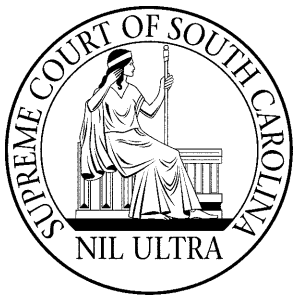

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 46
December 15, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2008-UP-670-The State v. Sidney Darden Dowling, Jr.
(Charleston, Judge Michelle J. Childs)

2008-UP-671-The State v. Clarence Glover
(Hampton, Judge John L. Breeden)

2008-UP-672-The State v Manix A. Bailey
(York, Judge Michael G. Nettles)

2008-UP-673-The State v Randall Lane Smith, Sr.
(Greenville, Judge D. Garrison Hill)

2008-UP-674-The State v. Larry Mitchell, Jr.
(Richland, Judge L. Casey Manning)

2008-UP-675-The State v. Erika Moore
(Spartanburg, Judge Kenneth G. Goode)

2008-UP-676-The State v. Britney E. Ervin
(Greenville, Judge James W. Johnson, Jr.)

2008-UP-677-The State v. Terry Lee Smith
(Spartanburg, Judge Lee S. Alford)

2008-UP-678-The State v. Bianca Lanor Ford
(Georgetown, Judge John M. Milling)

2008-UP-679-Calvin Bernard Hankins #241248 v. S.C. Department of Corrections
(Richland, Administrative Law Judge John D. Geathers)

2008-UP-680-The State v. Clifton Suber
(Richland, Judge James R. Barber)

PETITIONS FOR REHEARING

4423-State v. D. Nelson	Pending
4436-State v. Whitner	Pending
4437-Youmans v. SCDOT	Pending
4438-State v. Martucci	Pending
4439-Bickerstaff v. Prevost	Pending
4440-Corbett v. Weaver	Pending
4441-Ardis v. Combined Ins.	Pending
4444-Enos v. Doe	Pending
4446-Vista Antiques v. Noaha LLC	Pending
4447-State v. O. Williams	Pending
4448-State v. Mattison	Pending
4449-Sloan v. Greenville County	Pending
4450-SC Coastal v. SCDHEC	Pending
4451-State v. Dickey	Pending
4454-Paschal v. Price	Pending
4455-Gauld v. O'Shaugnessy Realty	Pending
4457-Pelzer v. State	Pending
4458-McClurg v. Deaton	Pending
2008-UP-214-State v. James Bowers	Pending
2008-UP-283-Gravelle v. Roberts	Pending

2008-UP-285-Biel v. Clark	Pending
2008-UP-507-State v. R. Hill	Pending
2008-UP-531-State v. Collier	Pending
2008-UP-534-State v. Woody	Pending
2008-UP-536-State v. A. Woods	Pending
2008-UP-539-Pendergrass v. SCDPP&P	Pending
2008-UP-543-O'Berry v. Carthens	Pending
2008-UP-546-State v. R. Niles	Pending
2008-UP-552-Theron Bartell v. Francis Marion University	Pending
2008-UP-554-State v. James Prather	Pending
2008-UP-556-State v. C. Grate	Pending
2008-UP-559-SCDSS v. Katrina P.	Pending
2008-UP-565-State v. Matthew W. Gilliard, III	Pending
2008-UP-591-Mungin v. REA Construction	Pending
2008-UP-595-Eugene Stauch v. Deborah Pearce	Pending
2008-UP-596-Doe (C. Collie) v. Duncan	Pending
2008-UP-598-Causey v. SCB&CB	Pending
2008-UP-604-State v. J. Davis	Pending
2008-UP-606-SCDSS v. Serena B. and Gerald B.	Pending
2008-UP-607-DeWitt v. Charleston Gas Light	Pending
2008-UP-609-State v. Thompson	Pending
2008-UP-612-Rock Hill v. Garga-Richardson	Pending

2008-UP-613-State v. Bradley Pending

2008-UP-629-State v. L. Waller Pending

2008-UP-639-Overnite Transport v. SC Second Injury Fund Pending

2008-UP-643-Howard v. Marvin Pittman Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4279-Linda Mc Co. Inc. v. Shore Pending

4285-State v. Danny Whitten Pending

4300-State v. Carmen Rice Pending

4304-State v. Arrowood Pending

4310-State v. John Boyd Frazier Pending

4314-McGriff v. Worsley Pending

4316-Lubya Lynch v. Toys "R" Us, Inc Pending

4318-State v. D. Swafford Pending

4320-State v. D. Paige Pending

4325-Dixie Belle v. Redd Pending

4338-Friends of McLeod v. City of Charleston Pending

4339-Thompson v. Cisson Construction Pending

4342-State v. N. Ferguson Pending

4344-Green Tree v. Williams Pending

4353-Turner v. SCDHEC Pending

4354-Mellen v. Lane Pending

4355-Grinnell Corp. v. Wood	Pending
4369-Mr. T. v. Ms. T.	Pending
4370-Spence v. Wingate	Pending
4371-State v. K. Sims	Pending
4372-Robinson v. Est. of Harris	Pending
4373-Partain v. Upstate Automotive	Pending
4374-Wieters v. Bon-Secours	Pending
4375-RRR, Inc. v. Toggas	Pending
4376-Wells Fargo v. Turner	Pending
4377-Hoard v. Roper Hospital	Pending
4382-Zurich American v. Tolbert	Pending
4383-Camp v. Camp	Pending
4384-Murrells Inlet v. Ward	Pending
4385-Collins v. Frasier	Pending
4386-State v. R. Anderson	Pending
4387-Blanding v. Long Beach	Pending
4388-Horry County v. Parbel	Pending
4389-Charles Ward v. West Oil Co.	Pending
4391-State v. L. Evans	Pending
4392-State v. W. Caldwell	Pending
4394-Platt v. SCDOT	Pending
4395-State v. H. Mitchell	Pending

4396-Jones (Est. of C. Jones) v. L. Lott	Pending
4397-T. Brown v. G. Brown	Pending
4401-Doe v. Roe	Pending
4402-State v. Tindall	Pending
4403-Wiesart v. Stewart	Pending
4405-Swicegood v. Lott	Pending
4406-State v. L. Lyles	Pending
4407-Quail Hill, LLC v Cnty of Richland	Pending
4409-State v. Sweat & Bryant	Pending
4411-Tobia v. Rice	Pending
4412-State v. C. Williams	Pending
4413-Snavely v. AMISUB	Pending
4414-Johnson v. Beauty Unlimited	Pending
4417-Power Products v. Kozma	Pending
4419-Sanders v. SCDC	Pending
4420-Mauricio v. The State	Pending
4426-Mozingo & Wallace v. Patricia Grand	Pending
4428-The State v. Ricky Brannon	Pending
2007-UP-151-Lamar Florida v. Li'l Cricket	Pending
2007-UP-272-Mortgage Electronic v. Suite	Pending
2007-UP-364-Alexander Land Co. v. M&M&K	Pending

2007-UP-498-Gore v. Beneficial Mortgage	Pending
2007-UP-544-State v. C. Pride	Pending
2008-UP-047-State v. Dozier	Pending
2008-UP-060-BP Staff, Inc. v. Capital City Ins.	Pending
2008-UP-070-Burriss Elec. v. Office of Occ. Safety	Pending
2008-UP-081-State v. R. Hill	Pending
2008-UP-082-White Hat v. Town of Hilton Head	Pending
2008-UP-084-First Bank v. Wright	Pending
2008-UP-104-State v. Damon Jackson	Pending
2008-UP-126-Massey v. Werner Enterprises	Pending
2008-UP-131-State v. Jimmy Owens	Pending
2008-UP-151-Wright v. Hiester Constr.	Pending
2008-UP-173-Professional Wiring v. Sims	Pending
2008-UP-187-State v. Rivera	Pending
2008-UP-192-City of Columbia v. Jackson	Pending
2008-UP-194-State v. D. Smith	Pending
2008-UP-200-City of Newberry v. Newberry Electric	Pending
2008-UP-204-White's Mill Colony v. Williams	Pending
2008-UP-205-MBNA America v. Baumie	Pending
2008-UP-207-Plowden Const. v. Richland-Lexington	Pending
2008-UP-209-Hoard v. Roper Hospital	Pending

2008-UP-223-State v. C. Lyles	Pending
2008-UP-240-Weston v. Margaret Weston Medical	Pending
2008-UP-244-Magaha v. Greenwood Mills	Pending
2008-UP-247-Babb v. Est. Of Watson	Pending
2008-UP-251-Pye v. Holmes	Pending
2008-UP-252-Historic Charleston v. City of Charleston	Pending
2008-UP-256-State v. T. Hatcher	Pending
2008-UP-261-In the matter of McCoy	Pending
2008-UP-271-Hunt v. State	Pending
2008-UP-277-Holland v. Holland	Pending
2008-UP-278-State v. C. Grove	Pending
2008-UP-279-Davideit v. Scansource	Pending
2008-UP-289-Mortgage Electronic v. Fordham	Pending
2008-UP-296-Osborne Electric v. KCC Contr.	Pending
2008-UP-297-Sinkler v. County of Charleston	Pending
2008-UP-310-Ex parte:SCBCB (Sheffield v. State)	Pending
2008-UP-320-Estate of India Hendricks (3)	Pending
2008-UP-330-Hospital Land Partners v. SCDHEC	Pending
2008-UP-331-Holt v. Holloway	Pending
2008-UP-332-BillBob’s Marina v. Blakeslee	Pending
2008-UP-335-D.R. Horton v. Campus Housing	Pending

2008-UP-336-Premier Holdings v. Barefoot Resort	Pending
2008-UP-340-SCDSS v. R. Jones	Pending
2008-UP-418-L.A. Barrier v. SCDOT	Pending
2008-UP-431-Silver Bay v. Mann	Pending
2008-UP-432-Jeffrey R. Hart v. SCDOT	Pending
2008-UP-502-Johnson v. Jackson	Pending
2008-UP-512-State v. M. Kirk	Pending
2008-UP-523-Lindsey #67021 v. SCDC	Pending
2008-UP-526-State v. A. Allen	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Craig Duval Davis, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 26570
Heard November 18, 2008 – Filed December 15, 2008

DISMISSED AS IMPROVIDENTLY GRANTED

John S. Nichols, of Bluestein Nichols Thompson and Delgado, of Columbia, for Petitioner.

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, of Columbia, John Gregory Hembree, of Conway, for Respondent.

PER CURIAM: We granted certiorari to review the Court of Appeals decision in *State v. Davis*, 371 S.C. 412, 639 S.E.2d 457 (Ct. App. 2006). After careful consideration of the record and briefs, the writ of certiorari is

DISMISSED AS IMPROVIDENTLY GRANTED.

TOAL, C.J., WALLER, BEATTY, KITTREDGE, JJ. and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anthony M. Lounds, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Greenville County
John C. Few, Circuit Court Judge

Opinion No. 26571
Submitted October 22, 2008 – Filed December 15, 2008

REVERSED AND REMANDED

Appellate Defender LaNelle C. DuRant, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Karen Ratigan, all of Columbia, for Respondents.

JUSTICE WALLER: In this post-conviction relief (PCR) case, we granted certiorari to review the PCR court's denial of relief to petitioner, Anthony M. Lounds. We reverse and remand for a new trial.

FACTS

Petitioner was indicted for armed robbery and kidnapping. A jury found petitioner not guilty of armed robbery but convicted him on the kidnapping charge. He was sentenced to life without parole (LWOP).

At trial, Todd Garrett testified that on February 18, 2000, petitioner entered his warehouse in Greenville County and inquired about a job. When Garrett replied that petitioner would have to submit an application at the company's office located a few blocks away, petitioner "stepped a little bit closer and pulled a gun out of his left hand pocket, kept it to his side and said, give me your money." Garrett stated he only had a couple of dollars in his wallet. Another man who had been standing in the doorway approached, and helped petitioner pat Garrett down. Garrett testified that petitioner asked where the rest of the money was, and he said he had a little bit in a bank account. According to Garrett, petitioner and the other man pulled him up, and led him out of the warehouse to Garrett's truck.

Garrett testified that once in his truck, petitioner found a knife and held it to his neck while the other man drove the truck. After Garrett told them he did not have an ATM card and would have to go into the bank, Garrett then suggested they could go to his parents' house to find some money there. Garrett explained that he believed his life was in danger if he did not "get them something."

After parking the truck in his parents' driveway, Garrett, petitioner, and the other man exited the truck. Garrett advised the other man that the keys to the house were on the keychain left in the truck. When the man went back to retrieve the keys, Garrett punched petitioner in the face and ran away. He noticed that the men had gotten back into his truck and were coming back after him. Once Garrett made it to a store, he called police and reported the incident.

The police officer left after taking Garrett's statement. Garrett testified that he and his father decided to "ride through the neighborhoods" to find the perpetrators or his truck. They located the truck and told police its location. The truck was impounded and a forensic investigation revealed a fingerprint on the rearview mirror that matched petitioner. Garrett identified petitioner from a photo line-up and then again at trial. Garrett testified he had never seen petitioner before the day of the incident.

