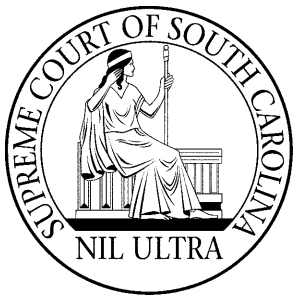

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 46
December 19, 2012
Daniel E. Shearouse, Clerk
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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UNPUBLISHED OPINIONS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UNPUBLISHED OPINIONS

2012-UP-667-State v. Artrell Hickson
(Aiken, Judge Doyet A. Early, III)

2012-UP-668-Johnny Thacker and Cora Thacker v. Aaron Sales and Leasing
(Richland, Judge Alison Renee Lee)

2012-UP-669-Sylvia Ann Davis v. Allendale County Hospital et al.
(S.C. Workers' Compensation Commission)

2012-UP-670-Yolando A. Burgess v. Shawneil Burgess
(Richland, Judge Gwendlyne Y. Smalls)

2012-UP-671-SCDSS v. Lacy M., L.C. H., Terrell M. and Van (last name unknown)
(Spartanburg, Judge James F. Fraley, Jr.)

2012-UP-672-Deborah Strong v. Robert J. Strong
(Dorchester, Judge William J. Wylie Jr.)

2012-UP-673-Brenda Barrington, III, v. Outsourcing Solutions Inc. et al.
(Charleston, Judge Deadra L. Jefferson)

2012-UP-674-SCDSS v. Devin B. and Brian G. and Sue G.
(Richland, Judge Harry L. Phillips, Jr.)

2012-UP-675-State v. Deqing Chen
(Beaufort, Judge D. Craig Brown, Jr.)

2012-UP-676-Gregory M. Gottschlich and Donald L. McNeil v. Strimpfel Custom Homes, et al.
(Beaufort, Judge Marvin H. Dukes, III)

2012-UP-677-Wells Fargo Bank v. EGIS 521 et al.
(Lancaster, Special Referee Clyde N. Davis, Jr.)

PETITIONS FOR REHEARING

5008-Stephens v. CSX Transportation	Pending
5011-A. Dreher v. SCDHEC	Pending
5016-SC Public Interest Foundation v. Greenville County	Pending

5034-State v. Richard Bill Niles, Jr.	Pending
5041-Carolina First Bank v. BADD	Pending
5046-State v. Kendra Samuel	Pending
5048-State v. John Bendarian Bonner	Pending
5049-Paine Gayle Properties v. CSX Transporation	Pending
5052-State v. Michael Donahue	Denied 12/13/12
5053-State v. Thomas E. Gilliland	Pending
2012-UP-267-State v. J. White	Pending
2012-UP-295-L. Hendricks v. SCDC	Pending
2012-UP-351-State v. K. Gilliard	Pending
2012-UP-399-Bowen v. S.C. Department of Motor Vehicles	Pending
2012-UP-475-Shah v. Palmetto Health Alliance	Pending
2012-UP-487-David Garrison and Diane G. Garrison v. Dennis Pagette and Melanie Pagette v. Nesbitt Surveying Co., Inc.	Pending
2012-UP-520-Johnson v. Mew	Pending
2012-UP-552-V. Miles v. Waffle House Inc.	Pending
2012-UP-563-State v. Marion Bonds	Pending
2012-UP-571-Sarah Jo Gaylord v. Jules Gaylord	Pending
2012-UP-576-State v. Trevee J. Gethers	Pending
2012-UP-585-State v. Rushan Counts	Denied 12/13/12
2012-UP-595-State v. Anthony Linton	Pending
2012-UP-600-Karen Irby v. Augusta Lawson	Pending

2012-UP-603-Fidelity Bank v. Cox Investment Group et al. Pending

2012-UP-608-SunTrust Mortgage v. Mark Ostendorff Pending

2012-UP-609-Coghlan v. Coghlan Pending

2012-UP-610-Crenshaw's TV v. Jocassee Partners Pending

2012-UP-611-US Bank Association v. Christine Jolley Johnson Pending

2012-UP-614 - Charles Griggs v. Ashleytowne Development Pending

2012-UP-616-State v. Jamel Dwayne Good Pending

2012-UP-623-L. Paul Trask v. S.C. Department of Public Safety et al. Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4670-SCDC v. B. Cartrette Pending

4705-Hudson v. Lancaster Convalescent Pending

4725-Ashenfelder v. City of Georgetown Pending

4750-Cullen v. McNeal Pending

4764-Walterboro Hospital v. Meacher Pending

4779-AJG Holdings v. Dunn Pending

4819-Columbia/CSA v. SC Medical Pending

4823-State v. L. Burgess Pending

4832-Crystal Pines v. Phillips Pending

4833-State v. L. Phillips Pending

4838-Major v. Penn Community Pending

4851-Davis v. KB Home of S.C. Pending

4857-Stevens Aviation v. DynCorp Intern.	Pending
4859-State v. B. Garris	Pending
4862-5 Star v. Ford Motor Company	Pending
4863-White Oak v. Lexington Insurance	Pending
4865-Shatto v. McLeod Regional Medical	Pending
4867-State v. Jonathan Hill	Pending
4872-State v. Kenneth Morris	Pending
4873-MRI at Belfair v. SCDHEC	Pending
4877-McComb v. Conard	Pending
4879-Stephen Wise v. Richard Wise	Pending
4880-Gordon v. Busbee	Pending
4887-Rebecca West v. Todd Morehead	Pending
4888-Pope v. Heritage Communities	Pending
4890-Potter v. Spartanburg School	Pending
4892-Katie Green Buist v. Michael Scott Buist	Pending
4894-State v. Andre Jackson	Pending
4895-King v. International Knife	Pending
4897-David Tant v. SCDC	Pending
4898-Purser v. Owens	Pending
4902-Kimmer v. Wright	Pending
4905-Landry v. Carolinas Healthcare	Pending
4907-Newton v. Zoning Board	Pending

