectuated if no settled rule of law is contravened." S. Ry. Co. v. Smoak, 243 S.C. 331, 336, 133 S.E.2d 806, 808 (1963); Wayburn v. Smith, 270 S.C. 38, 41, 239 S.E.2d 890, 892 (1977); Estate of Sherman ex rel. Maddock v. Estate of Sherman ex rel. Snodgrass, 359 S.C. 407, 413, 597 S.E.2d 850, 853 (Ct. App. 2004); see also McDaniel v. Connor, 206 S.C. 96, 100, 33 S.E.2d 75, 76 (1945) ("As has many times been said, the governing principle in the construction of deeds is that the intention of the grantor, if consistent with law, shall govern."). Moreover, in ascertaining such intention, the deed must be construed as a whole and effect given to every part thereof, if such can be done consistently with law. Wayburn, 270 S.C. at 42, 239 S.E.2d at 892; Bean v. Bean, 253 S.C. 340, 343, 170 S.E.2d 654, 655 (1969); Alexander v. Burnet, 39 S.C.L. (5 Rich.) 189, 196 (1851); see also First Carolinas Joint Stock Land Bank of Columbia v. Ford, 177 S.C. 40, 46, 180 S.E. 562, 565 (1935) ("Larger and more sensible rules of construction require that the whole deed should be considered together, and effect be given to every part, if all can stand together consistently with law . . . . ").

B. Clauses in the Deed

Guided by our mandate to read the Deed as a whole, we examine the specific clauses therein. The term "premises" is used to refer to "all that part of [a] deed preceding the habendum clause, containing generally the names or description of the parties; explanatory recitals, including consideration and its receipt; a description of the realty; the exception, if any; and sometimes a designation of the estate or interest conveyed." 26A C.J.S. Deeds § 35 (2001); see also Artis v. Artis, 47 S.E.2d 228, 232 (N.C. 1948) ("Ordinarily the premises and granting clauses designate the grantee and the thing granted, while the habendum clause relates to the quantum of the estate.").

In South Carolina, the term "granting clause" is used. This court in Hunt v. Forestry Comm'n, 358 S.C. 564, 566-67, 595 S.E.2d 846, 847 (Ct. App. 2004), referred to the following language in a deed as the "granting clause:"

> The First Carolinas Joint Stock Land Bank of Columbia . . . [has] granted, bargained, sold and released, and by these presents [does] grant, bargain, sell and release unto the said [SCFC] and their successors in office all that certain piece . . . .

(emphasis removed); see also Estate of Sherman, 359 S.C. at 409, 597 S.E.2d at 850-51 (referring to similar language in another deed as the "granting clause"). The granting clause in the Deed incorporates an attached property description which, in turn, incorporates the Plat.

The Latin phrase "habendum et tenendum" means "to have and to hold." Black's Law Dictionary 716 (7th ed. 1999). Thus, in Hunt, 358 S.C. at 567, 595 S.E.2d at 847, this court quoted the habendum clause in that deed: "To Have and to Hold all and singular the premises before mentioned unto the said [SCFC] and their successors in office, and assigns forever." (emphasis removed); see also Smoak v. McClure, 236 S.C. 548, 549, 115 S.E.2d 55, 55 (1960) ("The habendum clause is regular in form, as follows: 'To have and to hold, all and singular, the said premises before mentioned unto the said Ben Garris, and his Heirs and Assigns forever.' ").

The habendum "is the clause usually following the granting part of the premises of a deed, which defines the extent of the ownership in the thing granted to be held and enjoyed by the grantee." 26A C.J.S. Deeds § 36 (2001). Accordingly, in South Carolina, "the estate conveyed by the deed must be determined from the whole deed including the habendum clause." Batesburg-Leesville Sch. Dist. No. 3 v. Tarrant, 293 S.C. 442, 445, 361 S.E.2d 343, 345 (Ct. App. 1987). Luculently, the habendum clause in the Deed is the section beginning "TO HAVE AND TO HOLD . . ."

The habendum clause in the Deed is followed by Crescent's covenant to Bristol whereby Crescent "covenants to warrant specially the title to the

Property against the lawful claims of any person claiming from, through, or under it." "The doctrine of caveat emptor . . . has, in the absence of fraud and misrepresentation long governed the obligations of the parties in the sale of real estate in this State." Rutledge v. Dodenhoff, 254 S.C. 407, 412, 175 S.E.2d 792, 794 (1970). In South Carolina, the purchaser of unimproved land must covenant to protect whatever special rights or interests he would presume to acquire in the land. Jackson v. River Pines, Inc., 276 S.C. 29, 31, 274 S.E.2d 912, 913 (1981); see also 21 C.J.S. Covenants § 14 (1990) ("The only protection of title afforded a purchaser of land is in the covenants contained in the deed.").

In Martin v. Floyd, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984), this court explained:

> A South Carolina general warranty deed embraces all of the following five covenants usually inserted in fee simple conveyances by English conveyors: (1) that the seller is seized in fee; (2) that he has a right to convey; (3) that the purchaser, his heirs and assigns, shall quietly enjoy the land; (4) that the land is free from all encumbrances; and (5) for further assurances.

A grantor seeking to include all the common law covenants of title may use the language in section 27-7-10 of the South Carolina Code to carry out this effect. The statute reads:

> The following form or purport of a release shall, to all intents and purposes, be valid and effectual to carry from one person to another or others the fee simple of any land or real estate if it shall be executed in the presence of and be subscribed by two or more credible witnesses:
>
> > The State of South Carolina.
> >
> > Know all men by these presents that I, A B, of _____, in the State aforesaid, in consideration of the sum of ___ dollars, to me in hand paid by C D

> of _____ County, State of _____, the receipt of which is hereby acknowledged, have granted, bargained, sold and released and by these presents do grant, bargain, sell and release unto the said C D all that (here describe the premises), together with all and singular the rights, members, hereditaments and appurtenances to said premises belonging or in any wise incident or appertaining; to have and to hold all and singular the premises before mentioned unto said C D, his heirs and assigns, forever. And I do hereby bind myself, my heirs, executors, and administrators, to warrant and forever defend all and singular said premises unto said C D, his heirs and assigns, against myself and my heirs and against every person whomsoever lawfully claiming or to claim the same, or any part thereof.
>
> Witness my hand and seal this ___ day of _____ in the year of our Lord _____ and in the ___ year of the independence of the United States of America. _____ [L.S.]

S.C. Code Ann. § 27-7-10 (Supp. 2005); see 17 S.C. Jur. Covenants § 32 (Supp. 2005). However, section 27-7-10 does not preclude the grantor from using other language of warranty in a deed.

> Section 27-7-10 shall be so construed as not to oblige any person to insert the clause of warranty or to restrain him from inserting any other clause in conveyances, as may be deemed proper and advisable by the purchaser and seller, or to invalidate the forms formerly in use within this State.