Petitioner testified in his own defense and related a much different account. According to petitioner, Garrett had bought crack cocaine from him on several occasions from 1999 to 2000, and Garrett owed petitioner about five hundred fifty dollars in connection with the drug deals. Petitioner testified that he went to Garrett's place of business on February 18, 2000, and asked for his money. Petitioner stated he did not have a gun, he did not threaten Garrett in any way, and he was not looking for any trouble. When pressed on whether he had a weapon, petitioner stated that he did not need a weapon since "there was [sic] two people."

Petitioner further explained that Garrett "volunteered to go to his people's home" to get some money. According to petitioner, it was Garrett who drove the truck, and when he stopped it, he "got out and took off running." Petitioner took the truck back to Garrett's warehouse and suggested that Garrett had moved the truck to the location where police found it. The following colloquy then took place:

> Q. You did not commit this crime here?
>
> A. No, sir, I didn't. If anything you can find me guilty of is taking his truck. I did that. You know what I'm saying? I had to get back to my location. That's how my fingerprint got on that window.
>
> Q. All right. And you don't make money by robbing people? You sell drugs?

A. Yes, Sir. Got various drug charges to prove it.

On reply, the State recalled Garrett who denied ever buying or using crack cocaine.

During deliberations, the jury returned to the courtroom with a request for a recharge on kidnapping. A few hours later, the jury again returned with a request to rehear petitioner's testimony in full. Ultimately, the jury reached its verdict of not guilty on the armed robbery charge, but guilty on the kidnapping charge. Because of a prior conviction, the trial court sentenced petitioner to LWOP.[1]

Petitioner directly appealed, but the Court of Appeals dismissed the appeal. State v. Lounds, Op. No. 2003-UP-408 (S.C. Ct. App. filed June 18, 2003).

Thereafter, petitioner filed for PCR. Petitioner raised several issues at the hearing, including that trial counsel was ineffective for failing to investigate and prepare for trial, and for making improper comments during closing argument. The PCR court denied relief and also subsequently denied petitioner's motion to alter or amend the judgment.

ISSUES

1. Did the PCR court err in failing to find counsel ineffective for inadequate preparation?

2. Did the PCR erroneously find that counsel's closing argument comments were not improper?

[1] Petitioner was convicted of voluntary manslaughter in 1995. He was sentenced to 15 years imprisonment, suspended on the service of seven years and five years probation.

DISCUSSION

In order to prove counsel was ineffective, the PCR applicant must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984); Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Moreover, "when a defendant's conviction is challenged, 'the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.'" Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (quoting Strickland v. Washington, 466 U.S. at 695).

In a PCR proceeding, the burden is on the applicant to prove the allegations in his application. E.g., Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). This Court will uphold the findings of the PCR court if there is any evidence of probative value to support them. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, if no probative evidence supports these findings, the Court will not uphold the findings of the PCR court. Jackson v. State, 355 S.C. 568, 570, 586 S.E.2d 562, 563 (2003). Furthermore, this Court will reverse the PCR court's decision when it is controlled by an error of law. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

1. Inadequate preparation

Petitioner argues that trial counsel was ineffective for failing to adequately prepare for petitioner's trial, especially given the fact that counsel had ample notice this was an LWOP case. We agree.

A criminal defense attorney has a duty to perform a reasonable investigation. Ard v. Catoe, 372 S.C. at 331, 642 S.E.2d at 597. "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make

an **independent** investigation of the facts and circumstances of the case." Id. at 331-32, 642 S.E.2d at 597 (internal quotes and citation omitted).

Petitioner's trial took place on December 4 – 5, 2001. At the outset, trial counsel Greg Newell informed the court that petitioner's family was "supposed to bring several witnesses with them" for petitioner. Counsel then requested a continuance because he had "found out the names of these people **just this morning**" and therefore had not had a chance to subpoena them. (emphasis added).

Newell discussed witnesses for the defense a few other times during trial. After a pretrial hearing, Newell advised the trial court there were two witnesses who would be arriving in the afternoon, but two others who were "not available." Newell offered his opinion that the unavailable witnesses would not "add much" to petitioner's case, although he informed the trial court that the witnesses would be able to connect Garrett with petitioner through drug dealing. Later that afternoon, counsel requested assistance to locate a witness named Elaine Sara Hawkins who was in detention. Hawkins, however, was unable to be located either that day or the following day. Newell told the court that he had spoken to the two other witnesses, but contended they would not "add that much" to the case. As a result, petitioner was the sole defense witness.

According to the State, both petitioner and Newell had been served written notice of the State's intent to seek an LWOP sentence on May 3, 2001. Additionally, Newell was served again with notice on October 18, 2001. Therefore, Newell had several months' notice petitioner was facing a LWOP sentence if convicted.

At the PCR hearing, petitioner testified that Newell had not done anything to investigate his case. Significantly, petitioner stated Newell had met with him only once – **on the morning of trial**. Although Newell had represented petitioner in a probation violation matter in August 2001, petitioner testified Newell never discussed the armed robbery and kidnapping charges at all. Petitioner further explained that on the morning of trial, he gave Newell the names of witnesses who could identify Garrett as someone

with whom he had dealt. Petitioner said Newell showed him some discovery that morning, but Newell did not discuss the file; he simply asked petitioner to look it over and if petitioner saw anything, to let him know.

Petitioner presented two other witnesses at the PCR hearing. George Lounds, petitioner's brother, testified that Garrett and petitioner bought and used drugs together. George stated that Newell spoke to him before trial, and said he would get back to him, but George never heard back from Newell. According to George, if Newell had called him to the stand, he would have testified about the connection between Garrett and petitioner. Moreover, George stated he was surprised when he learned that petitioner had been charged with robbing and kidnapping Garrett because the two of them were "always together" hanging out and smoking together at a crack house.

Preston Lounds, petitioner's nephew, testified that he had seen Garrett purchase drugs and had also seen petitioner and Garrett together **in Garrett's truck**. Preston further testified he was at the courthouse during petitioner's trial, but Newell never spoke to him.

Newell did not testify at the PCR hearing. The State attempted to subpoena Newell for the PCR hearing, but was unable to successfully serve him.[2]

The PCR court found that "trial counsel adequately conferred with [petitioner], conducted a proper investigation, and was competent in his representation." The PCR court suggested that because Newell told the trial court the witnesses would not "add anything to the defense case," it was a strategic reason to not call the witnesses. Moreover, the PCR court found it unlikely that George and Preston's testimony "would have overcome the victim's testimony at trial."

[2] We note that the PCR hearing was held in 2004. In 2002, Newell was definitely suspended for nine months. See In re Newell, 349 S.C. 40, 562 S.E.2d 308 (2002). Newell was again suspended in 2003 for failure to comply with CLE requirements. It appears Newell currently remains suspended from the practice of law.

We find there is no probative evidence to support the PCR court's findings on this issue.

We have recognized that when counsel articulates a **valid** reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. Ingle v. State, 348 S.C. 467, 560 S.E.2d 402 (2002); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). The validity of counsel's strategy is reviewed under "an objective standard of reasonableness." Ingle, 348 S.C. at 470, 560 S.E.2d at 402.

In the instant case, however, Newell did not articulate a strategy because he did not testify at the PCR hearing. Although Newell did state to the trial court he believed the witnesses would not add much to petitioner's defense, we find this was not objectively reasonable given the defense theory of the case. The only defense Newell presented to the jury was that petitioner and Garrett knew each other through drug dealing. If witnesses other than petitioner were willing to testify to this fact, certainly that would have added significantly to the credibility of petitioner's case. Thus, we find the PCR court erred in finding that Newell offered an objectively valid strategic reason not to call these witnesses.

Furthermore, both the trial transcript and petitioner's PCR testimony inescapably point to the conclusion that Newell simply had not adequately prepared the defense case. Newell himself admitted to the trial court he had only learned of defense witnesses that morning, and therefore they had neither been interviewed nor subpoenaed. Petitioner corroborated this at the PCR hearing when he stated Newell had only spoken to him about the case on the morning of trial.

We hold the evidence clearly shows that Newell inadequately prepared for trial. See Ard v. Catoe, supra (at a minimum, counsel has the duty to interview potential witnesses). This was unreasonable in light of the fact that Newell had several months' notice that petitioner was facing LWOP if convicted. Therefore, we find counsel deficient in this regard.

As to the prejudice resulting from counsel's deficient performance, we believe petitioner clearly was prejudiced by Newell's failure to subpoena and call witnesses who would have supported petitioner's own testimony at trial. With its not-guilty verdict on the armed robbery charge, the jury necessarily rejected several aspects of Garrett's account, and accepted as true certain parts of petitioner's testimony. Moreover, the jury's questions during deliberations indicate it also struggled with whether petitioner was guilty of kidnapping. Thus, we find that if additional witnesses had confirmed petitioner's testimony, there is a reasonable likelihood the result of the trial would have been different on the kidnapping count. Strickland v. Washington, supra.

Accordingly, the PCR court erred in not finding ineffective assistance of counsel on this issue. See Jackson v. State, supra (if no probative evidence supports the PCR court's findings, this Court will not uphold the findings of the PCR court) Pierce v. State, supra (the PCR court's decision will be reversed when it is controlled by an error of law).

2. Counsel's closing argument comments

Petitioner also argues the PCR court erred in not finding counsel ineffective for certain comments made during closing argument. We agree.

During closing argument, Newell essentially tried to point out the inconsistencies and improbabilities in Garrett's account. However, he also offered his own characterization of petitioner's testimony, as follows:

> But what it comes down to is two different stories…
>
> The victim told a story. And his story was that there was an armed robbery. And in the course of that armed robbery he was taken to his parents' home, let out, escaped, and then called the police. My client's story is, and he admitted, I deal drugs. I admit that I'm a criminal in that respect, but I did not do this armed robbery. I came there to collect some money I was owed. The guy had built up an account, I mean, and it was getting too

> big. And I wanted my money. **And I brought along a little muscle.… I brought along a little muscle with me. Two against one, hey, we're going to – we want our money. You owe us money. We want our money. A little bit of leaning, not necessarily beating him up.** But I'm standing there, two big guys, I need my money. Okay.

(Emphasis added).

At the PCR hearing, petitioner testified that Newell "repeatedly pounded his right fist into his left palm in a display of use of force to the jury." According to petitioner, Newell pounded his fist as he said, "I brought along a little muscle." Petitioner further maintained he told Newell that he did not rob or kidnap Garrett and had not threatened Garrett in any way; petitioner specifically denied he had told Newell he went with some "muscle." In addition, petitioner stated that Newell's comments, coupled with the fist-pounding, gave the jury the impression that petitioner used force, which is an element of kidnapping.[3]

The PCR court found that Newell's comments were not improper as he was "simply presenting to the jury an alternate explanation of events that was implied from [petitioner's] own testimony."

In our opinion, there is no probative evidence to support the PCR court's findings on this issue. While Newell's comments were not an outright admission of kidnapping, they significantly departed from petitioner's own testimony which was that Garrett "volunteered to go to his people's home" to get some money. The pounding of Newell's fist into his palm only served to highlight the inference that petitioner and the other man had threatened the use of force. This form of argument did not advocate in petitioner's favor, but rather tended to support the State's theory on

[3] The trial court charged the jury that kidnapping has four elements: (1) intent (2) to take or carry away the victim (3) by force or threat of force (4) without the consent of the victim. Specifically as to the element of force, the trial court stated that force "can result from the threatened use of force by placing that person in fear of losing his life or suffering bodily harm."

kidnapping. Therefore, we hold Newell's closing argument comments were improper and constituted deficient performance.

We further find petitioner was prejudiced by Newell's closing argument. Both petitioner and Garrett testified that they went from the warehouse to Garrett's parents' home in the truck. Thus, the elements at issue were petitioner's intent, force, and the victim's consent. Petitioner's credibility was crucial as to these elements. The jury clearly struggled with whether petitioner was guilty of kidnapping as evidenced by its requests for a recharge on kidnapping and the replaying of petitioner's testimony. Yet, petitioner's own counsel damaged the defense case because the closing argument did not support petitioner's account of what had happened. Cf. Ingle v. State, 348 S.C. at 472, 560 S.E.2d at 403 (where defense counsel put up a witness who gave testimony contradictory to the petitioner's defense and was therefore "quite damaging" to the defense, the Court found ineffective assistance of counsel). In other words, we find there is a reasonable probability that, but for counsel's improper closing argument comments, the result of the trial would have been different. Strickland v. Washington, supra.

CONCLUSION

The PCR court erred in not finding that counsel was ineffective. Accordingly, we reverse the denial of PCR and remand for a new trial.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Furman Edward Fulmer, Jewel F. Oxner, Carolyn F. Garner, Sandra F. Metts, and Faye F. Cannon, Petitioners,

v.

Janette F. Cain, Respondent.

Jewel Oxner, As the Personal Representative of the Estate of Mary F. Fulmer, deceased, Petitioner,

v.