4909-North American Rescue v. Richardson	Pending
4914-Stevens v. Aughtry (City of Columbia) Stevens (Gary v. City of Columbia)	Pending
4918-Patricia Lewin v. Albert Lewin	Pending
4921-Roof v. Steele	Pending
4923-Price v. Peachtree Electrical	Pending
4924-State v. Bradley Senter	Pending
4926-Dinkins v. Lowe's Home Centers	Pending
4927-State v. John Porter Johnson	Pending
4932-Margie Black v. Lexington County Bd. Of Zoning	Pending
4933-Fettler v. Genter	Pending
4934-State v. Rodney Galimore	Pending
4936-Mullarkey v. Mullarkey	Pending
4940-York Cty. and Nazareth Church v. SCHEC et al	Pending
4941-State v. Bentley Collins	Pending
4947-Ferguson Fire and Fabrication v. Preferred Fire Protection	Pending
4949-Robert Crossland v. Shirley Crossland	Pending
4953-Carmax Auto Superstores v. S.C. Dep't of Revenue	Pending
4954-North Point Dev. Group v. SCDOT	Pending
4956-State v. Diamon D. Fripp	Pending
4960-Justin O'Toole Lucey et al. v. Amy Meyer	Pending

4964-State v. Alfred Adams	Pending
4973-Byrd v. Livingston	Pending
4975-Greeneagle Inc. v. SCDHEC	Pending
4979-Major v. City of Hartsville	Pending
4983-State v. James Ervin Ramsey	Pending
4989-Dennis N. Lambries v. Saluda County Council et al.	Pending
4992-Gregory Ford v. Beaufort County Assessor	Pending
4995-Keeter v. Alpine Towers International and Sexton	Pending
5001-State v. Alonzo Craig Hawes	Pending
5003-Earl Phillips as personal representative v. Brigitte Quick	Pending
5006-J. Broach and M. Loomis v. E. Carter et al.	Pending
5010-S.C. Dep't of Transportation v. Janell P. Revels et al.	Pending
5013-Geneva Watson v. Xtra Mile Driver Training	Pending
5019-John Christopher Johnson v. Reginald C. Lloyd et al.	Pending
5020-Ricky Rhame v. Charleston Cty. School District	Pending
5021-Southern Glass & Plastics Co, Inc. v. Kemper	Pending
5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual	Pending
5035-David R. Martin and Patricia F. Martin v. Ann P. Bay et al.	Pending
2010-UP-356-State v. Darian K. Robinson	Pending
2011-UP-038-Dunson v. Alex Lee Inc.	Pending
2011-UP-052-Williamson v. Orangeburg	Pending

2011-UP-084-Greenwood Beach v. Charleston	Pending
2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-127-State v. Beulah Butler	Pending
2011-UP-162-Bolds v. UTI Integrated	Pending
2011-UP-199-Amy Davidson v. City of Beaufort	Pending
2011-UP-263-State v. Phillip Sawyer	Pending
2011-UP-268-In the matter of Vincent Way	Pending
2011-UP-285-State v. Bobby Lee Burdine	Pending
2011-UP-304-State v. Billy Winchester	Pending
2011-UP-328-Davison v. Scaffe	Pending
2011-UP-334-LaSalle Bank v. Toney	Pending
2011-UP-343-State v. Eric Dantzler	Pending
2011-UP-359-Price v. Investors Title Ins.	Pending
2011-UP-363-State v. Lloyd Wright	Pending
2011-UP-371-Shealy v. The Paul E. Shelton Rev. Trust	Pending
2011-UP-380-EAGLE v. SCDHEC and MRR	Pending
2011-UP-383-Belk v. Harris	Pending
2011-UP-385-State v. Anthony Wilder	Pending
2011-UP-400-McKinnedy v. SCDC	Pending
2011-UP-441-Babb v. Graham	Pending

2011-UP-447-Brad Johnson v. Lewis Hall	Pending
2011-UP-456-Thomas Heaton v. State	Pending
2011-UP-463-State v. Rebekah Rogers	Pending
2011-UP-468-Patricia Johnson v. BMW Manuf.	Pending
2011-UP-471-State v. Terrell McCoy	Pending
2011-UP-475-State v. James Austin	Pending
2011-UP-481-State v. Norris Smith	Pending
2011-UP-495-State v. Arthur Rivers	Pending
2011-UP-496-State v. Coaxum	Pending
2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Pending
2011-UP-503-State v. William Ricky Welch	Pending
2011-UP-516-Vaughn Smith v. SCDPPPS	Pending
2011-UP-517-N. M. McLean et al. v. James B. Drennan, III	Pending
2011-UP-519-Stevens & Wilkinson v. City of Columbia	Pending
2011-UP-522-State v. Michael D. Jackson	Pending
2011-UP-550-McCaskill v. Roth	Pending
2011-UP-558-State v. Tawanda Williams	Pending
2011-UP-562-State v. Tarus Henry	Pending
2011-UP-565-Griggs v. Ashley Towne Village	Pending
2011-UP-572-State v. Reico Welch	Pending
2011-UP-581-On Time Transp. v. SCWC Unins. Emp. Fund	Pending