S.C. Code Ann. § 27-7-20 (Supp. 2005).

A "special warranty" is "[a] warranty against any person's claim made by, through, or under the grantor or the grantor's heirs." Black's Law

Dictionary 1581 (7th ed. 1999). The deed at issue in Knotts v. Joiner, 217 S.C. 99, 102, 59 S.E.2d 850, 851 (1950), "was a printed form but the warranty clause was so stricken with pen as to change it from the usual general warranty to a special warranty, that is, against the heirs of the grantor only." A quitclaim deed, on the other hand, does not convey the fee, but only the right, title, and interest of the grantor. Martin v. Ragsdale, 71 S.C. 67, 77, 50 S.E. 671, 674 (1905).

C. Incorporation of the Plat

Appellants' first contention that the incorporation of the Plat creates a representation or covenant of the width of SCDOT's right-of-way completely ignores the habendum and warranty clauses in the Deed.

"The question as to the purpose and effect of a reference to a plat in a deed is ordinarily one as to the intention of the parties to be determined from the whole instrument and the circumstances surrounding its execution." Lancaster v. Smithco, Inc., 246 S.C. 464, 468, 144 S.E.2d 209, 211 (1965). When a deed describes land as shown on a certain plat, such plat becomes part of the deed for the purpose of showing the boundaries, metes, courses and distances of the property conveyed. Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 397, 252 S.E.2d 133, 136 (1979); Carolina Land Co., Inc. v. Bland, 265 S.C. 98, 105, 217 S.E.2d 16, 19 (1975); see also Holly Hill Lumber Co. v. Grooms, 198 S.C. 118, 135, 16 S.E.2d 816, 823 (1941) (" 'As a general rule, when maps, plats, or field notes are referred to in a grant or conveyance they are to be regarded as incorporated into the instrument and are usually held to furnish the true description of the boundaries of the land . . . ' ") (citation omitted).

In Blue Ridge Realty Co. v. Williamson, 247 S.C. 112, 118, 145 S.E.2d 922, 925 (1965), our Supreme Court stated the general rule that when the owner of land has it subdivided and platted into lots and streets and sells and conveys lots with reference to the plat, he thereby dedicates said streets to the use of such lot owners, their successors in title, and the public. See also Carolina Land Co., 265 S.C. at 105, 217 S.E.2d at 19. Thus, the purchaser of lots with reference to the plat of the subdivision acquires every easement,

privilege and advantage shown upon said plat, including the right to the use of all the streets, near or remote, as laid down on the plat by which the lots are purchased. Blue Ridge, 247 S.C. at 119-20, 145 S.E.2d at 925; Carolina Land Co., 265 S.C. at 105, 217 S.E.2d at 19.

In Lancaster, 246 S.C. at 469, 144 S.E.2d at 211, "[t]he only reference in the deed in th[e] case to the plat was in connection with the description of the lot." Therefore, such reference to the recorded plat made it a part of the deed for the purpose of showing the boundaries, metes, courses and distances of the property conveyed. Id. In that case, our Supreme Court edified:

> A plat, however, is not an index to encumbrances, and the mere reference in a deed, as in this case, to a plat for descriptive purposes does not incorporate a notation thereon as to an easement held by a third party so as to exclude such easement from the covenant against encumbrances in the absence of a clear intention that it so operate.

Id.

Both Blue Ridge and Lancaster look to the intention of the parties in incorporating a plat to determine its effect. In the instant case, a reading of the Deed as a whole reveals the parties used the Plat as a reference to the boundaries, metes, courses and distances of the property conveyed. However, Crescent unambiguously put the burden of obtaining an accurate survey on Appellants and excluded from its grant "matters affecting title to the Property as shown on the Plat," matters "which would be shown on a current and accurate survey of the Property," and rights-of-way of public streets and roads. Moreover, Appellants do not dispute "[t]he actual dimensions and location of a highway right of way are things that will be revealed by a current and accurate survey of the property prepared by the surveyor." The intention of the parties in incorporating the Plat, when discerned from the Deed as a whole, was to show the boundaries, metes, courses and distances of the property conveyed, not to represent or warranty the width of SCDOT's right-of-way.

D. Failure to Convey 47.82 Acres

We observe Appellants' second contention that Crescent failed to convey 47.82 acres of property directly contravenes well-established law in South Carolina. Appellants essentially claim SCDOT's right-of-way, an easement, reduces the fee simple grant by the total acreage of the easement. In Douglas v. Med. Investors, Inc., 256 S.C. 440, 445, 182 S.E.2d 720, 722 (1971), respondent contended the reservation of an easement in a deed was "repugnant to the fee simple title granted and is, therefore, ineffective." Our Supreme Court noted:

> 'An easement is a right which one person has to use the land of another for a specific purpose.' Steele v. Williams, 204 S.C. 124, 28 S.E.2d 644; and 'gives no title to the land on which the servitude is imposed,' Morris v. Townsend, 253 S.C. 628, 172 S.E.2d 819. An easement is therefore not an estate in lands in the usual sense.'

Id. Thus, the court held the easement in that case "in no way cut down the fee simple estate conveyed" and, therefore, "the reservation of the easement following the description in the deed was not repugnant to the fee simple title conveyed in the granting clause." Id. at 445-46, 182 S.E.2d at 722.

Reading the Deed as a whole, the granting clause conveyed fee simple title in 47.82 acres of property to Bristol. Therefore, Appellants' second argument is without merit.

E. The Habendum Clause

Appellants complain the habendum clause is ambiguous. Exception (6) in the habendum clause provides:

> [E]asements, covenants, restrictions and conditions of record, and rights-of-way of public and private streets and roads, including, but not limited to, the road shown on the Plat as "old road bed"

> and the sixty-six (66) foot wide road right-of-way shown on the Plat as "SC 188 Keowee School Road (66' R/W)" . . . .

(emphasis added). Appellants claim the emphasized language warrants the width of SCDOT's right-of-way. We agree the emphasized language indicates the parties assumed SCDOT's right of way was sixty-six feet wide. However, all of the language in exception (6), read with the Deed as a whole, clearly and unambiguously placed the liability of error with respect to the Plat on Bristol and subsequent purchasers. Under no possible construction of the habendum clause can Appellants claim they had a right to rely on the Plat and, if the Plat contained an error, seek damages from Crescent.