Janette F. Cain, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Newberry County
Wyatt T. Saunders, Jr, Circuit Court Judge

Opinion No. 26572
Heard October 21, 2008 – Filed December 15, 2008

REVERSED AND REMANDED

Pope D. Johnson, III, of Johnson & Barnette, of Columbia, Samuel M. Price, Jr., of Newberry, for Petitioner.

Adele Jeffords Pope, of Columbia, for Respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in Fulmer v. Cain, Op. No. 2006-UP-256-256 (S.C. Ct. App. filed May 19, 2006). We reverse.

FACTS

This is a dispute between siblings over the will of their mother, Mary Fulmer, who died on April 29, 2002. The petitioners are Jewel Oxner, one of Mary Fulmer's children and the Personal Representative of Mary's estate, and four of Jewel's five siblings. Respondent is Janette Cain, the remaining sibling. In her 1998 will, Mary bequeathed 10.59 acres of property to Cain; Fulmer's remaining real estate was to be divided equally among the remaining siblings. By a 2002 addendum/codicil, Mary bequeathed her house and pecan trees to Cain.

In December 2002, after Mary's death, Jewel Oxner, as Personal Representative of the estate, brought an action in probate court to set aside the transfer of funds in certain bank accounts which were jointly held by Mary and Cain; Oxner also alleged fraud and sought to have the codicil set aside. Cain counterclaimed for Oxner's removal as personal representative, and sought damages for waste, and the issuance of deeds of distribution.

In February 2003, Oxner and her remaining siblings filed a petition for formal testacy in probate court, challenging the validity of the codicil, and listing Cain as defendant. Attached to the Petition, the siblings filed a complaint against Cain, reiterating the allegations of Oxner's earlier complaint, seeking to set aside the codicil and alleging fraud. The complaint also alleged causes of action for tortious interference with a contract and tortious interference with inheritance rights. The siblings requested consolidation with the action previously filed by Oxner. Cain moved to

remove the siblings' action to circuit court; she also moved to dismiss the siblings' action on the ground that another formal testacy matter related to the same subject matter was pending between the parties.

The probate court denied Cain's motions to remove and to dismiss, finding Cain had waived her right to remove the siblings' action by failing to remove the action instituted by Oxner as personal representative; the probate court granted the siblings' motion to consolidate.

Cain appealed, and the circuit court affirmed, without prejudice to Cain's right to remove the consolidated action after the personal representative filed an amended pleading in the probate court. In an unpublished opinion, the Court of Appeals held the order, although interlocutory, was immediately appealable inasmuch as it denied Cain a mode of trial to which she was entitled.

ISSUE

Did the Court of Appeals err in ruling the order denying Cain's motion to remove was immediately appealable?

DISCUSSION

Appeal may be taken, as provided by law, from any final judgment, appealable order or decision. Rule 201, SCACR. Accord Culbertson v. Clemens, 322 S.C. 20, 471 S.E.2d 163 (1996) (general rule that only final orders are appealable). Appeals from the probate court are governed by S.C. Code Ann. § 62-1-308 (Supp. 2007), which provides, in pertinent part:

> Except as provided in subsection (g),[1] appeals from the probate court must be to the circuit court and are governed by the following rules:

[1] Section 62-1-308(g) allows the parties, under certain conditions, to consent to a direct appeal to this Court. They did not do so in the present case.

> (a) A person interested in a **final order, sentence, or decree of a probate court** and considering himself injured by it may appeal to the circuit court in the same county.

Emphasis supplied. The order denying Cain's motion to remove is not a final order, and is therefore not reviewable under S.C. Code Ann. § 62-1-308.

The Court of Appeals found that, although the order on appeal was interlocutory, it was nonetheless immediately appealable because it denied Cain a mode of trial to which she was entitled. The Court of Appeals relied upon its opinion in Truluck v. Snyder, 362 S.C. 108, 606 S.E.2d 792 (Ct. App. 2004). Truluck was wrongly decided. There, the Court of Appeals held the probate court's order denying the plaintiff's motion to remove a matter to circuit court was "a final order for purposes of filing an appeal" (under S.C. Code Ann. § 62-1-308), because it impacted the mode of trial. 362 S.C. at 113, 606 S.E.2d at 794. However, jury trials are available in the probate court. See S.C. Code § 62-1-306. Contrary to the Court of Appeals' holding in Truluck, the order denying the plaintiff's motion to remove was not a final, appealable order.

The cases of this Court permitting an appeal from the denial of the mode of trial to which a party is entitled are distinguishable. Salmonsen v. CGD, Inc., 377 S.C. 442, 661 S.E.2d 81 (2008); Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000); Hagood v. Somerville, 362 S.C. 191, 607 S.E.2d 707 (2005); Creed v. Stokes, 285 S.C. 542, 331 S.E.2d 351 (1985). As Justice Pleicones noted in his dissent in Salmonsen, "the 'mode of trial' exception to the general rule that only final orders are appealable is confined to orders which abridge a party's constitutional right to trial by jury." 377 S.C. at 461, 661 S.E.2d at 91. Here, there has been no abridgment of Cain's right to a jury trial.

The Court of Appeals erred in holding the order denying Cain's motion to remove was immediately appealable because it is not a final order, as required by S.C. Code Ann. § 62-1-308. Cf. Woodward v. Westvaco, 319 S.C. 240, 460 S.E.2d 392 (1995) (order denying a motion to dismiss for lack

of subject matter jurisdiction does not finally determine anything and is not immediately appealable); Breland v. Love Chevrolet, 339 S.C. 89, 559 S.E.2d 11 (2000) (order denying a motion to change venue is not immediately appealable); Ballenger v. Bowen, 313 S.C. 476, 477-78, 443 S.E.2d 379, 380 (1994) (order denying a motion for summary judgment is not appealable). Accordingly, we reverse and remand to the probate court.

REVERSED AND REMANDED.

PLEICONES, BEATTY and KITTREDGE, JJ., concur. TOAL, C.J., concurring in a separate opinion.

CHIEF JUSTICE TOAL: I agree with the majority's holding that this interlocutory order was not immediately appealable. I write separately, however, to express my view that the probate court properly consolidated the two cases. Both matters involve the estate of Mary Fulmer, similar questions of law and fact exist, and consolidation of the actions will promote judicial economy and reduce the risk of inconsistent rulings. Furthermore, it is my view that considering the nature of this consolidated action, Respondent has an absolute right to remove this case to circuit court following the personal representative's amendment to the pleading. Not only does the consolidated action relate to an amount in controversy of at least $5,000, but also it involves a formal proceeding for the probate of Fulmer's will. *See* S.C. Code Ann. § 62-1-302(d)(1) and (5) (2007) (providing that any action or proceeding filed in the probate court and relating to formal proceedings for the probate of wills and actions in which a party has a right to trial by jury and which involve an amount in controversy of at least five thousand dollars in value must be removed to the circuit court).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In The Matter Of The Care And Treatment Of John David Canupp, Appellant.

Appeal From York County
Larry R. Patterson, Circuit Court Judge

Opinion No. 4463
Heard November 6, 2008 – Filed December 4, 2008

AFFIRMED

Appellate Defender Lanelle C. Durant, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Deborah R.J. Shupe, Assistant Attorney General Brandy A. Duncan and Assistant Attorney General William M. Blitch, Jr., all of Columbia, for Respondent.

GEATHERS, J.: The State brought this action under the Sexually Violent Predator Act, S.C. Code Ann. §§ 44-48-10 to -170 (Supp. 2007), for a determination that Appellant was a sexually violent predator in need of

involuntary civil commitment in a secure facility for long-term control, care, and treatment. A jury found that Appellant was a sexually violent predator, and the circuit court ordered that Appellant be committed to the South Carolina Department of Mental Health. Appellant challenges the commitment order on the ground that the circuit court failed to charge the jury that Appellant had a constitutional right to decline to take the witness stand. We affirm.

FACTS/PROCEDURAL HISTORY

On June 24, 2002, Appellant pled guilty to one count of committing a lewd act upon a child and was sentenced to fifteen years in prison, suspended upon the service of eight years and five years of probation. While he was in prison, Appellant entered an Alford plea to a second count of committing a lewd act upon a child,[1] and, on January 22, 2003, he was sentenced to seven years in prison, to run concurrently with the first sentence. Prior to his release from prison, Appellant was referred for review to determine if there was probable cause to believe that he met the definition of a sexually violent predator. The circuit court determined that such probable cause existed and ordered Appellant to submit to an evaluation pursuant to S.C. Code Ann. § 44-48-80. Following the evaluation, the circuit court conducted a jury trial for a final determination of whether Appellant met the definition of a sexually violent predator pursuant to S.C. Code Ann. § 44-48-90.

At trial, the State presented to the jury the indictments and sentencing sheets for Appellant's two convictions for sexually violent offenses. Dr. Pamela Crawford, an expert in general psychiatry and forensic psychiatry, testified about the significance of the two events underlying the convictions. Dr. Crawford expressed the opinion that Appellant met the criteria for a

[1] See North Carolina v. Alford, 400 U.S. 25 (1970), which discusses the acceptance of a guilty plea from a defendant who maintains his innocence.

diagnosis of pedophilia and alcohol dependence and that he needed sex offender treatment. She also stated that Appellant presented a significant likelihood of a repeat offense.

Appellant presented the testimony of his stepdaughter and the programs manager for the York County Detention Center. The stepdaughter, who was eleven or twelve years old when Appellant began living with her and her mother, stated that Appellant never acted inappropriately toward her. The York County employee testified that, while Appellant was in prison, he had participated in the Life Skills program and also served as the chaplain's assistant.

After all of the evidence was presented, Appellant's counsel requested the circuit court to charge the jury that Appellant had a right to decline to take the witness stand. The circuit court denied the request. The jury later determined that Appellant was a sexually violent predator, and the circuit court issued an order committing Appellant to the South Carolina Department of Mental Health. This appeal follows.

ISSUE ON APPEAL

Did the circuit court commit reversible error in refusing to charge the jury that Appellant had a constitutional right to decline to take the witness stand?

STANDARD OF REVIEW

The circuit court is required to charge only the current and correct law of South Carolina. McCourt By and Through McCourt v. Abernathy, 318 S.C. 301, 306, 457 S.E.2d 603, 606 (1995). The law to be charged to the jury is determined by the evidence presented at trial. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993).

In reviewing jury charges for error, this Court must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial. Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999). If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error. Id. A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. Id. at 495-96, 514 S.E.2d at 574.

To warrant reversal, a circuit court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct. App. 2006).

LAW/ANALYSIS

Appellant contends that the circuit court erred when it denied counsel's request to instruct the jury that Appellant had a constitutional right to decline to take the witness stand. Appellant specifically argues that, as one subject to proceedings under South Carolina's Sexually Violent Predator Act (the Act), he should have the same constitutional rights as a criminal defendant because the same personal freedom is at stake.[2] Appellant also argues that this omission prejudiced him because there is a reasonable probability that the outcome would have been different if the circuit court had given the requested charge. We disagree.

The Fifth Amendment to the United States Constitution sets forth the right against self-incrimination as follows: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . . " U.S.

[2] Appellant concedes that the commitment of a sexually violent predator under the Act is civil in nature.

Const. amend. V. The South Carolina Constitution also provides for a right against self-incrimination: "[N]or shall any person be compelled in any criminal case to be a witness against himself." S.C. Const. art. I, § 12.

Similarly, a witness in a civil action may decline to answer a certain question if there is a reasonable possibility that the answer would provide information that could be used against the witness in a criminal proceeding or would lead to the discovery of such information. See Grosshuesch v. Cramer, 377 S.C. 12, 24, 659 S.E.2d 112, 118 (2008); see also State v. Hook, 348 S.C. 401, 415, 559 S.E.2d 856, 863 (Ct. App. 2001) (quoting Lefkowitz v. Turley, 414 U.S. 70, 77-78 (1973) and stating that the Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."), modified on other grounds, 356 S.C. 421, 590 S.E.2d 25 (2003).

Nonetheless, only a criminal defendant has the right to decline to take the witness stand altogether. See Baxter v. Palmigiano, 425 U.S. 308 (1976) (citing prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them and holding that permitting an adverse inference to be drawn from an inmate's silence at civil disciplinary proceedings is not, on its face, an invalid practice).

While the Act bestows some of the rights normally associated with criminal prosecutions,[3] it is not intended to be punitive in nature; rather, it

[3] The Act provides for a probable cause hearing, the assistance of counsel, a jury trial, the right to cross-examine witnesses, and the right to view and copy all petitions and reports in the court file. S.C. Code Ann. § 44-48-80 (Supp. 2007). Additionally, the Act adopts the burden of proof required in criminal prosecutions; S.C. Code Ann. § 44-48-100(A) (Supp. 2007) requires that a determination of whether one is a sexually violent predator be made only

sets forth a civil process for the commitment and treatment of sexually violent predators. In re Matthews, 345 S.C. 638, 649, 550 S.E.2d 311, 316 (2001) (noting that, in Kansas v. Hendricks, 521 U.S. 346 (1997), the United States Supreme Court deemed Kansas' Sexually Violent Predator Act, on which the South Carolina Act is modeled, to be a civil, non-punitive scheme);[4] In re Care and Treatment of Brown v. State, 372 S.C. 611, 616, 643 S.E.2d 118, 121 (Ct. App. 2007). The Act is designed to: (1) meet the special needs of sexually violent predators; (2) address the significant likelihood that they will engage in repeated acts of sexual violence if not treated for their mental conditions; and (3) assess the risks requiring their involuntary civil commitment in a secure facility for long-term control, care, and treatment. Id. at 616-617, 643 S.E.2d at 121 (citing S.C. Code Ann. § 44-48-20 (Supp. 2006)).