2011-UP-583-State v. David Lee Coward	Pending
2011-UP-587-Trinity Inv. v. Marina Ventures	Pending
2011-UP-590-A. Leon Ravenell v. Nancy Meyer	Pending
2012-UP-003-In the matter of the care and treatment of G. Gonzalez	Pending
2012-UP-010-State v. Norman Mitchell	Pending
2012-UP-014-State v. Andre Norris	Pending
2012-UP-018-State v. Robert Phipps	Pending
2012-UP-030-Babaee v. Moisture Warranty Corp.	Pending
2012-UP-037-Livingston v. Danube Valley	Pending
2012-UP-058-State v. Andra Byron Jamison	Pending
2012-UP-060-Austin v. Stone	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-089-State v. A. Williamson	Pending
2012-UP-091-State v. Mike Salley	Pending
2012-UP-152-State v. Kevin Shane Epting	Pending
2012-UP-153-McCall v. Sandvik, Inc.	Pending
2012-UP-203-State v. Dominic Leggette	Pending
2012-UP-217-Forest Beach Owners' Assoc. v. C. Bair	Pending
2012-UP-218-State v. Adrian Eaglin	Pending
2012-UP-219-Dale Hill et al. v. Deertrack Golf and Country Club	Pending
2012-UP-267-State v. James Craig White	Pending

2012-UP-270-National Grange Ins. Co. v. Phoenix Contract Glass, LLC, et al.	Pending
2012-UP-274-Passaloukas v. Bensch	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-278-State v. Hazard Cameron	Pending
2012-UP-285-State v. Jacob M. Breda	Pending
2012-UP-286-Diane K. Rainwater v. Fred A. Rainwater	Pending
2012-UP-290-State v. Eddie Simmons	Pending
2012-UP-292-Demetrius Ladson v. Harvest Hope	Pending
2012-UP-293-Clegg v. Lambrecht	Pending
2012-UP-302-Maple v. Heritage Healthcare	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-314-Grand Bees Development v. SCDHEC et al.	Pending
2012-UP-321-James Tinsley v. State	Pending
2012-UP-348-State v. Jack Harrison, Jr.	Pending
2012-UP-365-Patricia E. King and Robbie King Jones, as representatives of W.R. King and Ellen King v. Margie B. King and Robbie Ione King, individually and as co-representatives of the estate of Christopher G. King et al.	Pending
2012-UP-371-State v. Thomas Smart	Pending
2012-UP-404-McDonnell and Assoc v. First Citizens Bank	Pending
2012-UP-432-State v. Bryant Kinloch	Pending
2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending

2012-UP-460-Figueroa v. CBI/Columbia Place Mall et al.	Pending
2012-UP-471-SCDSS v. Kelcie C. et al.	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-504-Palmetto Bank v. Cardwell	Pending
2012-UP-559-NAFH National Bank v. Israel Romero	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Danny Cortez Brown, Respondent.

Appellate Case No. 2010-175826

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27202
Heard October 31, 2012 – Filed December 19, 2012

REVERSED

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Mark Reynolds Farthing, all of Columbia; and Solicitor John Gregory Hembree, of Conway, for Petitioner.

Appellate Defender David Alexander, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

JUSTICE BEATTY: Danny Cortez Brown was convicted of trafficking in cocaine and sentenced to twenty-five years in prison. Brown appealed, arguing the trial court erred in denying his motion to suppress the cocaine, which was seized from a duffel bag after his arrest for an open container violation during an automobile stop. The Court of Appeals reversed on the basis the search was improper under *Arizona v. Gant*, 556 U.S. 332 (2009). *State v. Brown*, 389 S.C. 473, 698 S.E.2d 811 (Ct. App. 2010). This Court has granted the State's petition for a writ of certiorari to review the decision of the Court of Appeals. We reverse.

I. FACTS

Shortly after 7:00 p.m. on October 6, 2005, Officer Daryl Williams of the Horry County Police Department was on patrol in Myrtle Beach, in the vicinity of 16th Avenue South and Kings Highway, when he looked over at a vehicle near him, a 1970s-model Plymouth, and noticed the passenger was drinking from a beer can. Upon making eye contact with Officer Williams, the passenger, Brown, tucked the beer can between his legs. Officer Williams then initiated a traffic stop based on the open container violation. The driver of the car, Rodney Smith, stopped the car in the roadway, near the curb, rather than pulling off the road.

When Officer Williams approached the vehicle, he asked Brown about the beer can. Brown initially denied having any beer, but upon further questioning Brown revealed the beer can that was in his lap. Officer Williams removed Brown from the car and arrested him for an open container violation. Officer Williams had previously noticed a small black duffel bag on the floorboard of the car, on the passenger's side between Brown's legs. When he removed Brown from the car, Officer Williams placed the bag on the sidewalk and then placed Brown, handcuffed, in the back of his patrol car. Officer Williams asked Brown if that was his bag, and Brown confirmed that it belonged to him.

After securing Brown, Officer Williams returned to the stopped vehicle. While talking to Smith, Officer Williams unzipped the duffel bag, which was still on the sidewalk, and looked inside. He discovered what appeared to be powdered cocaine in a plastic bag (122.65 grams) hidden inside a crumpled Fritos bag. Officer Williams closed the duffel bag and resumed his conversation with Smith and asked for his driver's license.

Upon running a license check, Officer Williams discovered Smith's driver's license was suspended, and he arrested Smith for driving under suspension and placed him in another patrol vehicle as more officers arrived at the scene. A search under the driver's seat in the car revealed a black pouch roughly the size of a cigarette pack that contained a small amount of several drugs. Smith was advised that he was also under arrest for those drugs. Smith acknowledged the drugs under the seat belonged to him.

Brown's first trial ended in a mistrial. During the current trial, held in September 2006, Brown moved to suppress the drugs seized from the duffel bag, arguing the search and seizure violated his Fourth Amendment rights. The trial court denied the motion on the basis the drugs were discovered during a search incident to a lawful arrest, which was conducted in conformance with *New York v. Belton*, 453 U.S. 454 (1981).