F. Limitation on Special Warranty

Appellants argue the special warranty clause in the Deed automatically provides protection against prior encumbrances created by Crescent. To hold otherwise allegedly would render it a quitclaim deed. A special warranty binds the grantor and the grantor's heirs. See Knotts, 217 S.C. 99, 102, 59 S.E.2d 850, 851 (1950). However, "[t]he grantor can, and often does, limit [covenants] so as to exclude existing encumbrances." G.W. Thompson, Thompson on Real Property § 82.10(c)(3) (Supp. 2005); see § 27-7-20; see also Steele v. McRaney, 855 So. 2d 1114, 1122-23 (Ala. Civ. App. 2003) (finding language grantee would take "subject to" matters a survey or inspection of the property would have uncovered prevented grantee from prevailing in breach of deed covenant claim); Kamenar R.R. Salvage, Inc. v. Ohio Edison Co., 607 N.E.2d 1108, 1113 (Ohio Ct. App. 1992) (holding when a deed provides grantee would take subject to "the state of facts which a personal inspection or accurate survey would disclose," grantee has no claim against grantor for power line easement).

Here, exceptions (5) and (6) in the habendum clause of the Deed limit Crescent's special warranty to Bristol. Specifically, the exceptions put Bristol and subsequent purchasers on notice Crescent was not covenanting the Plat, matters which would be uncovered by a current and accurate survey, or public rights-of-way. In this respect, Crescent did not covenant the Property would be free from all encumbrances. Instead, in keeping with

section 27-7-20, it limited its covenant to those encumbrances not excepted through the habendum clause. The circuit court did not err in finding exceptions (5) and (6) of the habendum clause limited Crescent's special warranty.

II. Appellants v. Investors

A. Policy Coverage

Appellants maintain an owners' title insurance policy always provides coverage against a surveying error. We disagree.

"Owners' title insurance policies generally exclude coverage for . . . matters which would be disclosed by an accurate survey and inspection of the premises." 16 Powell on Real Property § 92.12 (2005); see also Stephen A. Spitz, Real Estate Transactions Cases and Materials 498 (2d ed. 1998) ("Title commitments or policies often include an exception to those matters which a survey and examination of the ground would reveal."). In Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 562 A.2d 208, 217 (N.J. 1989), the Supreme Court of New Jersey explained the rationale behind this rule:

> The purpose of the survey exception is to exclude coverage when the insured fails to provide the insurer with a survey. From a search of relevant public records, a title company cannot ascertain the risks that an accurate survey would disclose. It is for this reason that the title company puts that risk on the insured, who can control it either by obtaining a survey or arranging for the elimination of the survey exception. Thus, the very purpose of a survey exception is to exclude from coverage errors that would be revealed not by a search of public records, but by an accurate survey.

(citation omitted); see also 16 Powell on Real Property § 92-12[1] (2005) ("Extended coverage for survey matters is available upon request. The extra coverage is more expensive than standard coverage and may require the purchase of a property survey.").

Moreover, a legion of case law recognizes title insurance policies using survey exceptions. See, e.g., Daniel v. Coastal Bonded Title Co., 539 So. 2d 567, 568 (Fla. Dist. Ct. App. 1989); Heyd v. Chicago Title Ins. Co., 354 N.W.2d 154, 155 (Neb. 1984); U.S. Life Title Ins. Co. v. Hutsell, 296 S.E.2d 760, 763 (Ga. Ct. App. 1982); Mims v. Louisville Title Ins. Co., 358 So. 2d 1028, 1028 (Ala. 1978); Nautilus, Inc. v. Transam. Title Ins. Co., 534 P.2d 1388, 1391 (Wash. Ct. App. 1975); Waterview Assocs., Inc. v. Lawyers Title Ins. Corp., 186 N.W.2d 803, 803-04 (Mich. Ct. App. 1971); Kuhlman v. Title Ins. Co., 177 F. Supp. 925, 926 (W.D. Mo. 1959).[5]

[5] For further edification, we note Appellants do not contend the loss here arose from a surveying error discoverable through the public records. However, the parties do not dispute SCDOT recorded its right-of-way. See S.C. Code Ann. § 57-5-550 (2006) (directing all rights-of-way for state highways be filed at SCDOT). Furthermore, we recognize "[t]he survey exception is aimed at excluding from coverage certain risks that can be ascertained by a physical inspection of the property." G.W. Thompson, Thompson on Real Property § 93.06(c) (2002) (emphasis added). Our Supreme Court, in I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000), provided:

> An appellate court may not, of course, reverse for any reason appearing in the record. The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.

(emphasis in original). Accordingly, we refuse to apply a rule of law Appellants failed to point out to this court or the circuit court.

B. Title Commitment

Appellants assert that Investors' failure to put a survey exception in the title commitment rendered the survey exception in the Policy invalid. Appellants did not preserve this issue for our review. The circuit court did not rule on this issue, and Appellants did not seek a ruling on it in their Rule 59, SCRCP, motion. See Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 235, 612 S.E.2d 719, 726 (Ct. App. 2005) ("An issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment."); McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 381, 597 S.E.2d 181, 186 (Ct. App. 2004) (holding an issue must be raised to and ruled upon by the trial court to be preserved for appellate review).

Additionally, Appellants fail to cite any case law for this proposition and make only conclusory arguments in support thereof. Thus, Appellants abandoned this issue on appeal. See Mulherin-Howell v. Cobb, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (noting when an appellant fails to cite any supporting authority for his position and makes conclusory arguments, the appellant abandons the issue on appeal). Consequently, we decline to address this issue.

CONCLUSION

We affirm the circuit court's summary judgment order. Crescent did not represent or covenant the width of SCDOT's right-of-way by incorporating the Plat. Moreover, Crescent coveyed 47.82 acres of real property to Bristol. The habendum clause unambiguously places the burden of a survey defect on Bristol and subsequent purchasers, and the circuit court correctly held exceptions (5) and (6) of the habendum clause limited Crescent's special warranty.

We decline to hold a title insurance policy always insures against surveying errors. Appellants failed to preserve the issue of whether the commitment precluded Investors from including the survey exception to the

Policy. Alternatively, Appellants offered only conclusory arguments to support this contention on appeal and, therefore, abandoned that argument.

AFFIRMED.

KITTREDGE, J. and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kenneth E. Bennett, Richard K. Bennett, James M. Hendershot, and Robert N. Parker, III, **Plaintiffs,**

v.

Investors Title Insurance Company, **Defendant.**

Investors Title Insurance Company, **Appellant,**

v.

Crescent Resources, LLC; Bristol, LLC and CBS Surveying & Mapping, Inc., **Defendants,**

Of Whom Crescent Resources, LLC is the **Respondent.**

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

Opinion No. 4153
Heard September 9, 2006 – Filed September 25, 2006

AFFIRMED

Louis H. Lang, of Columbia, for Appellant.

Benjamin A. Johnson and Stephen A. Cox, both of Rock Hill, and V. Clark Price, of Greenville for Respondent.