Appellant has not cited, nor has our research revealed, any South Carolina authority to support his argument that there exists a constitutional right to decline to take the witness stand in a commitment trial under the Act. Notably, existing federal precedent indicates that there exists no such right under the United States Constitution. See Kansas v. Hendricks, 521 U.S. 346 (1997) (stating that the State may take measures to restrict the freedom of the dangerously mentally ill and that such restriction is a legitimate, non-punitive governmental objective); Allen v. Illinois, 478 U.S. 364 (1986) (holding that proceedings under Illinois' Sexually Dangerous Persons Act were not "criminal" within meaning of Fifth Amendment's guarantee against compulsory self-incrimination because commitment to maximum security institution that also housed convicts needing psychiatric care did not make conditions of person's confinement amount to "punishment").[5]

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upon proof beyond a reasonable doubt.

[4] In Matthews, the South Carolina Supreme Court found that the appellant did not effectively distinguish the Kansas Act from South Carolina's Act; therefore, South Carolina's Act violated neither the Double Jeopardy Clause of the United States Constitution nor that of the South Carolina Constitution. Matthews, 345 S.C. at 649-51, 550 S.E.2d at 316-17.

[5] See also Joan Comparet-Cassani, A Primer on the Civil Trial of a Sexually

In any event, the omission of the requested charge did not prejudice Appellant. Even if the circuit court had given the requested charge, the jury had before it overwhelming evidence that Appellant met the statutory definition of a sexually violent predator, which is as follows:

> "Sexually violent predator" means a person who:
>
> (a) has been convicted of a sexually violent offense; and
>
> (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

S.C. Code Ann. § 44-48-30(1) (Supp. 2007).

The evidence presented to the jury shows that Appellant pled guilty to the sexual assault of a seven-year-old girl between 1995 and 1996 and that he also entered an Alford plea to the sexual assault of a child under the age of sixteen between the spring of 1995 and the summer of 1996. Dr. Crawford testified about the significance of the two events underlying the convictions. She stated that the events show a pattern of behavior involving sexual contact with prepubescent girls.

Dr. Crawford also gave her observations from her interviews with Appellant. She stated that Appellant's inconsistency in his rendition of the events showed her that he did not appear to be fully accepting responsibility

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Violent Predator, 37 San Diego L. Rev. 1057, 1109-15 (2000) (examining California's Sexually Violent Predator Act and applicable federal constitutional law).

for his actions. Dr. Crawford also indicated that Appellant was sexually aggressive, that he denied that he was sexually attracted to children despite evidence of a series of events, and that he did not believe that he needed sex offender treatment.

Dr. Crawford expressed the opinion that Appellant met the criteria for a diagnosis of pedophilia and alcohol dependence and that he needed sex offender treatment. Dr. Crawford explained that pedophilia is typically a life-long behavioral disorder. She also stated that Appellant's pedophilia affects his ability to control his behavior, that he is predisposed to commit future acts of sexual violence, and that he would present a danger to prepubescent children. Dr. Crawford expressed her opinion that Appellant presented a significant likelihood of a repeat offense.

Dr. Crawford acknowledged that approximately one year had elapsed between her interviews with Appellant and the commitment trial, and she qualified her opinions on that basis. However, no expert testimony was offered to assist the jury in determining whether Appellant had received any professional treatment or had made any significant progress during that one-year period. Therefore, the jury was presented with overwhelming evidence that Appellant met the definition of a sexually violent predator.

CONCLUSION

For the foregoing reasons, the circuit court's refusal to charge the jury that Appellant had a constitutional right to decline to take the witness stand was neither erroneous nor prejudicial. Under the current law, there exists no constitutional right to decline to take the witness stand in a civil proceeding, and it is not disputed that proceedings under the Act are civil in nature. Further, any adverse inference, permissible or impermissible, that the jury might have drawn from Appellant's absence from the witness stand would not be outcome determinative in light of the overwhelming evidence that Appellant met the Act's definition of a sexually violent predator. Accordingly, the circuit court's order is

AFFIRMED.

WILLIAMS, J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Crusader Servicing Corporation,

Respondent/Appellant,

v.

The County of Laurens, South Carolina, a Body Politic, and Southeastern Housing Foundation, Appellants/Respondents.

Appeal From Laurens County
Ellis B. Drew, Special Referee

Opinion No. 4464
Heard October 22, 2008 – Filed December 4, 2008

AFFIRMED IN PART and REVERSED IN PART

Robert Hill, of Newberry and Benjamin Goldberg, of Charleston, for Respondent/Appellant.

William Douglas Gray, of Anderson, for Appellant/Respondent, Laurens County.

Richard B. Ness, of Bamberg, for Appellant/Respondent, Southeastern Housing Foundation.

Robert E. Lyon, Jr. and Clifton Scott, of Columbia, Amicus Curiae.

KONDUROS, J.: Laurens County (the County) and Southeastern Housing Foundation (Southeastern) appeal the special referee's finding they were jointly and severally liable to Crusader Servicing Corporation (Crusader) for bid interest related to a delinquent tax sale. Crusader cross-appeals alleging the special referee erred in denying its request for statutory prejudgment interest. We affirm in part and reverse in part.

FACTS

Southeastern failed to pay ad valorem property taxes for 2001 and 2002 for its property located in Laurens County and known as the Westside Manor Apartments. In 2003, the County proceeded with a tax sale of the property. Crusader bid $348,000[1] for the property and deposited the bid money with the County. Southeastern claimed it was tax exempt and filed for such status with the Department of Revenue (the Department) subsequent to the sale of the property.[2] Two days prior to the expiration of the redemption period, Southeastern paid the taxes due to Laurens County plus twelve percent interest to be given to Crusader as the bidder pursuant to section 12-51-90(B) of the South Carolina Code (Supp. 2007). Four days later, the Department awarded Southeastern tax exempt status for the year 2002. Laurens County returned $67,569.00 to Southeastern, which specifically included the twelve percent interest on Crusader's bid.

[1] This was a clear overbid for the property.

[2] The record is unclear whether Southeastern may have at some point been declared tax exempt for the year 2001, but it is undisputed that Southeastern was assessed the taxes, failed to pay them in a timely manner, and was ultimately found liable for the ad valorem taxes for 2001.

The County sent a letter to Crusader indicating the tax sale was void and requesting return of the tax sale receipt to the property in exchange for a refund of the bid amount. Crusader refused arguing it was entitled to the twelve percent interest under the redemption statute.

Litigation ensued, and the special referee concluded Southeastern and Laurens County were jointly and severally liable for the twelve percent bid interest. The court reasoned the redemption statute provided for the payment of the interest. The court found the County was without authority under section 12-51-100 of the South Carolina Code (2000) to void a tax sale unless they made a procedural error in the conduct of the sale. The County and Southeastern appeal.

STANDARD OF REVIEW

"The sale of the property of a defaulting taxpayer is governed by statute." Key Corporate Capital Inc., v. County of Beaufort, 373 S.C. 55, 59, 644 S.E.2d 675, 677 (2007). Statutory interpretation is a question of law. State v. Sweat, 379 S.C. 367, 373, 665 S.E. 2d 645, 648 (Ct. App. 2008). "When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts. In such cases, the appellate court is not required to defer to the trial court's legal conclusions." Id., 665 S.E. 2d at 649. "If a statute's language is plain, unambiguous, and conveys a clear meaning, 'the rules of statutory interpretation are not needed and the court has no right to impose another meaning.'" Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

LAW/ANALYSIS

I. Bid Interest Under Sections 12-51-90, 12-51-100, and 12-51-150 of the South Carolina Code

Southeastern contends the special referee erred in finding it liable to Crusader for bid interest pursuant to section 12-51-90 of the South Carolina

Code (Supp. 2007) because the tax sale was voided once Southeastern was declared tax exempt for 2002. We disagree.

Under section 12-51-90(A), the defaulting taxpayer may redeem the affected property within the redemption period by paying delinquent taxes, assessments, penalties, and costs, together with interest as provided in subsection (B). Subsection (B) requires the delinquent taxpayer to remit interest on the tax sale bid amount in accordance with the schedule set forth. For property redeemed in the final three months of the redemption period, the interest rate is twelve percent. Section 12-51-100 of the South Carolina Code (2000) dictates what happens when the redemption is instituted: "The successful purchaser, at the delinquent tax sale, shall promptly be notified by mail to return the tax sale receipt to the person officially charged with the collection of delinquent taxes in order to be expeditiously refunded the purchase price plus the interest provided in Section 12-51-90." (emphasis added).

Section 12-51-150 of the South Carolina Code (Supp. 2007) governs the procedure for voiding a tax sale:

> If the official in charge of the tax sale discovers before a tax title has passed that there is a failure of any action required to be properly performed, the official may void the tax sale and refund the amount paid, plus interest in the amount actually earned by the county on the amount refunded, to the successful bidder. If the full amount of the taxes, assessments, penalties, and costs have not been paid, the property must be brought to tax sale as soon as possible.

The statutory framework for tax sales does not seem to contemplate the precise situation presented in this case. The interest provision of section 12-51-90(B) is intended to encourage the prompt payment of delinquent taxes and to penalize the delinquent taxpayer for delay. Furthermore, the interest provision is an incentive for purchasers to bid on tax sale property even

though there is risk involved that the property could be redeemed or the sale voided altogether.[3]

Once the redemption was accomplished by Southeastern under section 12-51-90, the terms of section 12-51-100 were triggered, and Crusader was entitled to the twelve percent interest on its bid. Section 12-51-150 does not provide that the official in charge of conducting the sale can void the sale because taxes were wrongfully assessed and the property was tax exempt. It only addresses situations in which the sale was not properly conducted. We decline to read more into the statute than can be discerned from its plain language. See Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (finding the court cannot impose another meaning on plain statutory language). Therefore, we cannot conclude the sale was void pursuant to section 12-51-150.

However, as Southeastern points out, section 12-4-730 of the South Carolina Code (2000) permits the county auditor to "void any tax notice applicable to the property" once notified by the department that a property is exempt from ad valorem taxes. We do not find it necessary to determine whether the auditor could retroactively void the tax notice thereby nullifying the sale. The record shows Southeastern did not pay, nor did it attempt to pay, the 2001 back taxes until after the tax sale. It is undisputed Southeastern was ultimately responsible for paying those taxes. The county was within its rights to proceed with a sale of the subject property based on the outstanding taxes owed for 2001. The failure to pay the undisputedly due taxes validates the sale even if the tax notice for the 2002 taxes was retroactively voided. Consequently, the sale was valid, the redemption was valid, and the subsequent determination of tax exempt status for 2002 did not affect the sale. The tax exempt determination entitled Southeastern to the refund of taxes assessed for 2002, but did not render the requirements under sections 12-51-90 and 12-51-100 ineffective. Therefore, we find the special referee correctly concluded Southeastern was required to pay the bid interest to the County of Laurens to be remitted to Crusader.

[3] We recognize section 12-51-150 provides the bidder is entitled to the interest actually accrued on the bid amount in the event the sale is voided.

The County argues it should not be responsible for payment of the bid interest to Crusader. We agree. Under the statute, the person officially charge with the collection of delinquent taxes should "expeditiously refund the purchase price plus the interest provided in Section 12-51-90." § 12-51-100. Under section 12-51-90, it is the defaulting taxpayer, in this case Southeastern, who is responsible for paying the bid interest. The County, under the statute, is responsible for remitting the paid money to the bidder as part of the redemption process.

Our analysis with respect to the County's liability must be performed in light of another case from this court, H & K Specialists v. Brannen, 340 S.C. 585, 532 S.E.2d 617 (2000). In H & K Specialists, the Beaufort County treasurer provided improper notice regarding the tax sale of the property. Id. at 586, 532 S.E.2d at 618. After the title to the property had passed to the successful bidder, H&K, the treasurer set aside the sale and refunded the purchase price less the tax delinquency to the defaulting taxpayers, the Brannens. Id. H&K then sued Beaufort County for the return of its purchase price plus statutory interest as provided under the redemption statute. Id. In finding the County liable for the funds, the court stated:

> Finally, we are mindful of the fact that the master based his decision, in part, on the fact that the Brannens received both the property and the money and thus H&K's sole remedy was against the Brannens. However, it was the Beaufort County Respondents which created this inequitable situation by failing to provide the Brannens with the proper notice that resulted in the tax sale being set aside and erred in refunding the purchase price, less the tax delinquency, to the Brannens rather than to H&K. Therefore, we do not believe H&K is limited to pursuing a legal remedy solely against the Brannens.