On appeal, the Court of Appeals reversed Brown's conviction and vacated his sentence on the basis the search violated Brown's Fourth Amendment rights. *State v. Brown*, 389 S.C. 473, 698 S.E.2d 811 (Ct. App. 2010). The court held the search was improper under the law recently announced in *Arizona v. Gant*, 556 U.S. 332 (2009), which departed from *Belton*, although it noted, "In fairness to the trial court, it did not have the guidance provided to us by the United States Supreme Court in the *Gant* case." *Brown*, 389 S.C. at 481 n.2, 698 S.E.2d at 815 n.2. Applying the new rule pronounced in *Gant*, the Court of Appeals found the exception allowing warrantless searches incident to a lawful arrest was inapplicable here because (1) Brown could not have accessed the vehicle or the duffel bag during the arrest, and (2) there was no indication that the duffel bag contained further evidence of the open container violation. *Id.* at 480-81, 698 S.E.2d at 815.

The Court of Appeals further held that the automobile exception for warrantless searches was inapplicable because the officer did not have probable cause to search the bag, and the inevitable discovery rule was unavailing because the State did not meet its burden at trial of establishing the evidence would inevitably have been discovered during an inventory search. *Id.* at 483-84, 698 S.E.2d at 816-17. This Court granted the State's petition for a writ of certiorari.

II. STANDARD OF REVIEW

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Baccus*, 367 S.C. 41, 625 S.E.2d 216 (2006); *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001).

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011) (citation omitted).

When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial court's ruling if there is any evidence to support it; the appellate court may reverse only for clear error. *State v. Missouri*, 361 S.C. 107, 603 S.E.2d 594 (2004); *State v. Pichardo*, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005).

III. LAW/ANALYSIS

On appeal, the State contends the Court of Appeals erred in reversing Brown's conviction and vacating his sentence. Specifically, the State argues the Court of Appeals erred because (1) the officer conducted the search of the duffel bag incident to Brown's arrest in compliance with the controlling appellate precedent in effect at the time of the search, and (2) the challenged evidence inevitably would have been discovered, regardless of the propriety of the search conducted incident to Brown's arrest. Because this case turns on a determination of the applicable precedent, a brief timeline of the pertinent authorities is desirable here.

Fourth Amendment, Exclusionary Rule, & Exceptions

The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be

seized. U.S. Const. amend. IV; *see also Baccus*, 367 S.C. at 50, 625 S.E.2d at 221 (stating a search warrant may be issued only upon a finding of probable cause). "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) (quoting *Horton v. California*, 496 U.S. 128, 133 (1990)).

The Fourth Amendment itself provides no remedy for a violation of the warrant requirement. *Davis v. United States*, 131 S. Ct. 2419 (2011). However, the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment. *Id.* at 2423. "Exclusion is 'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search.'" *Id.* at 2426 (citations omitted). "The rule's sole purpose, [the Supreme Court] has repeatedly held, is to deter future Fourth Amendment violations." *Id.* Because "[e]xclusion exacts a heavy toll on both the judicial system and society at large," the Court has stated "the deterrence benefits of suppression must outweigh its heavy costs" for the exclusion to be deemed appropriate. *Id.* at 2427. In addition, judicially-created exceptions have been established to ameliorate the harsh effects of the judicially-created exclusionary rule. *Id.*

"Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement." *Wright*, 391 S.C. at 442, 706 S.E.2d at 327. These exceptions include the following: (1) search incident to a lawful arrest, (2) hot pursuit, (3) stop and frisk, (4) automobile exception, (5) the plain view doctrine, (6) consent, and (7) abandonment. *State v. Dupree*, 319 S.C. 454, 462 S.E.2d 279 (1995); *State v. Moore*, 377 S.C. 299, 659 S.E.2d 256 (Ct. App. 2008); *see also Wright*, 391 S.C. at 444-45, 706 S.E.2d at 327-28 (discussing exigent circumstances); *State v. Herring*, 387 S.C. 201, 692 S.E.2d 490 (2009) (same).

Rule Announced in New York v. Belton (U.S. 1981)

In the current appeal, the trial court denied Brown's suppression motion and ultimately ruled the drugs were admissible pursuant to the authority of *New York v. Belton*, 453 U.S. 454 (1981) because they were discovered during a search incident to a lawful arrest. In *Belton*, the Supreme Court, "[i]n order to establish the workable rule this category of cases requires," held "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a

contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460 (footnote omitted).

"It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." *Id.* (citing *United States v. Robinson*, 414 U.S. 218 (1973) and *Draper v. United States*, 358 U.S. 307 (1959)). "Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have." *Id.* at 461. The Court observed "that these containers will sometimes be such that they could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested." *Id.* However, the Court cited its previous decision in *Robinson* that the authority to search "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence" could have been found. *Id.* (quoting *Robinson*, 414 U.S. at 235).

Limitation of Belton in Arizona v. Gant (U.S. 2009)

In *Arizona v. Gant*, 556 U.S. 332 (2009), the Supreme Court departed from twenty-eight years of precedent and altered the rule it had announced in *Belton*.

In *Gant*, the defendant was arrested for driving with a suspended license and then handcuffed and locked in the back of a patrol car while officers searched his car. *Id.* at 335. Officers discovered cocaine in the pocket of a jacket that was on the backseat. *Id.* The question arose whether *Belton*'s exception for warrantless searches of automobiles pursuant to a lawful arrest should apply to justify the search when it was undisputed that Gant could not have accessed his car to retrieve evidence or weapons at the time of the search. *Id.*

The Supreme Court stated the *Belton* "opinion has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Id.* at 341. The Court explained "[t]his reading may be attributable to Justice Brennan's dissent in *Belton*, in which he characterized the Court's holding as resting on the 'fiction . . . that the interior of a car is *always* within the immediate

control of an arrestee who has recently been in the car.'" *Id.* (quoting *Belton*, 453 U.S. at 466 (Brennan, J., dissenting)).[1]

The Court stated, "The experience of the 28 years since we decided *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded." *Id.* at 350. "We now know that articles inside the passenger compartment are rarely" within an arrestee's reach and that "blind adherence to *Belton*'s faulty assumption would authorize myriad unconstitutional searches." *Id.* at 350-51. "The doctrine of *stare decisis* does not require us to approve routine constitutional violations." *Id.* at 351.