ANDERSON, J.: In this indemnification action, Investors Title Insurance Company appeals the circuit court's grant of summary judgment to Crescent Resources, LLC. On appeal, Investors argues the circuit court erred in failing to hold Crescent liable for an alleged breach of a deed covenant. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On December 28, 2001, Crescent conveyed 47.82 acres of real property in Oconee County (the Property) to Bristol, LLC, for $2.5 million. The deed from Crescent to Bristol (the Deed), entitled "Special Warranty Deed," contains a granting clause referring to an attached property description, which, in turn, incorporates a plat (the Plat). CBS Surveying and Mapping, Inc., prepared the Plat for Crescent. The Plat shows a sixty-six foot right-of-way, entitled "SC 188 KEOWEE SCHOOL RD (66' R/W)," on the western boundary of the Property.

The habendum clause of the Deed reads, in pertinent part:

> **TO HAVE AND TO HOLD** all and singular the Property, unto the said Grantee and Grantee's heirs, successors and assigns forever, except:
>
> . . . .

> (5) matters affecting title to the Property as shown on the Plat or which would be shown on a current and accurate survey of the Property (including any encroachments);
>
> (6) easements, covenants, restrictions and conditions of record, and rights-of-way of public and private streets and roads, including, but not limited to, the road shown on the Plat as "old road bed" and the sixty-six (66) foot wide road right-of-way shown on the Plat as "SC 188 Keowee School Road (66' R/W)" . . . .

The Deed further provides Crescent "covenants to warrant specially the title to the Property against the lawful claims of any person claiming from, through, or under it."

Later on the same day, Bristol conveyed the Property by general warranty deed to Kenneth E. Bennett, Richard K. Bennett, James M. Hendershot, and Robert N. Parker, III, (collectively Plaintiffs), for $2.85 million. On January 4, 2002, Plaintiffs procured from Investors an owner's title insurance policy (the Policy) covering the Property.

Plaintiffs developed the Property and built two brick walls at the entrance near Highway 188. The South Carolina Department of Transportation (SCDOT) notified Plaintiffs the walls had been built within SCDOT's right-of-way. The right-of-way easement, dated August 1, 1968, and recorded at SCDOT, shows Crescent granted a 200 foot right-of-way for Highway 188 to SCDOT.[1] See S.C. Code Ann. § 57-5-550 (2006) (directing all rights-of-way for state highways be filed at SCDOT).

[1] Crescent Resources, LLC conveyed the Property to Bristol. The Deed indicates Crescent Resources, LLC is "a successor by merger and conversion to Crescent Resources, Inc., whose name was changed from Crescent Land and Timber Corp." Crescent Land and Timber Corp. granted the easement to SCDOT.

After Plaintiffs notified Investors of a possible title insurance claim, Investors offered Plaintiffs $64,000 to settle the claim. Plaintiffs accepted the $64,000 in settlement of its claim for actual damages, leaving a claim for consequential damages outstanding. Having failed to fully settle the claim, Plaintiffs filed a complaint against Investors on June 26, 2003, alleging breach of the title insurance contract and bad faith. Investors answered the complaint and later filed an amended answer, adding a third-party complaint against Crescent, Bristol, and CBS.

In its third-party complaint, Investors sought indemnity from Crescent, alleging it breached the special warranty clause in the Deed. Moreover, Plaintiffs later amended their complaint to allege a breach of the Deed's warranty clause by Crescent and Bristol and negligence by CBS. Crescent filed separate answers to Investors' third-party complaint and Plaintiffs' amended complaint.

Investors moved for summary judgment against Plaintiffs. Subsequently, Crescent moved for summary judgment against Investors and Plaintiffs.[2] The circuit court granted Crescent's motion for summary judgment against both Plaintiffs and Investors, holding exceptions (5) and (6) in the habendum clause of the Deed limited Crescent's special warranty. Furthermore, the circuit court applied its ruling to Investors, finding Investors could not recover more than Plaintiffs.

Investors moved to alter or amend this order. The circuit court denied this motion but made minor factual corrections and entered an amended order. The circuit court also granted summary judgment to Investors against Plaintiffs. This appeal followed.

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: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a

[2] This motion is not included in the record.

matter of law. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006); Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corrections, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); Eagle Container Co., LLC v. County of Newberry, 366 S.C. 611, 620, 622 S.E.2d 733, 737 (Ct. App. 2005). If triable issues exist, those issues must go the jury. Mulherin-Howell v. Cobb, 362 S.E.2d 588, 595, 608 S.E.2d 587, 591 (Ct. App. 2005). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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; Law, 323 S.C. at 434, 629 S.E.2d at 648; BPS, Inc. v. Worthy, 362 S.C. 319, 325, 608 S.E.2d 155, 159 (Ct.App.2005). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006); see also Schmidt v. Courtney, 357 S.C. 310, 317, 592 S.E.2d 326, 330 (Ct.App.2003) (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Gadson v. Hembree, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005); Miller, 365 S.C. at 220, 616 S.E.2d at 729; Montgomery v. CSX Transp., Inc., 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004). 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. Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct.App.2004). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Rife v. Hitachi Const. Mach. Co., Ltd., 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005); Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 228, 612 S.E.2d 719, 722 (Ct. App. 2005). The moving party may discharge the burden of demonstrating the absence of a genuine issue of material fact by pointing out the absence of evidence to support the nonmoving party's case. Lanham v. Blue Cross and Blue Shield of South Carolina, Inc., 349 S.E. 256, 361, 563 S.E.2d 331, 333 (2002). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Wogan v. Kunze, 366, S.C. 583, 591, 623, S.E.2d 107, 112 (Ct. App. 2005). The nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rife, 363 S.C. at 214, 609 S.E.2d at 568.

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003); Eagle Container, 366 S.C. at 621, 622 S.E.2d at 738; Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 393, 593 S.E.2d 183, 186 (Ct.App.2004). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004); Wogan, 366, S.C. at 592, 623, S.E.2d at 112; B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004).

LAW/ANALYSIS

Investors contends the circuit court erred in holding exceptions (5) and (6) in the habendum clause of the Deed limited Crescent's special warranty. Investors argues: (1) the granting clause and its incorporation of the Plat created a representation or covenant of the width of SCDOT's right-of-way; (2) exceptions (5) and (6) in the Deed's habendum "cuts down" the fee simple estate conveyed in the granting clause, rendering the habendum repugnant to the granting clause; (3) the habendum and granting clause are inconsistent, making the Deed ambiguous; and (4) the Deed's special warranty automatically protects Bristol and subsequent purchasers against

claims created by Crescent; otherwise, the Deed would be a quitclaim deed. We disagree.