Id. at 589, 532 S.E.2d at 619-20.

In this case, the County does not appear to be responsible for the inequity that has resulted to the parties. Southeastern neglected to pay its 2001 taxes and was not as diligent as it should have been in ascertaining the status of its tax exemption for 2002. Had Southeastern paid the taxes due and then sought a refund, the property would not have been sold, thereby avoiding the present scenario.

The County was faced with a legitimate conundrum in light of the Department's notice of tax exemption being issued almost simultaneously with the redemption. The County consulted its legal counsel, and based on that advice proceeded to refund the 2002 taxes and the bid interest paid to Southeastern believing the sale to be legally void at that time. The County then attempted to return the purchase price to Crusader as mandated and was willing to return the interest actually earned.

We do not find statutory authority for requiring the County to pay the bid interest to Crusader, and we find the present facts distinguishable from those present in H&K Specialists so that the County should not be found jointly and severally liable with Southeastern for the bid interest. Therefore, we conclude the bid interest was properly due to Crusader under section 12-51-100, but only Southeastern, the defaulting taxpayer thereunder, is liable for payment.

II. Statutory Prejudgment Interest on the Bid Interest

Crusader contends the special referee erred in denying its request for statutory prejudgment interest on the bid interest it was due under the redemption statute. We disagree.

Section 34-31-20(A) of the South Carolina Code (Supp. 2007) provides "[i]n all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum." (emphasis added). Prejudgment interest is allowed if the sum is

certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties. Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 133, 631 S.E.2d 252, 258-59 (2006).

In the instant case, the sum due to Crusader was the bid interest under the redemption statute. Although the bid interest ultimately would be paid to Crusader, the statute required the money first pass from Southeastern through the County. According to the County, the bid interest was no longer due and owing. Consequently, the sum was removed from the purview of section 34-31-20(A), and Crusader is not entitled to statutory prejudgment interest.

CONCLUSION

We find Southeastern liable for the bid interest due to Crusader pursuant to section 12-51-100, but Southeastern is not responsible for statutory prejudgment interest. We conclude this case is distinguishable from H & K Specialists so that the County is not responsible for payment of the bid interest or statutory prejudgment interest. Therefore, the order of the circuit court is

AFFIRMED IN PART and REVERSED IN PART.

ANDERSON and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Trey Gowdy, as Solicitor for
The Seventh Judicial Circuit, Respondent,

v.

Bobby Gibson, Jr. and Lillie
Gibson, Appellants.

IN REM:

$146,050.00 in U.S. Currency

Appeal From Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 4465
Heard October 21, 2008 – Filed December 4, 2008

AFFIRMED

Miles F. Weaver, of Columbia, for Appellants.

Robin C. File, Jr., of Spartanburg, for Respondent.

KONDUROS, J: Bobby Gibson, Jr. (Gibson) and his mother, Lillie Gibson, appeal the trial court's confirmation of the forfeiture of $146,050 pursuant to section 44-53-520 of the South Carolina Code (2002 & Supp. 2007). We affirm.

FACTS

In September 2004, Gibson was under investigation by the Spartanburg County Sheriff's Office for drug activity. When officers stopped Gibson for driving under suspension, they searched him and discovered a single crack rock in the bottom of his cell phone case. Based on this discovery, police obtained a search warrant for 2015 Howard Street in Spartanburg, where Gibson lived with his mother, Lillie Gibson. When executing the warrant, police found a small fire safe in the attic, which could only be accessed through a hole cut in the ceiling of the closet in Gibson's bedroom. Before opening the safe, officers allowed the narcotics canine to sniff the safe and the dog alerted on it. The safe contained $146,050 as well as a small metal box containing an unknown amount of currency and old coins. Mrs. Gibson did not know the combination to the safe and made no claim of ownership to the money at that time. Officers also found $3,000 in the trunk of a car located at the home. Officers seized the $146,050 but elected not to seize the metal box or the $3,000.

A search of the premises outside the house yielded a set of digital scales, a plastic medicine bottle containing 24.4 grams of crack cocaine, and a plastic bag containing 11.7 grams of marijuana. The items were found approximately 140 feet from the location of the safe, concealed under bricks, behind a detached garage located behind the residence.

Another search warrant was executed at 420 Farley Street, the location of a building being remodeled by Gibson for use as a beauty salon. A plastic bag containing 713 grams of cocaine was found hidden in the ceiling at that location.

The solicitor filed the underlying civil action to confirm the seizure and forfeiture of the money alleging it was Gibson's property and was subject to

forfeiture under section 44-53-520 of the South Carolina Code (2002 & Supp. 2007). Mrs. Gibson was added as a party to the action based on her claim to the money.

The circuit court determined the money was subject to forfeiture "because it was traceable to illegal transactions based on the facts presented in this case." The court made its finding "applying the [] standard in Pope v. Gordon, 359 S.C. 572, 598 S.E.2d 288 (2004)," which recognized a totality of the circumstances analysis for determining probable cause. The court cited the close proximity of the money to evidence of illegal drug activity, Gibson's history of drug activity, and the failure to provide a plausible explanation for a legitimate source for the funds as a basis for its ruling. The court also relied on the credibility of the testifying officers to determine the forfeiture was appropriate. This appeal followed.

STANDARD OF REVIEW

"An action for forfeiture of property is a civil action at law." Pope v. Gordon, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006). In an action at law, tried by a judge, the appellate court standard of review extends only to the correction of errors of law. Id. "The trial judge's findings of fact will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or controlled by an erroneous conception of the application of the law." Id.

LAW/ANALYSIS

I. The State's Case Under Section 44-53-520 of the South Carolina Code[1]

The Gibsons contend the State failed to establish the seized funds were in close proximity to evidence of illegal drug activity or were traceable to illegal drug activity. We disagree.

[1] The discussion in this section encompasses the third issue raised on appeal regarding the trial court's use of the standard set forth in Pope v. Gordon, 359 S.C. 572, 598 S.E.2d 288 (Ct. App. 2004).

The purpose of a forfeiture hearing is to confirm the state had probable cause to seize the property in question. Medlock v. One 1985 Jeep Cherokee VIN 1JCWB7828FT129001, 322 S.C. 127, 131, 470 S.E.2d 373, 376 (1996). "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise." Lynch v. Toys "R" Us - Del., Inc., 375 S.C. 604, 616-17, 654 S.E.2d 541, 548 (Ct. App. 2007) (citing Jones v. City of Columbia, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990)).

Section 44-53-520 of the South Carolina Code (2002 & Supp. 2007) enumerates what property is subject to forfeiture in a criminal action. Sub-parts (7) and (8) are the sub-parts of concern to us in this case.

> (a) The following are subject to forfeiture . . .
>
> (7) all property including, but not limited to, monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, and all proceeds including, but not limited to, monies, and real and personal property traceable to any exchange;
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> (8) all monies seized in close proximity to forfeitable controlled substances, drug manufacturing, or distributing paraphernalia, or in close proximity to forfeitable records of the importation, manufacturing, or distribution of controlled substances and all monies seized at the time of arrest or search involving violation of this article. If the person from whom the monies were taken can establish to the satisfaction of a court of competent jurisdiction that the monies seized are not products of illegal acts, the monies must be returned pursuant to court order.

Id.

The Gibsons contend the relationship between the locations of the money and the drugs and drug paraphernalia did not constitute close proximity as contemplated by the statute. No South Carolina cases discuss precisely how close proximity is to be measured. However, we do not find it necessary to determine what distance constitutes close proximity for purposes of sub-part (8). Although the circuit court stated the money was found in close proximity to evidence of illegal drug activity, that finding is not the sole basis for the court's ruling. Rather, proximity appears to be one of several factors the court considered in determining the money was "traceable" to illegal drug activity under sub-part (7).

Therefore, we turn our attention to whether the State established probable cause the money was traceable to illegal drug activity. Traceability was recently discussed by our supreme court in Pope v. Gordon, 369 S.C. 469, 633 S.E.2d 148 (2006). In that case, police seized a business bank account of the claimant, who was convicted of trafficking in cocaine. Id. at 473, 633 S.E.2d at 150. The State presented evidence Gordon paid for his monthly rent in cash and did not file tax returns for 1995 and 1996. Id. at 475, 633 S.E.2d at 151-52. The State further contended Gordon's expenses exceeded his business income. Id. at 475-76, 633 S.E.2d at 152. The court concluded:

> The record shows that [Gordon] did have a legitimate car detailing business that involved cash transactions. In addition, the bank records show that money in the accounts came from the car detailing business. As a result, the State failed to demonstrate how the money contained in the bank account came from illegal drug transactions.

Id. at 476, 633 S.E.2d at 152.

The Pope court went on to reject a totality of the circumstances approach set forth in United States v. Thomas, 913 F.2d 1111 (4th Cir. 1990). In Thomas, the fourth circuit examined the government's evidence in toto in

determining there was probable cause to seize certain property of Thomas' including a $25,000 bond. Id. at 1114-15, 1117. The court considered Thomas' unusual travel patterns, one-way trips to Miami, prior drug activity, and excessive expenditures for his legitimate income. Id. at 1115-17. The court concluded the evidence, "[i]n its totality," strongly implicated Thomas in illegal drug activity. Id. at 1117. In rejecting this approach our supreme court stated: "[W]e decline to use the rationale in Thomas because we believe the standard in Thomas would lessen the burden on the State and is in direct contravention to the word traceable in the language of the statute." Pope, 369 S.C. at 476, 633 S.E.2d at 152.

With all the foregoing in mind, we find this case to be distinguishable from Thomas and Pope. As previously discussed, the money in this case was found hidden in the ceiling of Gibson's bedroom, and drugs and drug paraphernalia were discovered on the property. Furthermore, the drug dog at the scene alerted to the safe indicating the safe or its contents had at some point in time been in contact with illegal narcotics. Additionally, drugs were found at the beauty shop, another location under Gibson's control.

While our analysis does look at several pieces of evidence, we do not believe this is the type of totality of the circumstances analysis set forth in Thomas and disapproved of in Pope. We believe the evidence presented in this case is much more compelling and does not require making the kinds of assumptions that would have been required in Pope. Drugs were found on the same property with the money. The funds were hidden in a location that was inaccessible to the alleged owner. Mrs. Gibson made no claim to the money at the time it was seized and, very significantly, the drug dog alerted on the safe making it more likely than not the money and/or the safe had been in contact with drugs.[2]

We think it important to note, Pope is factually distinguishable from the case sub judice. The money at issue in Pope was in a business bank account, which would necessitate tracing the funds through some type of

[2] While some courts disapprove of the admission of drug canine alerts, the Gibsons did not object to the admission of the testimony in this case.

documentation or testimony the money was not the product of legitimate business. In this case, the actual currency was found during the execution of a search warrant seeking illegal drugs.

In Pope, the court expressed concern over lessening the burden on the State to prove its case. We agree mere suspicion and innuendo should not be mistaken for the establishment of probable cause. However, the State was not required to prove with certainty the money was connected to illegal drug transactions. The statute requires the State to establish probable cause the seized money was traceable to drug activity. We believe, under the particularized circumstances of this case, the State met its burden.

II. The Gibsons' Rebuttal

The Gibsons further argue they satisfied the burden of showing by a preponderance of the evidence the money belonged to Mrs. Gibson and constituted her life savings. We disagree.

"If probable cause is shown, the burden shifts to the owner to show by the preponderance of the evidence that he or she 'was not a consenting party to, or privy to, or did not have knowledge of, the use of the property which made it subject to seizure and forfeiture.'" Medlock, 322 S.C. at 131, 470 S.E.2d at 376 (quoting S.C. Code Ann. § 44-53-586(b)(1) (Supp. 1994)).

Mrs. Gibson was under a higher burden than the State and was required to prove her claim to the money by a preponderance of the evidence. Mrs. Gibson testified the money seized was her life savings. She testified she had worked at the same company for twenty-seven years and at the time of trial earned $14.33 per hour. Mrs. Gibson indicated she sometimes worked as much as sixty hours per week being paid time-and-a-half for any time over forty hours. Mrs. Gibson also claimed she had some money from illegal gambling. She testified she did not keep the money in the bank because she had lost money that way before and the safe was in the attic because it would be safer in the event of a break-in. Mrs. Gibson admitted she could not access the safe herself and did not know the combination.

Mrs. Gibson was unable to provide any documentation regarding a legitimate source for the money or to in any way rebut the evidence presented by the state the money was connected to illegal drug activity. Furthermore, the circuit court did not find Gibson or Mrs. Gibson to be credible regarding their explanation for the money. Although not bound by that conclusion, we generally defer to the findings of the trial judge in that regard. See USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 652-53, 661 S.E.2d 791, 796 (2008) ("[N]oting the circuit court judge, who saw and heard the witnesses, is in a better position to evaluation their credibility and assign comparative weight to their testimony.") (citing Reed v. Ozmint, 374 S.C. 19, 24, 647 S.E.2d 209, 211 (2007)).

For all of the foregoing reasons, the determination of the trial court is

AFFIRMED.

ANDERSON and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jonathan S. McCall, Appellant,

v.