The Supreme Court declared the following new two-part rule:

> Police may search a vehicle incident to a recent occupant's arrest *only if* [1] the arrestee is within reaching distance of the passenger compartment at the time of the search *or* [2] it is reasonable to believe the vehicle contains evidence of the arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Id. (emphasis added).

Supreme Court's Qualification of Gant

Thereafter, in *Davis v. United States*, 131 S. Ct. 2419, 2423-24 (2011), the Supreme Court observed that *Gant* represented "a shift in our Fourth Amendment jurisprudence on searches of automobiles incident to arrests of recent occupants" and considered the question of "whether to apply [the] sanction [of the exclusionary rule] when the police conduct a search in compliance with binding precedent that is later overruled." The Court held that, "[b]ecause suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, . . . searches

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[1] The dissent in *Gant* observes, "Contrary to the Court's suggestion, however, Justice Brennan's *Belton* dissent did not mischaracterize the Court's holding in that case or cause that holding to be misinterpreted. As noted, the *Belton* Court explicitly stated precisely what it held." *Gant*, 556 U.S. at 357 (Alito, J., dissenting).

conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *Id.*

The Court explained that, "[f]or years, *Belton* was widely understood to have set down a simple, bright-line rule. Numerous courts read the decision to authorize automobile searches of recent occupants, regardless of whether the arrestee in any particular case was within reaching distance of the vehicle at the time of the search." *Id.* at 2424. "Even after the arrestee had stepped out of the vehicle and had been subdued by police, the prevailing understanding was that *Belton* still authorized a substantially contemporaneous search of the automobile's passenger compartment." *Id.*

The Supreme Court stated it had "adopted a new, two-part rule" in *Gant*. *Id.* at 2425. The Court noted the search at issue in *Davis* occurred in 2007, some two years before it announced its new rule in *Gant*. *Id.* The driver was arrested for driving while intoxicated and the passenger, Willie Davis, was arrested for giving a false name to police. *Id.* Both were handcuffed and placed in the back of separate patrol cars. *Id.* The police then searched the car and found a revolver inside Davis's jacket pocket. *Id.* The Court's opinion in *Gant* was issued while Davis's appeal from his conviction was still pending. *Id.*

The Court reasoned that the exclusionary rule's sole purpose is to deter future Fourth Amendment violations and that where suppression fails to yield "appreciable deterrence," exclusion is "clearly . . . unwarranted." *Id.* at 2426-27 (citation omitted). The Court stated that "when binding appellate precedent specifically *authorizes* a particular police practice," such that the officer has acted in an objectively reasonable manner, the application of the exclusionary rule would serve only to discourage an officer from doing his duty and to deter "conscientious police work." *Id.* at 2429. The Court stated, "That is not the kind of deterrence the exclusionary rule seeks to foster." *Id.*

The Court held that *Gant* would apply retroactively to Davis because his "conviction had not yet become final on direct review." *Id.* at 2431. However, the Court distinguished the concept of a "remedy" from the question of "retroactivity" and found the exclusionary rule does not apply when the police conduct a search in accordance with existing appellate precedent. *Id.* at 2430-34. The Court stated that, in those circumstances, the police have not engaged in culpable misconduct, so the deterrent purpose of the exclusionary rule would not be served. *Id.* at 2434.

Application of Precedent in the South Carolina Courts

In *Narciso v. State*, 397 S.C. 24, 723 S.E.2d 369 (2012), this Court, in considering a belated appeal[2] from a conviction for trafficking in cocaine, examined the interplay of *Belton*, *Gant*, and *Davis*. The police had been investigating Osiel Narciso as part of an ongoing drug investigation, but stopped him in 2005 after receiving a report that he might be operating a vehicle in the area with an expired license tag and possibly no driver's license. *Id.* at 26-27, 723 S.E.2d at 370. A police officer conducted a traffic stop after confirming that Narciso's license tag was expired. *Id.* at 27, 30, 723 S.E.2d at 370, 372. Another officer arrived at the scene, and Narciso was arrested after the police verified that he did not possess a valid driver's license. *Id.* The police then conducted a search, including a "K-9" search, of his vehicle incident to that arrest. *Id.* at 27, 723 S.E.2d at 370. The narcotics-detection dog alerted on drug residue inside the vehicle, and the police ultimately seized cocaine from the vehicle. *Id.*

Narciso was tried in 2007 on charges of trafficking, two years prior to the United States Supreme Court's holding in *Gant*. *Id.* at 30, 723 S.E.2d at 372. The trial court, though expressing misgivings, denied the defendant's motion to suppress the drug evidence in reliance upon *Belton*. *Id.* After reviewing the holdings of the foregoing cases and other authority, this Court concluded on appeal that "*Davis v. United States*, [131 S. Ct. 2419 (2011),] and our own standard of review, commands that the circuit court's decision be affirmed." *Id.* at 32, 723 S.E.2d at 373. The Court stated,

> In the instant case, the search incident to arrest violated Petitioner's Fourth Amendment rights pursuant to *Gant.* However, excluding the evidence against Petitioner would not deter police misconduct because the police in this instance conducted a search incident to arrest pursuant to binding appellate precedent. *See* [*Davis v. United States*], 131 S.Ct. at 2426–28. Moreover, exclusion of the evidence in this case would result in severe social costs, including the articulation of an inexplicable and undecipherable message to law enforcement regarding how to conduct a legal search. The protection of the Fourth Amendment can only be realized if the police are acting

[2] In *Narciso*, the State consented to a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). Although Brown has argued against the precedent of *Narciso*, we reaffirm that its result is mandated by *Davis*.