I. Construction of the Deed

The construction of a clear and unambiguous deed is a question of law for the court. Hammond v. Lindsay, 277 S.C. 182, 184, 284 S.E.2d 581, 582 (1981); Hunt v. Forestry Comm'n, 358 S.C. 564, 568, 595 S.E.2d 846, 848 (Ct. App. 2004); see also Vause v. Mikell, 290 S.C. 65, 68, 348 S.E.2d 187, 189 (Ct. App. 1986) ("The construction of an unambiguous deed is a question of law, not fact."). " '[I]t is the duty of the court to construe deeds and determine their legal effect, where there is no such ambiguity as requires parol proof and submission to the jury.' " Hunt, 358 S.C. at 569, 595 S.E.2d at 848 (quoting 26A C.J.S. Deeds § 168 (2001)).

"One of the first canons of construction of a deed is that the intention of the grantor must be ascertained and effectuated if no settled rule of law is contravened." S. Ry. Co. v. Smoak, 243 S.C. 331, 336, 133 S.E.2d 806, 808 (1963); Wayburn v. Smith, 270 S.C. 38, 41, 239 S.E.2d 890, 892 (1977); Estate of Sherman, 359 S.C. at 413, 597 S.E.2d at 853; see also McDaniel v. Connor, 206 S.C. 96, 100, 33 S.E.2d 75, 76 (1945) ("As has many times been said, the governing principle in the construction of deeds is that the intention of the grantor, if consistent with law, shall govern."). Moreover, in ascertaining such intention the deed must be construed as a whole, and effect given to every part thereof, if such can be done consistently with law. Wayburn, 270 S.C. at 42, 239 S.E.2d at 892; Bean v. Bean, 253 S.C. 340, 343, 170 S.E.2d 654, 655 (1969); Alexander v. Burnet, 39 S.C.L. (5 Rich.) 189, 196 (1851); see also First Carolinas Joint Stock Land Bank of Columbia v. Ford, 177 S.C. 40, 46, 180 S.E. 562, 565 (1935) ("Larger and more sensible rules of construction require that the whole deed should be considered together, and effect be given to every part, if all can stand together consistently with law . . . . ").

II. The Deed's Clauses

Initially, we address the legal effect of the clauses in the Deed. The term "premises" is used to refer to "all that part of [a] deed preceding the

habendum clause, containing generally the names or description of the parties; explanatory recitals, including consideration and its receipt; a description of the realty; the exception, if any; and sometimes a designation of the estate or interest conveyed." 26A C.J.S. Deeds § 35 (2001); see also Artis v. Artis, 47 S.E.2d 228, 232 (N.C. 1948) ("Ordinarily the premises and granting clauses designate the grantee and the thing granted, while the habendum clause relates to the quantum of the estate.").

In South Carolina, the term "granting clause" is used. This court, in Hunt v. Forestry Comm'n, 358 S.C. 564, 566-67, 595 S.E.2d 846, 847 (Ct. App. 2004), referred to the following language in a deed as the "granting clause:"

> The First Carolinas Joint Stock Land Bank of Columbia . . . [has] granted, bargained, sold and released, and by these presents [does] grant, bargain, sell and release unto the said [SCFC] and their successors in office all that certain piece . . . .

(emphasis removed); see also Estate of Sherman ex rel. Maddock v. Estate of Sherman ex rel. Snodgrass, 359 S.C. 407, 409, 597 S.E.2d 850, 850-51 (Ct. App. 2004) (referring to similar language in another deed as the "granting clause"). The granting clause in Crescent's deed to Bristol incorporates an attached property description which, in turn, incorporates the Plat.

The Latin phrase "habendum et tenendum" means "to have and to hold." Black's Law Dictionary 716 (7th ed. 1999). Thus, in Hunt, 358 S.C. at 567, 595 S.E.2d at 847, this court quoted the habendum clause in that deed: "To Have and to Hold all and singular the premises before mentioned unto the said [SCFC] and their successors in office, and assigns forever." (emphasis removed); see also Smoak v. McClure, 236 S.C. 548, 549, 115 S.E.2d 55, 55 (1960) ("The habendum clause is regular in form, as follows: 'To have and to hold, all and singular, the said premises before mentioned unto the said Ben Garris, and his Heirs and Assigns forever.' ").

The habendum "is the clause usually following the granting part of the premises of a deed, which defines the extent of the ownership in the thing granted to be held and enjoyed by the grantee." 26A C.J.S. Deeds § 36

(2001). Accordingly, in South Carolina, "the estate conveyed by the deed must be determined from the whole deed including the habendum clause." Batesburg-Leesville Sch. Dist. No. 3 v. Tarrant, 293 S.C. 442, 445, 361 S.E.2d 343, 345 (Ct. App. 1987). Luculently, the habendum in the Deed is the section beginning "TO HAVE AND TO HOLD . . ."

The habendum in the Deed to Bristol is followed by Crescent's covenant to Bristol whereby Crescent "covenants to warrant specially the title to the Property against the lawful claims of any person claiming from, through, or under it." "The doctrine of caveat emptor . . . has, in the absence of fraud and misrepresentation long governed the obligations of the parties in the sale of real estate in this State." Rutledge v. Dodenhoff, 254 S.C. 407, 412, 175 S.E.2d 792, 794 (1970). In South Carolina, the purchaser of unimproved land must covenant to protect whatever special rights or interests he presumes to acquire in the land. Jackson v. River Pines, Inc., 276 S.C. 29, 31, 274 S.E.2d 912, 913 (1981); see also 21 C.J.S. Covenants § 14 (1990) ("The only protection of title afforded a purchaser of land is in the covenants contained in the deed.").

In Martin v. Floyd, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984), this court explained:

> A South Carolina general warranty deed embraces all of the following five covenants usually inserted in fee simple conveyances by English conveyors: (1) that the seller is seized in fee; (2) that he has a right to convey; (3) that the purchaser, his heirs and assigns, shall quietly enjoy the land; (4) that the land is free from all encumbrances; and (5) for further assurances.

A grantor seeking to include all of the common law covenants of title may use the language in section 27-7-10 of the South Carolina Code to carry out this effect. The statute reads:

> The following form or purport of a release shall, to all intents and purposes, be valid and effectual to carry from one person to another or others the fee simple of any land or real estate if it

shall be executed in the presence of and be subscribed by two or more credible witnesses:

> The State of South Carolina.
>
> Know all men by these presents that I, A B, of _____, in the State aforesaid, in consideration of the sum of ___ dollars, to me in hand paid by C D of _____ County, State of _____, the receipt of which is hereby acknowledged, have granted, bargained, sold and released and by these presents do grant, bargain, sell and release unto the said C D all that (here describe the premises), together with all and singular the rights, members, hereditaments and appurtenances to said premises belonging or in any wise incident or appertaining; to have and to hold all and singular the premises before mentioned unto said C D, his heirs and assigns, forever. And I do hereby bind myself, my heirs, executors, and administrators, to warrant and forever defend all and singular said premises unto said C D, his heirs and assigns, against myself and my heirs and against every person whomsoever lawfully claiming or to claim the same, or any part thereof.
>
> Witness my hand and seal this ___ day of _____ in the year of our Lord _____ and in the ___ year of the independence of the United States of America. _____ [L.S.]