IKON, d/b/a IKON Educational Services, Respondent.

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 4466
Heard November 19, 2008 – Filed December 12, 2008

AFFIRMED

Duke K. McCall, Jr., of Greenville for Appellant.

Sandi R. Wilson and Keith D. Munson, of Greenville for Respondent.

HUFF, J.: Jonathan S. McCall appeals from an order of the circuit court finding him entitled to damages of $24,379.33 on his breach of contract action against IKON Educational Services. We affirm.

FACTUAL/PROCEDURAL HISTORY

This matter originally came before this court on IKON's appeal from the denial of relief from a default judgment against it and in favor of McCall. Finding IKON did not receive sufficient notice of the damages hearing, we remanded the matter to the circuit court for a new hearing on damages. McCall v. IKON, 363 S.C. 646, 611 S.E.2d 315 (Ct. App. 2005).

During this hearing, the parties presented evidence that in November 2001, McCall signed an agreement with IKON for an "Enterprise Training Pass," entitling him to twelve months of unlimited course attendance at any scheduled IKON public systems training course in certain specified areas, including Microsoft, Novell and Lotus. McCall entered the course of study with the goal of becoming a Microsoft Certified Systems Engineer, and paid IKON tuition of $12,500. At that time, McCall held a Bachelor's degree in biology, as well as a Master's degree in forestry, and had worked for a number of years in the forestry related area.

In order to become a certified Microsoft Systems Engineer, McCall needed to pass tests in seven different courses that were administered by an independent agency. McCall began attending IKON classes on November 19, 2001, and completed three courses. He subsequently passed two of the seven required tests. However, IKON sold the company to CESC in the last quarter of 2001 and, thereafter, on January 2, 2002, CESC chose to cease operating in the Greenville area.

After learning of the closing, McCall went to the training facility and requested a refund of $12,500. On January 9, 2002, McCall filed the present breach of contract action, against IKON and CESC. McCall, 363 S.C. at 650, 611 S.E.2d at 316. On January 24, 2002, Clint Babcock sent McCall an e-mail with a document attached, requesting McCall sign and return the form to "cesc/IKON Education" if he agreed to the terms. The document offered a

refund to McCall in exchange for McCall signing a release.[1] McCall testified he did not consider the document an offer, "because [he] never saw the check."

Thereafter, McCall began looking for a job and ultimately went to work for Schneider Tree Care as a consulting arborist in July 2002, where he earned approximately $35,000 a year. He continued his employment with Schneider until June 2004, at which time McCall left that job in order to pursue a Ph.D. in horticulture at Clemson University. McCall stated he worked as a graduate assistant while pursuing that degree, earning about $7,500, however, the program was discontinued within six months due to lack of research funding and McCall's position was terminated.[2] On March 21, 2005, McCall began work with the North Carolina Forest Service, earning $33,942 a year. In May 2003, during the time he was working at Schneider's and well before he entered the Ph.D. program, McCall received a settlement of $25,000 from CESC.[3]

McCall admitted that in January 2002, he was aware of two or three other courses available in the area that were sufficient for him to obtain the certification he sought and were less expensive. He further agreed that after CESC stopped providing training in the area in January 2002, he did not enroll in any of the other available computer classes. McCall claimed,

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[1] Curiously, while the parties and the circuit court refer to this document as an offer to refund $10,416.66, a reading of the attachment in the record indicates, although CESC believed it was only required to refund McCall the pro-rata amount of $10,416.66, CESC would provide him "a full refund of ($12,500) as an exception to [their] established policy."

[2] There is also evidence of record which suggests McCall's actual earnings for the year 2004 were only $4,964, and were thus less than the $7,500 he claimed to have made that year as a graduate assistant.

[3] McCall testified he used this money to pay his mother the $12,500 he borrowed for the tuition and the rest was used to pay off two car loans. McCall admitted he did not pay interest on the loan from his mother.

however, that his lack of funds, created by the actions of IKON, kept him out of a career in computers. He asserted at trial that he was entitled to damages of $12,500 plus prejudgment interest for the tuition he paid, lost wages for a period of six months, and interest of six percent incurred on the money borrowed for the tuition.

McCall further presented Dr. Charles Alford as an expert witness in economics and business valuation.[4] Dr. Alford testified he computed the present value difference between a projection of lifetime earnings McCall would have received had he entered a career in the computer field as opposed to a projection of lifetime earnings in the forestry field in which McCall was currently working. Dr. Alford compared McCall's current wages of $33,942 in forestry and his projected future earnings were he to stay with his current job against data from a South Carolina Occupational Employment and Wage report indicating the projected income of someone working as a systems administrator in the computer field at the time McCall would have finished the IKON program, along with his projected future income in that field. He opined that if McCall had become a computer systems engineer, he would receive $340,406 more in lifetime income and fringe benefits than he would if he remained a forester.

On cross-examination, Dr. Alford admitted he was not a vocational expert and was not qualified to determine employability. He testified he based his determination on projections for a network and systems administrator because McCall had identified that as his career objective, but agreed McCall had no employment history in the computer field and acknowledged he was not willing to offer testimony that McCall could have been employed as such. Dr. Alford also agreed his figures did not include starting McCall out at projected entry level earnings for a forester because he knew McCall's actual earnings at that time. He further admitted he did not

[4] IKON questioned Dr. Alford's qualification and his testimony regarding McCall's loss of earning capacity based upon the fact Dr. Alford was not a vocational expert, but the circuit court qualified Dr. Alford as requested and allowed the evidence, finding it was an issue which could be explored on cross-examination.

take into account in the forestry earnings projection that McCall had years of experience as well as a Master's degree in forestry. He consistently stated that if the court were to determine McCall did not earn as much as he could have earned in the forestry field, the figures should be adjusted or "the whole thing [should] be set aside."

Dr. Benson Hecker testified on behalf of IKON as an expert in the area of vocational evaluation. Dr. Hecker testified, as a vocational evaluation specialist, he looked at a person's age, education, vocational background and skills, along with the job market to "put together an opinion regarding a person's capacity to earn money," to aid the court in determining a person's employability and salary levels. After reviewing information on McCall relative to these factors, as well as obtaining information from The U.S. Department of Labor Statistics showing State Occupation and Employment Wage Estimates for South Carolina, and further contacting Clemson University with regard to salary levels, Dr. Hecker was of the opinion that McCall would suffer no loss of earning capacity as a result of the cancellation of the computer program.

In reaching his conclusion, Dr. Hecker opined McCall could have entered the forestry field in North Carolina at the mean salary level rather than at entry level, and determined the appropriate figure to use for determining McCall's expected salary in forestry was the mean salary level of between $51,000 and $52,000 based on McCall's experience and background. Dr. Hecker further testified it was his opinion McCall's failure to take the refund offered in January 2002 delayed his completion of a program and continuation of his education, and further delayed his entry into the job market. Had McCall been dedicated to entering the computer field, he reasonably would have accepted the offer and continued his education. As a result, there would be no loss. Additionally, Dr. Hecker noted McCall's receipt of the $25,000 settlement proceeds in May 2003 and his failure to continue his education in the computer field at that time indicated McCall's desire to work in the forestry industry instead of the computer field. It was his opinion that the best occupational career path for McCall was, and continued to be, in the forestry field. According to Dr. Hecker, Dr. Alford's

present value calculations were of no import because he was of the opinion McCall suffered "no loss of earning, no loss of wages."

IKON also presented the testimony of Peter Tiffany, a Certified Public Accountant. Mr. Tiffany was offered and qualified as an expert in the area of computation of present values. Given the $52,000 mean salary figure for foresters in Dr. Hecker's report, Mr. Tiffany used the same inflation rates, growth rates and discount rates as Dr. Alford used in his analysis to project present value and determined, using the same assumption as Dr. Alford for the projected present value of earnings in the computer field, that the projected earnings in the forestry industry would be greater than those in the computer industry, resulting in no loss of earning capacity for McCall. Mr. Tiffany likewise performed the same calculations based on an average $40,000 starting salary range for foresters, taken from Dr. Hecker's report indicating such starting range is between $35,000 and $45,000, as well as on a mean salary range of $49,538 taken from an exhibit from Dr. Alford's deposition. In both cases, the present values of the forestry earnings compared to the computer earnings resulted in a negative net result, showing no loss of earnings in the forestry field compared to the computer industry.

Based on the evidence presented, the circuit court found McCall was entitled to damages in the amount of $24,379.33. The court held the testimony of IKON's witnesses was more reliable, credible, and persuasive, and that Dr. Alford's opinion was not "reliable or probative on the issue of damages." The court noted, although McCall testified of his desire to pursue a career in computers, there was little evidence to support this assertion, the vast majority of McCall's education and employment was in forestry related fields, and McCall's "foray in the computer field" only lasted for approximately one month. The court further considered that Dr. Alford, who admitted he is not a vocational expert, based his opinion as to McCall's vocational aptitude entirely upon McCall's "beliefs as to his desires," and based his calculations of lost earnings in the computer field on a position McCall was merely "hoping to obtain." Because of the improper foundation on which Dr. Alford based his opinion as to the $340,406 difference in projected lifetime earnings between the two fields, the circuit court

determined Dr. Alford's testimony did not provide persuasive evidence of McCall's loss of earnings or loss of earning capacity.

On the other hand, the court found Dr. Hecker, who is a vocational expert, considered the fact that comparable programs for computer study were available to McCall both in January 2002 when he was offered a refund, and May 2003 when he received the $25,000 settlement, yet McCall chose not to pursue any training in the computer field. Thus, it was reasonable to assume McCall's interests actually rested in the forestry field. The court agreed with Dr. Hecker that McCall's best vocational path was in the forestry related field and it would therefore be speculative to make a mathematical comparison of projected incomes between the computer and forestry fields. The court further found, however, even if the mathematical comparison is analyzed, the evidence confirms McCall suffered no loss of earnings or earning capacity. Finding the main difference between the parties' calculations to arise from the use of the starting salary in the forestry field, the court recognized Dr. Alford failed to consider McCall's educational or employment background in the forestry field.

As to the loss of earnings McCall sought from January 2002 through 2005, the court found McCall could have returned to the workforce after CESC cancelled the program instead of waiting seven months to obtain employment. Additionally, McCall could have continued with his job as an arborist making in excess of $35,000 a year, but voluntarily quit that job and, thereafter, did not work for approximately one year before taking the North Carolina forestry job. Accordingly, the trial court determined McCall was, "for the most part, voluntarily unemployed or underemployed." The court further found McCall's claim for lost wages of $12,157 between January 2002 and July 2002 was the result of McCall's own decision to not be employed during that time period. The circuit court also noted, although McCall sought $1,012.70 in interest he allegedly paid his mother on a $12,500 note he signed for a loan on the tuition, McCall ultimately admitted that he did not, in fact, pay any interest on the note. Finally, the trial court found McCall's testimony regarding his reasons for failure to use the offered refund or settlement money to enroll in computer classes to lack credibility. The court thus determined McCall failed to mitigate any alleged damages by

refusing to take available funds and pursue a career path in computers, and IKON should not be held responsible for any alleged economic loss due to McCall's decisions.

The court concluded McCall's claim for loss of future earnings and earning capacity were based wholly on speculation or conjecture and McCall failed to establish his claim for the same with reasonable certainty. It further held McCall failed to mitigate any such alleged damages resulting from the breach. However, the court determined McCall was entitled to damages for the tuition paid along with a reasonable amount for lost wages, resulting in a total sum of $24,379.33. The circuit court held, in light of the settlement money McCall received from CESC, IKON was entitled to a credit in the amount of $25,000, and the judgment was therefore to be marked satisfied.

ISSUES

1. Did the trial court improperly calculate McCall's damages?

2. Did the trial court err in its admission and interpretation of the January 24, 2002 e-mail sent to McCall?

3. Were the damages of McCall "properly mitigated?"

4. Did the trial court err in requesting additional evidence of an asset purchase agreement between IKON and CESC after the conclusion of the damages hearing?

STANDARD OF REVIEW

An action for breach of contract seeking money damages is an action at law. Eldeco, Inc. v. Charleston County Sch. Dist., 372 S.C. 470, 476, 642 S.E.2d 726, 729 (2007). On appeal of an action at law tried without a jury, the findings of fact of the trial court will not be disturbed unless found to be without evidence which reasonably supports the trial court's findings.

Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "Stated another way, the trial court's findings of fact will not be disturbed on appeal unless wholly unsupported by the evidence or unless it clearly appears the findings were influenced or controlled by an error of law." Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 127, 631 S.E.2d 252, 255 (2006). In such a case, the trial court's findings are equivalent to a jury's findings in a law action. Id. Further, questions concerning credibility and the weight to be accorded evidence are exclusively for the trial court. Ward v. West Oil Co., 379 S.C. 225, 238, 665 S.E.2d 618, 625 (Ct. App. 2008).