> under a set of rules which make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement. Wayne R. LaFave, "*Case–By–Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma,* 1974 Sup.Ct. Rev. 127, 142 (1974).

Id. The Court noted that the State, as the respondent, had argued that due to *Gant*, the search-incident-to-arrest ground was no longer appropriate for denying the suppression motion, and had urged the Court to find the search was justified under the automobile exception. *Id.* at 32 n.2, 723 S.E.2d at 373 n.2. The Court stated that, because the decision in *Davis* was dispositive and the exclusionary rule did not apply, it "need not reach the automobile exception, or any other grounds, for upholding the search." *Id.*

Similarly, in the current appeal, Brown's arrest and the police search incident to arrest occurred in 2005, when *Belton* was still the prevailing appellate precedent. As a result, the trial court properly denied Brown's motion to suppress at trial in 2006 after concluding the search was then legal under *Belton* as a search incident to a lawful arrest (for an open container violation).

Thereafter, on April 21, 2009, the United States Supreme Court issued its opinion in *Gant*, which declared the police may conduct a warrantless search of a vehicle incident to a recent occupant's arrest only if (1) the person is within reaching distance of the passenger compartment at the time of the search, or (2) it is reasonable to believe the vehicle contains evidence of an arrest. *Gant*, 556 U.S. at 351.

The following year, the South Carolina Court of Appeals heard Brown's direct appeal. In its decision filed on June 14, 2010, the court applied the new rule articulated in *Gant*. *State v. Brown*, 389 S.C. 473, 698 S.E.2d 811 (Ct. App. 2010). The court held that, under *Gant*, the search of Brown's duffel bag was unlawful because Brown was handcuffed and placed in the patrol car prior to the search and, thus, he did not have access to the vehicle at the time of the search. *Brown*, 389 S.C. at 480-81, 698 S.E.2d at 815. The court then applied the exclusionary rule to bar the admission of the drug evidence and reversed Brown's conviction and vacated his sentence. *Id.* at 483-84, 698 S.E.2d at 816-17.

Since Brown's appeal was still pending on direct review, we find the Court of Appeals properly applied *Gant* and determined the search of Brown's duffel bag

violated his Fourth Amendment rights because neither alternative of *Gant*'s two-part test was met so as to justify a warrantless search.

The Court of Appeals, however, like the trial court before it, did not have the benefit of subsequent authority. On June 16, 2011, a year after the Court of Appeals filed its decision, the United States Supreme Court issued its opinion in *Davis v. United States*, 131 S. Ct. 2419 (2011), clarifying that *Gant* would apply to pending cases on direct review, but that the exclusionary rule could *not* be applied in these circumstances because the officers carried out their searches in accordance with existing appellate precedent and the exclusionary rule would serve no deterrent purpose. Consequently, we find the exclusionary rule should not be applied in Brown's case because it would contravene the dictates of *Davis*.[3] We, therefore, reverse the decision of the Court of Appeals and reinstate his conviction and sentence.

Having determined that the exclusionary rule should not be applied in the circumstances present here, it is unnecessary to reach the State's second argument regarding inevitable discovery, which is an exception to the exclusionary rule. *See Narciso*, 397 S.C. at 32 n.2, 723 S.E.2d at 373 n.2 (finding where *Davis* was dispositive and the exclusionary rule did not apply to bar the evidence, exceptions to the exclusionary rule need not be considered).

IV. CONCLUSION

In conclusion, we hold the Court of Appeals properly applied *Gant* and found the warrantless police search conducted incident to Brown's arrest for an open container violation was illegal. We further hold, however, pursuant to the Supreme Court's subsequent pronouncement in *Davis*, that the exclusionary rule is not applicable to this case because the officer relied upon existing appellate

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[3] We reject Brown's contention that this Court should not apply the *Davis* decision based on alleged error preservation grounds. The State filed its petition for a writ of certiorari with this Court in 2010, and the Supreme Court did not issue *Davis* until 2011, while Brown's appeal was still pending on direct review in this Court. The parties thoroughly argued this issue in their briefs. In *Narciso*, this Court applied both *Gant* and *Davis*, finding these authorities were applicable to all cases still pending on direct review. In our view, it would be incongruous to apply *Gant* to pending appeals to find the search was unlawful, but not to apply the Supreme Court's corresponding clarification in *Davis*.

precedent at the time he conducted his search. Consequently, the decision of the Court of Appeals is reversed.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina, Respondent,

v.

Timothy Wallace, Petitioner.

Appellate Case No. 2011-192266

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Oconee County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 27203
Heard December 5, 2012 – Filed December 19, 2012

DISMISSED AS IMPROVIDENTLY GRANTED

Kathrine Haggard Hudgins, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, all of Columbia; and Solicitor Christina T. Adams, of Anderson, for Respondent.

PER CURIAM: We granted a petition for a writ of certiorari to review the decision of the Court of Appeals in *State v. Wallace*, 392 S.C. 47, 707 S.E.2d 451 (Ct. App. 2011). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

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

The Supreme Court of South Carolina

In the Matter of Charles E. Houston, Jr., Respondent.