S.C.Code Ann. § 27-7-10 (Supp. 2005); see 17 S.C. Jur. Covenants § 32 (Supp. 2005). However, section 27-7-10 does not preclude the grantor from using other warranty language in a deed.

> Section 27-7-10 shall be so construed as not to oblige any person to insert the clause of warranty or to restrain him from inserting any other clause in conveyances, as may be deemed proper and

> advisable by the purchaser and seller, or to invalidate the forms formerly in use within this State.

S.C. Code Ann. § 27-7-20 (Supp. 2005).

A "special warranty" is "[a] warranty against any person's claim made by, through, or under the grantor or the grantor's heirs." Black's Law Dictionary 1581 (7th ed. 1999). For example, the deed at issue in Knotts v. Joiner, 217 S.C. 99, 102, 59 S.E.2d 850, 851 (1950), "was a printed form but the warranty clause was so stricken with pen as to change it from the usual general warranty to a special warranty, that is, against the heirs of the grantor only." A quitclaim deed, on the other hand, does not convey the fee, but only the right, title, and interest of the grantor. Martin v. Ragsdale, 71 S.C. 67, 77, 50 S.E. 671, 674 (1905).

III. Incorporation of the Plat

Investors' initial argument that the incorporation of the Plat creates a representation or covenant of the width of SCDOT's right-of-way completely ignores the habendum and warranty clauses.

"The question as to the purpose and effect of a reference to a plat in a deed is ordinarily one as to the intention of the parties to be determined from the whole instrument and the circumstances surrounding its execution." Lancaster v. Smithco, Inc., 246 S.C. 464, 468, 144 S.E.2d 209, 211 (1965). When a deed describes land as shown on a certain plat, such plat becomes part of the deed for the purpose of showing the boundaries, metes, courses and distances of the property conveyed. Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 397, 252 S.E.2d 133, 136 (1979); Carolina Land Co., Inc. v. Bland, 265 S.C. 98, 105, 217 S.E.2d 16, 19 (1975); see also Holly Hill Lumber Co. v. Grooms, 198 S.C. 118, 135, 16 S.E.2d 816, 823 (1941) (" 'As a general rule, when maps, plats, or field notes are referred to in a grant or conveyance they are to be regarded as incorporated into the instrument and are usually held to furnish the true description of the boundaries of the land . . . ' ").

In Blue Ridge Realty Co. v. Williamson, 247 S.C. 112, 118, 145 S.E.2d 922, 925 (1965), our Supreme Court stated the general rule that when the owner of land has it subdivided and platted into lots and streets and sells and conveys lots with reference to the plat, he thereby dedicates said streets to the use of such lot owners, their successors in title and the public. See also Carolina Land Co., 265 S.C. at 105, 217 S.E.2d at 19. Thus, the purchaser of lots with reference to the plat of the subdivision acquired every easement, privilege and advantage shown upon said plat, including the right to the use of all the streets, near or remote, as laid down on the plat by which the lots were purchased. Blue Ridge, 247 S.C. at 119-20, 145 S.E.2d at 925; Carolina Land Co., 265 S.C. at 105, 217 S.E.2d at 19.

In Lancaster, 246 S.C. at 469, 144 S.E.2d at 211, "[t]he only reference in the deed in th[e] case to the plat was in connection with the description of the lot." Therefore, such reference to the recorded plat made it a part of the deed for the purpose of showing the boundaries, metes, courses and distances of the property conveyed. Id. In that case, our Supreme Court edified:

> A plat, however, is not an index to encumbrances, and the mere reference in a deed, as in this case, to a plat for descriptive purposes does not incorporate a notation thereon as to an easement held by a third party so as to exclude such easement from the covenant against encumbrances in the absence of a clear intention that it so operate.

Id. (emphasis added).

Both Blue Ridge and Lancaster looked to the intention of the parties in incorporating a plat to determine its effect. In the present case, a reading of the Deed as a whole reveals the parties used the Plat as a reference to the boundaries, metes, courses and distances of the property conveyed. Crescent put the burden of obtaining an accurate survey on Plaintiffs and excluded from its grant "matters affecting title to the Property as shown on the Plat," matters "which would be shown on a current and accurate survey of the Property," and rights-of-way of public streets and roads. Moreover, Investors does not dispute that "[t]he actual dimensions and location of a highway right-of-way are things that will be revealed by a current and accurate survey

of the property prepared by the surveyor." Accordingly, we hold the intention of the parties in incorporating the Plat, when discerned from the Deed as a whole, was to show the boundaries, metes, courses and distances of the property conveyed, rather than represent or warranty the width of SCDOT's right-of-way.

IV. The Habendum

Investors' second contention that the habendum of the Deed is repugnant to or inconsistent with its granting clause is without merit. We recognize "when the estates given in the granting clause and the habendum of a deed are so repugnant to each other as not to be susceptible of any reasonable reconciliation, the granting clause will control and the habendum will be rejected as void." Glasgow v. Glasgow, 221 S.C. 322, 327, 70 S.E.2d 432, 434 (1952). When the granting clause in a deed purports to convey a fee simple absolute title, subsequent provisions of the deed cannot diminish that granted or deprive the grantee of the incidents of ownership in the property. Shealy v. S.C. Elec. & Gas Co., 278 S.C. 132, 135, 293 S.E.2d 306, 308 (1982). In Porter v. Ingram, 16 S.C.L. (Harp.) 492, 493-94 (1824), the Constitutional Court of Appeals of South Carolina held "when the premises are complete and perfect and the habendum is at variance with them, and they cannot stand together, the habendum is void." See also Rhodes v. Black, 170 S.C. 193, 202, 170 S.E. 158, 161 (1933) ("Where the habendum is repugnant to or irreconcilable with the grant, it will be rejected, and the grant will prevail.").

Investors essentially asserts SCDOT's right-of-way, an easement, reduces the fee simple grant by the total acreage of the easement. This position directly contravenes established law in South Carolina. In Douglas v. Med. Investors, Inc., 256 S.C. 440, 445, 182 S.E.2d 720, 722 (1971), respondent contended the reservation of an easement in a deed was "repugnant to the fee simple title granted and is, therefore, ineffective." Our Supreme Court noted:

> 'An easement is a right which one person has to use the land of another for a specific purpose.' Steele v. Williams, 204 S.C. 124, 28 S.E.2d 644; and 'gives no title to the land on which the

> servitude is imposed,' Morris v. Townsend, 253 S.C. 628, 172 S.E.2d 819. An easement is therefore not an estate in lands in the usual sense.'