LAW/ANALYSIS

A. Calculation of Damages

On appeal, McCall first contends the circuit court improperly calculated his damages. He maintains he is entitled to damages of $12,500 for the tuition, $5,397.80 in prejudgment interest on the tuition, $12,157 in lost wages from January 4, 2002 through July 13, 2002, and a wage differential through at least June 1, 2004 of $32,164 for a total minimum in damages of $62,218.80. McCall also argues the court erroneously refused to consider the testimony of Dr. Alford based on the fact Dr. Alford was not a vocational expert, asserting Dr. Alford never addressed any vocational issues. McCall further asserts IKON's witness used "the wrong category of earnings" by assuming McCall's salary in forestry would be $52,000 when his actual salary in that field was only $34,000.

We find no error in the circuit court's findings regarding Dr. Alford and its determination that McCall suffered no loss of earning capacity. There is more than sufficient evidence of record to support the court's findings that McCall's best vocational path was in the forestry field. The record further supports the court's determination that, even in performing a mathematical comparison between the forestry and computer fields, McCall still suffered no loss. The court did not, as McCall argues, refuse to consider the testimony of Dr. Alford. Rather, the court considered his testimony, but concluded it did not provide persuasive evidence of McCall's loss of earning capacity and

found that IKON's witnesses were more reliable, credible and persuasive. As noted, in an action at law sitting without a jury, the trial court's findings are equivalent to that of a jury, and questions concerning credibility and the weight to be afforded evidence lie with the trial court.

Further, McCall does not argue on appeal that the circuit court's award of damages is unsupported by the evidence. Nor does McCall assert the trial court made a mathematical error in computation of the damages.[5] As to the specific figures to which McCall asserts he is entitled, he provides this court with no support for them in the record. In short, McCall summarily asserts he is entitled to these amounts without showing why the circuit court's calculation of damages was erroneous or how McCall's figures are supported by the evidence. See Weaver v. Recreation Dist., 328 S.C. 83, 88, 492 S.E.2d 79, 82 (1997); Ehlke v. Nemec Constr. Co., 298 S.C. 477, 481, 381 S.E.2d 508, 510 (Ct. App. 1989) (noting an appealed order comes to the appellate court with a presumption of correctness and the burden is on appellant to demonstrate reversible error); See also Harris v. Campbell, 293 S.C. 85, 87, 358 S.E.2d 719, 720 (Ct. App. 1987) (noting our court is "obliged to reverse when error is called to our attention, but we are not in the business of figuring out on our own whether error exists"). Accordingly, we find McCall has failed to meet his burden of demonstrating reversible error.

B. Error in Admission and Interpretation of E-mail

McCall next contends the circuit court erred in admitting into evidence the e-mail sent by Clint Babcock to McCall on January 24, 2002 because McCall was seeking damages from IKON and the e-mail involved

[5]Additionally, even if McCall contends the trial court made a mathematical computation error, it was incumbent upon McCall to raise the issue by way of a Rule 59 or 60, SCRCP motion to preserve the matter on appeal. See Revis v. Barrett, 321 S.C. 206, 210, 467 S.E.2d 460, 463 (Ct. App. 1996) (holding issue was not preserved on appeal where appellants never filed a motion to alter or amend the judgment to clarify the order pursuant to Rule 59, SCRCP, nor seek clarification pursuant to Rule 60(a), SCRCP and, issue was therefore not raised to and ruled upon by the trial court).

negotiations between him and CESC, not him and IKON. He further contends the court erred in interpreting the e-mail as an offer when it was only an invitation to negotiate. Finally, McCall claims there was no showing that the e-mail contained a "fair and equitable" proposal, especially in light of the circuit court's subsequent award of over twice that amount. We find no error.

At the damages hearing, McCall objected to the admission of the e-mail because "this offer was not from IKON . . . [but] was from another party altogether." When asked whether the basis of his objection was relevance, McCall's attorney stated it was, and that he was "objecting to this as being relevant." Counsel for IKON countered that Babcock worked for IKON at the time and that the e-mail denotes "cesc/IKON Education." IKON further argued the document was relevant as to the issue of McCall's failure to mitigate his damages.

The admission or exclusion of evidence is addressed to the sound discretion of the trial judge, whose decision will not be overturned absent an abuse of discretion. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 567, 658 S.E.2d 80, 92 (2008). Generally, all relevant evidence is admissible. Rule 402, SCRE. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCRE.

Here, McCall's sole objection raised to admission of the e-mail at the damages hearing was that it was not relevant because it was an "offer" from another party and not from IKON. Thus, this is the only argument on this issue preserved for review. See Durham v. Vinson, 360 S.C. 639, 653-54, 602 S.E.2d 760, 767 (2004) (holding to preserve an issue for appellate review, the issue must have been raised to and ruled upon by trial court, and a party may not argue one ground for objection at trial and another ground on appeal). McCall admitted at the hearing that he was aware of two or three other courses available in the area in January 2002 that were sufficient for him to obtain the certification he sought and were less expensive, yet he did not enroll in any of the other available computer classes, claiming a lack of

funds created by the actions of IKON. Whether it came from IKON or from the entity that acquired IKON, the e-mail offer of a refund only twenty-two days after CESC ceased providing classes in the Greenville area is clearly relevant to whether McCall suffered from a lack of funds that prohibited him from enrollment in the comparable computer classes and whether McCall attempted to mitigate his alleged damages. Accordingly, we find no error.

C. Mitigation of Damages

McCall next argues there is evidence he mitigated his damages. He asserts that he quickly sought employment after the computer classes were cancelled, obtaining a job at Schneider after a short period of time, and further sought to mitigate his damages by entering the Ph.D. program, but these efforts failed because Clemson University was unable to fund the program. McCall argues the circuit court's finding that he should have used the settlement proceeds to enroll into another local computer program amounted to speculation and there was no evidence of any local computer programs which would enable him to obtain Microsoft Certified Systems Engineer certification. He maintains "[t]here is ample evidence that [he] acted reasonably in regard to his decision to use his forestry education once he had been deprived of his opportunity to pursue a certified Microsoft Systems Engineer career."

The bulk of the damages sought by McCall center around his claim of loss of earning capacity based on the failure of IKON to provide the agreed to computer training and McCall's lack of available funds to continue down a computer career path. The circuit court found McCall's explanation for his failure to accept the refund offer in January 2002, because he "never saw a check," to lack credibility. The court further found McCall's testimony that it would have been irresponsible for him to quit his job with Schneider to go back to school after receiving the CESC settlement money because he had a son to care for at that time was also not credible in light of the fact that McCall ultimately quit this job to go back to school for his Ph.D. less than two months after his son was born. The court determined McCall had funds available to pursue his education in computers, but elected not to do so. Accordingly, the court held McCall failed to mitigate his damages.

There is evidence of record that in January 2002, McCall was offered a refund of the tuition and, though he was aware of two or three other less expensive courses available in the area that were sufficient for him to obtain the certification he sought, he failed to enroll in any of these other available computer classes. Further, there is evidence that McCall received a settlement of twice the tuition amount from CESC in May 2003, and therefore had funds available with which he could have enrolled in computer classes at that time. As noted, questions of credibility and the weight to be accorded evidence are exclusively with the trial court. There is more than sufficient evidence of record that reasonably supports the circuit court's findings in this regard.

McCall further asserts the trial court improperly used the settlement proceeds twice because it used the proceeds "as a mitigating factor to reduce [McCall's] damages" and then used the settlement proceeds "as a direct set-off." He asserts the proceeds could be used as a mitigating factor or an off-set, but not both. We do not follow McCall's logic. McCall cites no law or rule that prohibits the circuit court from considering receipt of the settlement money as a factor in determining mitigation and as a set-off against his total damages. Further, the court did not use the settlement proceeds to reduce McCall's damages. Rather, the court simply considered McCall's failure to use the available settlement proceeds as one of the factors in determining whether he mitigated his alleged damages. Thereafter, the court found McCall suffered total damages of $24,379.33 and concluded IKON was entitled to a credit of the $25,000 paid by CESC against its judgment pursuant to South Carolina Code Ann. Section 32-9-10 et seq., a determination that, in and of itself, McCall does not challenge. There is simply no logical reason the court could not both consider the availability of these funds, paid by IKON's successor entity, in determining the ultimate damages to which McCall was entitled and award IKON a credit for the settlement funds paid toward those damages.

D. Evidence of an Asset Purchase Agreement

Finally, McCall argues the circuit court erred in asking for the additional evidence of a copy of the asset purchase agreement between IKON and CESC following the conclusion of the damages hearing. He argues there was no testimony presented concerning the document, he was not afforded an opportunity to address this document, and no issue concerning this document was raised before the court.

There is no asset purchase agreement document in the record before this court. Further, there is nothing in the record to show the circuit court asked for such a document, nor any indication McCall objected to the document as he claims. Neither is there any evidence the circuit court considered such a document in its ruling. In short, the record is devoid of any evidence whatsoever concerning the document of which McCall complains. As the appellant, McCall bears the burden of providing this court with a record sufficient to allow appellate review. See Harkins v. Greenville County, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (noting the appellant has the burden of presenting an adequate record on appeal); see also Rule 210(h), SCACR ("Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal."). Because McCall did not provide this court with an adequate record to consider this argument, we affirm the trial court on this issue as well.

CONCLUSION

For the foregoing reasons, the trial court's order finding McCall entitled to damages of $24,379.33 on his breach of contract action against IKON is

AFFIRMED.

ANDERSON and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Pee Dee Stores, Inc.,	Plaintiff,
v.	
Carolyn H. Doyle, d/b/a Pee Dee Farms Company, and Billy W. Huggins, individually and d/b/a Huggins Farm Service, Inc.,	Defendants,
of Whom Carolyn H. Doyle, d/b/a Pee Dee Farms Company, and Billy W. Huggins, individually and d/b/a Huggins Farm Service, Inc. are the,	Third-Party Plaintiffs,
v.	
Helena Chemical Company,	Third-Party Defendant.
Pee Dee Stores, Inc.,	Plaintiff,
v.	
Carolyn H. Doyle, d/b/a Pee Dee Farms Company, Defendant, of Whom Carolyn H. Doyle, d/b/a Pee Dee Farms Company is the,	Third-Party Plaintiff,
v.	
Helena Chemical Company,	Third-Party Defendant,

of Whom Billy W. Huggins, individually and d/b/a Huggins Farm Service, Inc. is the Appellant

And Pee Dee Stores, Inc. is the Respondent.

Appeal From Horry County
John L. Breeden, Circuit Court Judge

Opinion No. 4467
Heard October 8, 2008 – Filed December 12, 2008

REVERSED

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

Douglas M. Zayicek, Esquire, of Myrtle Beach, for Respondent.

GEATHERS, J.: Appellant Billy W. Huggins, d/b/a Huggins Farm Service (Huggins), seeks review of an order granting Pee Dee Stores, Inc.'s (Pee Dee Stores) summary judgment motion and motion to compel settlement based on a Settlement Agreement. Huggins asserts that the Settlement Agreement was intended to resolve only the landlord/tenant claims and that his civil conspiracy and unfair trade practices claims against both Pee Dee Stores and Third-Party Defendant Helena Chemical Company (Helena) survived the Settlement Agreement. As such, Huggins alleges that summary judgment was improper because a genuine issue of material fact exists as to

whether the parties to the Settlement Agreement intended to extinguish Huggins' claims against Pee Dee Stores and Helena. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

Pee Dee Stores and Paul E. Doyle, deceased husband of Defendant Carolyn Doyle,[1] d/b/a Pee Dee Farms Company (Doyle), entered into a five-year commercial lease agreement that commenced on March 1, 2000 and was to terminate on February 28, 2005. Doyle used the leased premises to operate a convenience store, gas station, and farm supply retail store. The lease agreement afforded Doyle an option to renew the lease by providing written notice to Pee Dee Stores by December 1, 2004. During the lease term, and pursuant to an agreement with Doyle in late 2003, Huggins began selling farm supplies out of the leased premises in his capacity as a commissioned agent for Helena.[2]

Prior to the termination of the lease, Pee Dee Stores represented to Doyle that the lease term would be extended to allow Doyle until December 1, 2005 to consider the option to renew. In addition, Helena represented to Huggins that it intended to purchase Huggins' farm supply business with all of the attached goodwill. At that time, Huggins, Doyle, and Helena began negotiations. Subsequently, and prior to the December 1, 2005 deadline, Doyle notified Pee Dee Stores in writing of her intention to exercise the option to renew the lease. Pee Dee Stores informed Doyle that she could not exercise the option to renew and asked her to vacate the store.

Pee Dee Stores filed an ejectment action against Doyle in magistrate court, asserting a violation of the lease as well as its expiration as grounds for

[1] Carolyn Doyle succeeded to Paul E. Doyle's rights under the lease after his death.

[2] Huggins was not a party to the lease agreement.

ejectment.[3] Doyle answered the complaint by denying the material allegations and sought a declaratory judgment that she was the legal tenant under the lease and had properly exercised the option to renew. In addition, Pee Dee Stores later filed a separate action for breach of contract against Doyle and Huggins. The complaint also alleged interference with contractual relations and fraud, among other claims.