Appellate Case No. 2012-213047

ORDER

By order dated April 6, 2009, the Court publicly reprimanded respondent and, in relevant part, required him to "retain the services of a Certified Public Accountant to oversee the management of his trust account." In the Matter of Houston, 382 S.C. 164, 167, 675 S.E.2d 721, 723 (2009). In September 2010, the Office of Disciplinary Counsel (ODC) petitioned the Court to issue a rule to show cause asserting respondent failed to comply with the Court's order. ODC claimed that, while respondent did retain the services of a CPA in July 2009, he failed to provide her with any documentation from which to perform an accounting until July 2010 and, thereafter, provided incomplete and inadequate records to the CPA.

By order dated June 8, 2011, the Court accepted a proposed consent order submitted by ODC and respondent. The order declined to find respondent in contempt, but specified as follows:

> …for a period of two years following this order, Respondent shall submit to the Office of Commission Counsel monthly statements from his retained CPA containing the original wet signature of the CPA indicating whether Respondent is cooperating with the CPA. Respondent shall be responsible for payment of his CPA and timely submission of the CPA's statements containing original wet signatures.

The Court warned respondent that his failure "to fully and timely comply with the terms imposed by the consent order may subject him to a finding of contempt. No violation of the consent order shall be tolerated."

In February 2012, ODC again petitioned the Court to issue a rule to show cause asserting respondent failed to submit any of the monthly statements from his CPA to the Commission on Lawyer Conduct (the Commission). After a hearing on June

6, 2012, the Court found respondent in civil contempt of Court as a result of his failure to comply with the Court's June 8, 2011, order requiring him to submit monthly statements from his CPA to the Commission. *See* Order dated June 18, 2012. Among other requirements, the Court ordered respondent to either clear out the unknown trust account liabilities reported on his April 30, 2012, Trust Account Reconciliation or deliver the funds to the Lawyers Fund for Client Protection (the Lawyers Fund), and to enroll in the Legal Ethics and Practice Program Trust Account School to be held in September 2012. Both requirements were to be completed within one week of the June 18, 2012, order. The Court further ordered respondent to attend the South Carolina Bar's September 2012 Trust Account School and, upon completion of the course, immediately submit proof of attendance to the Commission. Finally, the Court ordered respondent to submit monthly statements from his CPA to the Commission through June 2013 as required by the Court's June 8, 2011, order.

The June 18, 2012, order concluded as follows:

> *[r]espondent's failure to comply with any of the obligations imposed by this order* or his failure to pay the costs of the contempt proceeding pursuant to the terms of the parties' agreed upon payment schedule *shall result in his immediate suspension from the practice of law.*

(Emphasis added).

In late September 2012, ODC notified the Court that respondent had not complied with all the requirements of the June 18, 2012, order. Specifically, respondent had not enrolled in the September 2012 Legal Ethics and Practice Program Trust Account School and had not cleared out the unknown trust account liabilities or delivered the funds to the Lawyers Fund within one week of the order. Further, respondent did not attend the September 2012 Legal Ethics and Practice Program Trust Account School held on September 19, 2012. In addition, respondent did not submit the July or August statements from his CPA to the Commission as required by the Court's June 8, 2011, and June 18, 2012, orders.

In response to ODC's notice, respondent offered no explanation for his failure to enroll in the September 2012 Legal Ethics and Practice Program Trust Account School, but asserted he did not attend the course due to illness. He submitted his July, August, and September 2012 statements from the CPA as attachments to his return. By letter received December 3, 2012, respondent informed the Court that

he was unable to determine to whom the funds in his trust account belonged and, therefore, he submitted a check payable to the Lawyers Fund in the amount of $3,349.00 to ODC on November 26, 2012.[1]

Respondent has clearly violated the Court's June 18, 2012, order. He did not enroll in the September 2012 Legal Ethics and Practice Program Trust Account School within one week of the order and did not attend the September 2012 Legal Ethics and Practice Program Trust Account School as required by the June 18, 2012, order. Further, respondent did not timely submit the July or August statements from his CPA to the Commission as required by the Court's June 18, 2012, order.

Finally, respondent neither cleared out the unknown trust account liabilities nor delivered the funds in the account to the Lawyers Fund within one week as required by the June 18, 2012, order. In fact, respondent has only now determined that he does not know to whom the funds in his trust account belong and has forwarded the trust account monies to the Lawyers Fund, five months after the Court's June 2012 order and after ODC notified the Court of respondent's failure to comply with the Court's June 18, 2012, order.

Accordingly, respondent remains in civil contempt of this Court and he is hereby suspended from the practice of law. Respondent may purge himself of contempt by attending the February 2013 Legal Ethics and Practice Program Trust Account School and, upon completion of the course, immediately submitting proof of attendance to the Commission. Respondent shall remain suspended until he files a petition to lift the suspension documenting he has fully complied with this order.

Respondent shall remain obligated to timely file monthly statements from his CPA to the Commission as required by the Court's June 8, 2011, and June 18, 2012, orders.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

[1] As specified in the June 18, 2012, order, the Lawyers Fund shall return these funds to respondent in two (2) years, provided no claims are filed against respondent.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 7, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wells Fargo Bank, NA, Respondent,

v.

Michael Smith; South Carolina Department of Motor Vehicles; M & T Properties, Inc.; State of South Carolina; Arthur State Bank; South Carolina Department of Probation, Pardon and Parole Services, Defendants, of whom Michael Smith is the Appellant.

Appellate Case No. 2009-125666

Appeal From Greenville County
Charles B. Simmons, Jr., Master-in-Equity

Opinion No. 4988
Submitted March 1, 2011 – Filed June 13, 2012
Withdrawn, Submitted and Refiled August 8, 2012

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Susan P. Ingles, of South Carolina Legal Services, of Greenville, for Appellant Michael Smith.

Sean Matthew Foerster, of Rogers Townsend & Thomas, PC, of Columbia, for Respondent Wells Fargo Bank.