Id. Thus, the court held the easement in that case "in no way cut down the fee simple estate conveyed" and, therefore, "the reservation of the easement following the description in the deed was not repugnant to the fee simple title conveyed in the granting clause." Id. at 445-46, 182 S.E.2d at 722.

Reading the Deed as a whole, the granting clause conveyed fee simple title in 47.82 acres of property to Bristol. The habendum then defines "the extent of the ownership in the thing granted to be held and enjoyed by the grantee." 26A C.J.S. Deeds § 36 (2001). In the instant case, the habendum is not repugnant to or inconsistent with the granting clause. Therefore, we conclude the habendum is not void, and the Deed is not ambiguous.

V. Limitation of Special Warranty

Investors maintains the special warranty clause in the Deed automatically provides protection against prior encumbrances created by Crescent. To hold otherwise allegedly would render it a quitclaim deed. A special warranty binds the grantor and the grantor's heirs. See Knotts v. Joiner, 217 S.C. 99, 102, 59 S.E.2d 850, 851 (1950). However, "[t]he grantor can, and often does, limit [covenants] so as to exclude existing encumbrances." G.W. Thompson, Thompson on Real Property § 82.10(c)(3) (Supp. 2005); see § 27-7-20; see also Steele v. McRaney, 855 So. 2d 1114, 1122-23 (Ala. Civ. App. 2003) (finding language grantee would take "subject to" matters a survey or inspection of the property would have uncovered prevented grantee from prevailing in breach of deed covenant claim); Kamenar R.R. Salvage, Inc. v. Ohio Edison Co., 607 N.E.2d 1108, 1113 (Ohio Ct. App. 1992) (finding when a deed provides grantee would take subject to "the state of facts which a personal inspection or accurate survey would disclose," grantee has no claim against grantor for power line easement).

Here, exceptions (5) and (6) in the habendum clause of the Deed limit Crescent's special warranty to Bristol. Specifically, the exceptions put

Bristol and subsequent purchasers on notice Crescent was not covenanting the Plat, matters which would be uncovered by a current and accurate survey, or public rights-of-way. In this respect, Crescent did not covenant the Property would be free from all encumbrances. Instead, in keeping with section 27-7-20, Crescent limited its covenant to encumbrances not excepted through the habendum clause. The circuit court did not err in finding exceptions (5) and (6) of the habendum clause limited Crescent's special warranty.

CONCLUSION

We hold Crescent did not represent or covenant the width of SCDOT's right-of-way by incorporating the Plat. Moreover, the habendum clause in the Deed is not repugnant to or inconsistent with the grant. Concomitantly, the habendum is not void, and the Deed is not ambiguous. The circuit court correctly held exceptions (5) and (6) of the habendum limited Crescent's special warranty. Accordingly, the circuit court's order is

AFFIRMED.

KITTREDGE, J. and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Michael J. McEachern, Appellant,

v.

South Carolina Employment Security Commission, Respondent.

Appeal From Beaufort County
Curtis L. Coltrane, Special Referee

Opinion No. 4154
Submitted September 1, 2006 – Filed September 25, 2006

AFFIRMED

Michael J. McEachern, of Port Royal, pro se Appellant.

Harold W. Funderburk, Jr., of the South Carolina Employment Security Commission, of Columbia, for Respondent.

GOOLSBY, J.: Michael J. McEachern appeals from a circuit court order affirming the denial of his claim for unemployment benefits by the South Carolina Employment Security Commission (the Commission). We affirm, finding substantial evidence supports the Commission's ruling.[1]

FACTS

McEachern began working in 1991 for the Roof Doctor, a business he formed that provides residential and commercial roofing services.[2] McEachern, the president of the corporation, is responsible for providing job proposals and estimates. He is the only person performing that function. His wife, Marilyn Smith, serves as the office manager.

Since 1991, the Roof Doctor has maintained an average of about twelve employees. When business slumped in 2002, the Roof Doctor laid off some employees, keeping a "skeleton crew" of about five or six employees, including McEachern, and sold some equipment. Because of the business downturn, McEachern eventually stopped taking a salary altogether. According to Smith, McEachern drew a salary of only $3,367.68 during the second quarter of 2003, compared with more than $11,000.00 for the previous quarter. Further, for the ten weeks immediately prior to the hearing in this matter, McEachern had not drawn a salary so the company could pay some of its outstanding financial obligations. McEachern continued, however, to work at least sixty hours a week, preparing bids and seeking jobs for the company. Business had been picking up, and the Roof Doctor expected to soon be able to resume paying McEachern a salary. McEachern had no plans to close the business or to look for other employment.

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[1] Because oral argument would not aid the Court in this appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

[2] The business began as a sole proprietorship; McEachern incorporated it several years later.

In June 2003, McEachern filed a claim for unemployment benefits while he continued to work for his company. On June 17, 2003, the Commission's Claims Adjudicator found McEachern did not meet the statutory eligibility requirement of being unemployed through no fault of his own because "as an officer of a corporation, [he had] control over [his] unemployment benefits." McEachern was deemed ineligible for benefits as of June 1, 2003.

On July 17, 2003, the Appeal Tribunal of the Commission upheld the Claims Adjudicator's determination. The Tribunal noted section 41-35-110 of the South Carolina Code provides a claimant must have unrestricted exposure to the labor market and be unemployed through no fault of his own. The Tribunal stated:

> The testimony reveals the claimant is a corporate official of an active business. It is unfortunate that the business slowed and has not sufficiently increased in order to allow him to receive pay for his services. However, since the claimant is not actively seeking other employment and is actively involved in the business, he does not meet the eligibility requirements of the law to receive benefits.

The full Commission confirmed the decision of the Appeal Tribunal, noting McEachern "continues to work as much as sixty hours a week for the employer and expects his business to return to profitability." The Commission found McEachern "is not unemployed since he continues to work in excess of the customary full-time hours for the employer."

McEachern appealed the Commission's ruling. The circuit court affirmed, stating substantial evidence supported the Commission's determination that McEachern did not meet the legal definition of "unemployed." The court found the Commission's decision was reasonable and not controlled by an error of law or an abuse of discretion.

STANDARD OF REVIEW

The Commission is an agency governed by the Administrative Procedures Act (APA).[3] Under the APA, a reviewing tribunal may reverse or modify the decision of the agency where it is arbitrary or capricious or constitutes an abuse of discretion.[4] Reviewing courts apply the substantial evidence rule, under which the agency's decision is upheld unless it is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record."[5]

"Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached."[6] "It is more than a mere scintilla of evidence, but is something less than the weight of the evidence."[7] "Furthermore, the possibility of drawing two inconsistent conclusions from the evidence does not prevent a court from concluding that substantial evidence supports an administrative agency's finding."[8]

LAW/ANALYSIS

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[3] Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984).

[4] S.C. Code Ann. § 1-23-610(D)(f) (2005).