In response to both the ejectment and breach of contract actions, Doyle and Huggins counterclaimed against Pee Dee Stores seeking monetary damages for issues related to the landlord/tenant relationship. Further, the parties asserted in a Third-Party Complaint against Helena causes of action for negligent misrepresentation, unfair trade practices, civil conspiracy, promissory estoppel, interference with a contract, and interference with a prospective contract. These causes of action were based upon an alleged conspiracy between Helena and Pee Dee Stores to oust Doyle and Huggins from the property in order to enable Helena to rent the leased premises and take over both parties' business goodwill without compensation.

Subsequently, Doyle and Huggins brought a motion to consolidate the ejectment and breach of contract actions. The trial court denied the motion to consolidate, ordering the parties to resolve the issues related to the ejectment action first, after which discovery and trial of the remaining issues would occur.

While both actions were pending, Pee Dee Stores, Doyle, and Huggins entered into a Settlement Agreement, which was subtitled as "Relating Only to All Landlord/Tenant Issues." All three parties signed the Settlement Agreement. The pertinent provisions of the Settlement Agreement are as follows:

[3] This action was subsequently transferred to trial court.

7. The parties shall forever release each other from all claims and/or issues, whenever arising, with each agreeing they will never sue or involve each other in any litigation involving the premises, the store, any business on the premises, and/or the relationship between the Parties, as follows: **(1) the Parties agree this is a full and complete release of all claims known and unknown, between Pee Dee Stores, Inc. and Carolyn Doyle, d/b/a Pee Dee Farms Company; and (2) the Parties agree this is a full and complete release of all landlord/tenant claims and issues, known or unknown, between the Parties.**

8. **Nothing in this agreement shall be construed as in any way effecting [sic] the rights of Billy W. Huggins and/or Huggins Farm Service, Inc. to assert claims against Helena Chemical Company. Nothing in this agreement shall be construed as in any way effecting [sic] the rights of Billy W. Huggins and/or Huggins Farm Service, Inc. to assert claims against Pee Dee Stores, Inc. for claims other than the landlord/tenant claims. Nothing herein shall be construed as a relinquishment**, waiver, discharge or release of any claims by Billy W. Huggins and/or Huggins Farm Services, Inc. against Pee Dee Stores, Inc., **for any claims other than the landlord/tenant claims**.

. . .

10. Pee Dee Stores, Inc. and Carolyn Doyle d/b/a Pee Dee Farms Company agree to dismiss all

> claims against each other, with prejudice, and Pee Dee Stores, Inc. and Billy W. Huggins, individually and Huggins Farm Service, Inc., agree to dismiss **only the** landlord/tenant claims with prejudice.

(emphasis added).

Pee Dee Stores later moved to enforce the Settlement Agreement. Subsequently, Doyle and Huggins moved to amend their pleadings to remove all of the landlord/tenant claims against Pee Dee Stores that were resolved by the Settlement Agreement, including the declaratory judgment, breach of lease, and negligent misrepresentation claims. Huggins proposed to leave intact the civil conspiracy and unfair trade practices claims against Pee Dee Stores and Helena. Pee Dee Stores also moved to amend its pleadings to reflect the Settlement Agreement and moved for summary judgment.

At the hearing on the various motions, counsel for Pee Dee Stores, Doyle, and Huggins acknowledged that settlement was reached regarding the ejectment action and that the terms were set forth in the Settlement Agreement. The trial court granted Pee Dee Stores' motion to compel settlement and summary judgment motion, finding the pleadings indicated that all allegations involved landlord/tenant claims and issues "involving the premises, the store, any business on the premises, and/or the relationship between the Parties[,]" and as such were resolved by the Settlement Agreement. Huggins now appeals.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this Court applies the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is appropriate only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Helms Realty, Inc. v. Gibson Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005) (when reviewing the grant of a summary judgment motion, the appellate court applies the same standard of review as the trial court). Summary judgment should be granted when plain, palpable, and indisputable facts exist on which

reasonable minds cannot differ. Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004). However, summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law. Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

In determining whether any triable issues of fact exist, the evidence and all inferences must be viewed in the light most favorable to the non-moving party. Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 227, 612 S.E.2d 719, 722 (Ct. App. 2005). Thus, the appellate court reviews all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party. Willis v. Wu, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004). If evidentiary facts are not disputed, but the conclusions or inferences to be drawn from them are, summary judgment should be denied. Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). Further, "[t]he purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001) (internal citations omitted).

Summary judgment is improper when there is an issue as to the construction of a written contract and the contract is ambiguous because the intent of the parties cannot be gathered from the four corners of the instrument. Gilliland v. Elmwood Prop., 301 S.C. 295, 299, 391 S.E.2d 577, 579 (1990) (internal citations omitted); HK New Plan Exch. Prop. Owner I, LLC v. Coker, 375 S.C. 18, 23, 649 S.E.2d 181, 184 (Ct. App. 2007); Bishop v. Benson, 297 S.C. 14, 17, 374 S.E.2d 517, 518-19 (Ct. App. 1988). The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed. Blakely v. Rabon, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976). Construction of an ambiguous contract is a question of fact to be decided by the jury. Soil Remediation Co. v. Nu-Way Envtl., Inc., 325 S.C. 231, 234, 482 S.E.2d 554, 555 (1997); Lacke v. Lacke, 362 S.C. 302, 309, 608 S.E.2d 147, 150 (Ct. App. 2005).

LAW/ANALYSIS

Huggins asserts the trial court erred in granting Pee Dee Stores' summary judgment motion and motion to compel settlement because a genuine issue of material fact exists as to whether the parties to the Settlement Agreement intended to dismiss Huggins' unfair trade practices and civil conspiracy claims against Helena and Pee Dee Stores. We agree.

A. Settlement Agreement Viewed as a Contract

In South Carolina jurisprudence, settlement agreements are viewed as contracts. Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 177, 557 S.E.2d 708, 711 (Ct. App. 2001); see also Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001) (enforcement of the terms of a settlement agreement is a matter of contract law); Ecclesiastes Prod. Ministries v. Outparcel Assoc., LLC, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) (a release agreement is a contract and contract principles of law should be used to determine what the parties intended); Mattox v. Cassady, 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct. App. 1986) (applying the general rules of contract construction to a settlement agreement).

General contract principles are applied in the construction of a settlement agreement because, as stated above, a settlement agreement is a contract. Summary judgment is not appropriate if a contract is ambiguous. Thus, the initial determination for a court seeking to ascertain whether a grant of summary judgment based on a settlement agreement's interpretation is proper is whether the agreement is ambiguous. See Soil Remediation Co. v. Nu-Way Envtl., Inc., 325 S.C. at 234, 482 S.E.2d at 555.

B. Ambiguity in a Contract

Whether the language of a contract is ambiguous is a question of law for the court. Auten v. Snipes, 370 S.C. 664, 669, 636 S.E.2d 644, 646 (Ct. App. 2006). A contract is ambiguous when the terms of the contract are reasonably susceptible to more than one interpretation. South Carolina Dept.

of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001); Davis v. Davis, 372 S.C. 64, 76, 641 S.E.2d 446, 452 (Ct. App. 2006). The uncertainty in interpretation can arise from the words of the instrument, or in the application of the words to the object they describe. Hann v. Carolina Cas. Inc. Co., 252 S.C. 518, 524, 167 S.E.2d 420, 422 (1969). Whether a contract is ambiguous must be determined from the entire contract and not from any isolated clause of the agreement. Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975).

In the matter presently before the Court, an ambiguity exists in the Settlement Agreement regarding the definition and scope of "landlord/tenant claims." The term "landlord/tenant claims" is reasonably susceptible to more than one interpretation, and therefore, summary judgment was inappropriate.

The trial court based its summary judgment ruling on the conclusion that all allegations in both the ejectment and breach of contract actions involved landlord/tenant claims, and issues "involving the premises, the store, any business on the premises, and/or the relationship between the Parties[,]" and as such were resolved by the Settlement Agreement. This constituted error because there was a genuine issue of material fact as to the meaning and scope of "landlord/tenant claims," and the parties' intentions as to which claims survived the Settlement Agreement differed, thus precluding summary judgment in favor of Pee Dee Stores.

The language of the Settlement Agreement is clear that all landlord/tenant claims were to be resolved by the Settlement Agreement. In fact, the title of the Agreement itself evinces the intent to resolve only all landlord/tenant issues. It reads in relevant part: "Relating Only to All Landlord/Tenant Issues." Paragraphs 7 and 10 of the Settlement Agreement state that the parties agree to dismiss with prejudice all litigation involving the premises, store, any business on the premises, and/or the relationship between the parties, including all claims between Pee Dee Stores and Doyle, and all landlord/tenant issues between all parties. These provisions clearly resolved the claims between Doyle and Huggins and Pee Dee Stores in the ejectment action, as well as all of the claims against Doyle and counterclaims by Doyle in the breach of contract case. This was the basis for Doyle and Huggins' motion to amend their pleadings.

However, the language of the Settlement Agreement does not provide a definition of "landlord/tenant claims." This phrase is not a legal term of art; rather it is shorthand for the parties' conceptualization of the claims that should be labeled as "landlord-tenant." Therefore, the Settlement Agreement is ambiguous as to the scope and application of "landlord/tenant claims." It is unclear whether the parties intended that the Settlement Agreement resolve Huggins' civil conspiracy and unfair trade practices claims against Pee Dee Stores and Helena because it is uncertain whether "landlord/tenant claims" includes civil conspiracy and unfair trade practices claims. Reasonable minds can certainly differ as to the meaning of "landlord/tenant claims."

The language of the Settlement Agreement does not support the trial court's conclusion that **all** of Huggins' claims were extinguished. That construction is implausible, particularly because it would nullify Paragraph 8 of the Settlement Agreement, which clearly sought to exclude some of Huggins' claims from the ambit of the Settlement Agreement. The language of Paragraph 8 unequivocally states that the parties agreed that Huggins never intended to relinquish all of his claims against Pee Dee Stores and Helena and, in fact, clearly excludes Huggins' **non**-landlord/tenant claims from resolution by the Settlement Agreement. It is highly unlikely that the language of Paragraph 8 was included in the Agreement but yet meant to have no effect. The parties must have intended that non-landlord/tenant claims survive the Settlement Agreement. Had it been the parties' intention to extinguish all claims by Huggins, the Settlement Agreement could have simply done so, instead of expressly carving out specific exceptions in Paragraphs 7, 8, and 10 to exclude Huggins' **non**-landlord/tenant claims. The language of the Settlement Agreement does not indicate that it was the parties' intention to resolve all claims.

Further, Pee Dee Stores' various statements concerning its own interpretation of the Settlement Agreement are inconsistent and improbable, again demonstrating that there was a genuine issue of material fact that rendered summary judgment improper. Pee Dee Stores contends that the "and/or [] relationship between the parties" language of Paragraph 7 was intended to be broadly interpreted to waive all claims relating to the

relationship between the parties, including the civil conspiracy and unfair trade practices claims. Yet, elsewhere in its brief Pee Dee Stores states:

> [Huggins and Doyle] also allege the Settlement Agreement is ambiguous because Huggins only agreed to dismiss with prejudice the landlord/tenant claims and issues, and thus reserved the right to sue [Pee Dee Stores] for other things. That is partially correct — the Settlement Agreement certainly does not apply, for example, to any open accounts [Pee Dee Stores] may have with Appellant Huggins, etc. However, Huggins clearly and unambiguously resolved with prejudice all landlord/tenant claims and issues, defined in the Settlement Agreement as "any litigation involving the premises, the store, any business on the premises, and/or the relationship between the Parties.

Contrary to its assertion above, Pee Dee Stores' broad interpretation of the Settlement Agreement would also preclude Huggins from litigating any open accounts with Pee Dee Stores, as these open accounts would certainly pertain to the relationship between the parties. Moreover, Pee Dee Stores moved to amend its pleadings to reflect the Settlement Agreement, which is inconsistent with its contention that the Settlement Agreement dismissed all claims.

In view of the fact that an ambiguity exists in the Settlement Agreement regarding the scope and definition of "landlord/tenant claims," this Court would have to strain to determine the parties' intention, and it is not at liberty to do so. See Blakely 266 S.C. at 73, 221 S.E.2d at 769. Thus, the parties' intention is a question of fact to be ascertained by a jury. To ascertain the parties' intent, the jury must look at the language of the Settlement Agreement, the circumstances known to the parties at the time, and all other pertinent extrinsic evidence.

The trial court committed reversible error in granting Pee Dee Stores' summary judgment motion and motion to compel settlement. The definition

of "landlord/tenant claims" is susceptible to more than one interpretation, and therefore, the contract is ambiguous. Because of the ambiguous nature of the contract, a genuine issue of material fact exists as to whether it was the intent of the parties to extinguish Huggins' claims for civil conspiracy and unfair trade practices.[4]

CONCLUSION

Accordingly, the trial court's order is

REVERSED.

HUFF, J., and GOOLSBY, A.J., concur.

[4] We decline to address Pee Dee Stores' purported sustaining grounds on appeal as our determination that the language of the Settlement Agreement is ambiguous is dispositive. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (the appellate court need not address remaining issues when the disposition of other issues is dispositive).