[5] Id. § 1-23-610(D)(e).

[6] Merck v. South Carolina Employment Sec. Comm'n, 290 S.C. 459, 461, 351 S.E.2d 338, 339 (1986).

[7] Porter v. South Carolina Pub. Serv. Comm'n, 333 S.C. 12, 20-21, 507 S.E.2d 328, 332 (1998).

[8] Id. at 21, 507 S.E.2d at 332.

On appeal, McEachern argues the Commission erred in denying his claim for benefits. We disagree.

Section 41-35-110 of the South Carolina Code governs the requirements for eligibility and provides as follows:

> An unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds that:
>
> (1) He has made a claim for benefits . . . .
>
> (2) He has registered for work and thereafter has continued to report at an employment office in accordance with such regulations as the Commission may prescribe, except that the Commission may, by regulation, waive or alter either or both of the requirements of this paragraph as to individuals attached to regular jobs . . . .
>
> (3) He is able to work and is available for work at his usual trade, occupation, or business or in such other trade, occupation, or business as his prior training or experience shows him to be fitted or qualified . . . .
>
> (4) He has been unemployed for a waiting period of one week . . . .
>
> (5) Claimant is separated, through no fault of his own, from his most recent bona fide employer . . . .
>
> (6) He participates in reemployment services . . . .[9]

A person is deemed "unemployed," as used in this context, "in any week during which he performs no services and with respect to which no wages are payable to him or in any week of less than full-time work if the

[9] S.C. Code Ann. § 41-35-110 (1986 & Supp. 2005) (emphasis added).

wages payable to him with respect to such week are less than his weekly benefit amount."[10]

"The burden is on a claimant to show compliance with benefit eligibility requirements."[11] "This includes a duty to show availability for work and a reasonable effort to obtain employment."[12] "The purpose of the availability requirement is to provide a test for determining whether a claimant is actually and currently attached to the labor market."[13]

McEachern contends the Commission erred in finding him ineligible on the basis that he was not seeking other employment and, as an officer of the corporation, he was not in a position to be involuntarily unemployed. He notes under section 41-35-110(2) of the South Carolina Code, the Commission may, by regulation, waive the requirement that an individual register for work. Citing Regulation 47-20(B)[14], McEachern argues the

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[10] Id. § 41-27-370(1) (1986) (emphasis added).

[11] Wellington v. South Carolina Employment Sec. Comm'n, 281 S.C. 115, 117, 314 S.E.2d 37, 38 (Ct. App. 1984).

[12] Id.

[13] Id.

[14] 24 S.C. Code Ann. Regs. 47-20 (Supp. 2005). This regulation provides as follows:

> 47-20. Types of Unemployment.
>
> A. "Non-Job-Attached Unemployment" means the unemployment of any individual in any week during which he performs no services and with respect to which no wages or wages totaling less than his weekly benefit amount are payable to him. Claims for such benefits will be filed directly with the local Commission office by the individual and not an employer. The

Commission should have characterized him as having "job-attached unemployment." McEachern states that, because he was job-attached, i.e., he had a regular job to which he could return, he was not required to seek alternative work and could continue working at his own company.

"Job-attached unemployment" is defined in Regulation 47-20(B) as "the unemployment of any individual who, during any week, earns less than his weekly benefit amount, is employed by a regular employer, and works less than his normal customary full-time weekly hours because of a lack of full-time work."[15]

We find there is substantial evidence to support the Commission's determination that McEachern was not unemployed because he continued to work in excess of customary full-time hours. At the hearing in this matter, McEachern acknowledged he worked at least sixty hours per week - well in excess of a normal work week - performing essential services for the company in order to meet other expenses, including the salaries of the

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> claimant will register for work with the Commission office and seek full time employment while pursuing such claim for benefits.
>
> B. "Job-Attached Unemployment" means the unemployment of any individual who, during any week, earns less than his weekly benefit amount, is employed by a regular employer, and works less than his normal customary full-time weekly hours because of a lack of full-time work. Any claim for benefits made under this definition will be initiated by the employer and a continuing employer-employee relationship is understood. In connection with any claim for benefits for job-attached unemployment, the claimant shall declare the amount of his earnings [from any source] for the seven day period for which he claims job-attached benefits.

[15] Id. 47-20(B) (emphasis added).

"skeleton crew" he retained. He admittedly was not seeking alternative employment because he expected his business to return to profitability in the near future.[16] Thus, even applying the regulation's definition of "job-attached unemployment," as urged by McEachern, he was not "unemployed" because he was not working fewer hours as required by the regulation.[17]

Although it is unfortunate that McEachern's business suffered a downturn, as the Commission notes in its brief, there is no provision that would allow it to subsidize individuals who choose to operate a business at a loss and continue to work while deferring a salary in order either to pay other employees or to meet other financial obligations.

The unemployment statutes and regulations, as currently written, are not designed to allow a corporate officer to elect to pay himself during profitable months, but then forego pay and receive unemployment benefits during less profitable months, as it would not be feasible for the Commission to sustain private businesses in this manner.[18]

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[16] McEachern indicated his business is somewhat seasonal. When talking about the fact that he previously employed nearly a dozen workers and sometimes "twice that," McEachern stated: "It's kind of a seasonal business and we fully expect that it will return to that if we can ride this out."

[17] Cf. Rieth v. Adm'r, Ohio Bureau of Employment Servs., 539 N.E.2d 1146, 1148-49 (Ohio Ct. App. 1988) (holding a corporate president was unemployed after laying himself off following substantial business losses and that he was "available for work" where he continued to work for his business only a few hours a week and actively contacted potential employers in search of alternative work).

[18] See, e.g., Alexander v. Walnut Fork Design, 593 S.W.2d 493, 493-94 (Ark. Ct. App. 1980) (finding a corporate president and hourly wage earner was not unemployed within the meaning of the state's unemployment security law and not eligible for benefits where he was laid off when the corporation ran out of work, but was expected to return to work with the same corporation within two months and was not seeking alternative employment); Child v.

Because of our narrow scope of review, we must affirm the Commission if there is substantial evidence, which is less than the weight of the evidence, to support the Commission's determination. In this case, there is substantial evidence to support the Commission's findings. Accordingly, the Commission's ruling is

AFFIRMED.

BEATTY and WILLIAMS, JJ., concur.

Bd. of Review of Indus. Comm'n, 332 P.2d 928, 929 (Utah 1958) ("A president of a corporation who is also manager, who has year-round responsibility to operate the business of the corporation and does so, cannot by purportedly laying himself off as manager in those periods when there may be no actual business activity, but when his corporate duties and management activity persist in the pursuit of future or continued business of the company, obtain unemployment benefits. He is much in the same position as a man working on a deferred commission payment basis who certainly cannot be said to be unemployed during the time the commission actually is not paid, but earned.").