WILLIAMS, J.: Michael Smith ("Smith") appeals the Master-in-Equity's ("Master") grant of Wells Fargo Home Mortgage, Inc.'s[1] ("Wells Fargo") motion to strike the jury demand. We affirm in part, reverse in part, and remand for further proceedings.

FACTS/PROCEDURAL HISTORY

The complaint alleges that on April 29, 2003, Smith gave a Fixed Rate Note ("Note") to Wells Fargo in the amount of $83,000. The Complaint further alleges that to secure payment of the Note, Smith gave Wells Fargo a real estate mortgage ("Mortgage") covering his real property at 1 Anchor Road in Greenville, South Carolina, as well as a 2003 Fleetwood mobile home.

Wells Fargo filed this action for foreclosure, alleging Smith defaulted on his loan payments under the Note and Mortgage and owed $77,460.63 on the debt. After the Greenville County Clerk of Court filed an order of reference, Smith filed a motion to allow late filing of responsive pleadings, and Wells Fargo consented to an extension of time. Smith filed an answer and counterclaim with a jury trial request and asserted, along with other various defenses, the following counterclaims: 1) accounting; 2) unconscionability; and 3) violation of section 37-10-102 of the South Carolina Code (Supp. 2010).[2] Wells Fargo filed a motion to strike the jury demand ("motion to strike"). The Master heard the motion to strike and asked Smith to submit additional authority to support his position.

On March 12, 2009, the Master issued an order granting Wells Fargo's motion to strike and confirming the order of reference. Smith timely filed a Rule 59(e), SCRCP, motion seeking to alter or amend the final order, and by order entered April 15, 2009, the Master denied Smith's Rule 59(e) motion. This appeal followed.

STANDARD OF REVIEW

"The matter of striking from a pleading, and the matter of admissibility of evidence is largely within the discretion of the trial judge." *Brown v. Coastal States Life Ins. Co.*, 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975). "The granting or refusal of a

[1] Wells Fargo, NA is the successor by merger to Wells Fargo Home Mortgage, Inc.
[2] Section 37-10-102 of the South Carolina Code (Supp. 2010) is also referred to as the Attorney Preference statute.

[m]otion to strike . . . will not be reversed except for an abuse of discretion or unless the action of the trial judge was controlled by an error of law." *Id.* at 194-95, 213 S.E.2d at 728 (internal citation omitted); *see also Mayes v. Paxton*, 313 S.C. 109, 115, 437 S.E.2d 66, 70 (1993) (holding absent an abuse of discretion, the trial court's ruling on a motion to strike will not be reversed).

Additionally, "[w]hether a party is entitled to a jury trial is a question of law." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). "An appellate court may decide questions of law with no particular deference to the trial court." *In re Campbell*, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008) (citation omitted).

LAW/ANALYSIS

A. Subject Matter Jurisdiction

On appeal, Smith asserts the Master exceeded his jurisdiction in ruling on Wells Fargo's motion to strike. As a result, Smith contends the matter should have been transferred to the circuit court when he initially filed the jury demand as part of the answer and counterclaim. We disagree.

Pursuant to Rule 53, SCRCP, a master has no power or authority except that which is given to him by an order of reference. *Smith v. Ocean Lakes Family Campground*, 315 S.C. 379, 381, 433 S.E.2d 909, 910 (Ct. App. 1993). When a case is referred to a master under Rule 53, the master is given the power to conduct hearings in the same manner as the circuit court unless the order of reference specifies or limits the master's powers. *Smith Cos. of Greenville, Inc. v. Hayes*, 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993). Specifically, Rule 53(c), SCRCP, states "[o]nce referred, the master or special referee shall exercise all power and authority which a circuit court judge sitting without a jury would have in a similar matter."

As a basis for this claim, Smith cites the Reporter's Note appended to the 2002 Amendment to Rule 53, SCRCP. This note states, "If there are counterclaims requiring a jury trial, any party may file a demand for a jury under Rule 38 and the case will be returned to the circuit court." However, the order of reference in this case authorized the Master "to take testimony and to direct entry of final judgment in this action under Rule 53(b), SCRCP, and all matters arising from or reasonably related to such action. The Master in Equity shall retain jurisdiction to perform all necessary acts incident to this foreclosure action . . . ." Thus, once the case is referred to the Master, he has subject matter jurisdiction to resolve the action to the

extent the order of reference provides, and with the authority a circuit court judge would have in a similar matter. *See* Rule 53(c), SCRCP; *Hayes*, 311 S.C. at 360, 428 S.E.2d at 902. Accordingly, we find the Master had subject matter jurisdiction to rule on Wells Fargo's motion to strike the jury demand as the matter was properly before the Master pursuant to the order of reference and our rules of civil procedure.

B. Smith's Counterclaims

Smith contends the Master erred in determining Smith's counterclaims for unconscionability and a violation of the Attorney Preference statute were not entitled to a jury trial. We disagree.

The South Carolina Constitution provides "[t]he right of trial by jury shall be preserved inviolate." S.C. Const. art. I, § 14. "The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868." *Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005) (citation omitted). Additionally, Rule 38(b), SCRCP, provides, in pertinent part:

> Any party may demand a trial by jury of any issue *triable of right by a jury* by serving upon the other parties a demand therefor[e] in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(emphasis added). Smith demanded a jury trial in his answer and counterclaim when he asserted counterclaims of accounting[3], unconscionability, and a violation of the Attorney Preference statute against Wells Fargo.

[3] Smith conceded at the non-evidentiary hearing he was not entitled to a jury trial on his counterclaim for accounting and subsequently abandoned this argument on appeal. *See* Rule 208(b)(1)(D), SCACR (stating each "particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority"); *Jinks v. Richland Cnty.*, 355 S.C. 341, 344, 585 S.E.2d 281, 283 (2003) (holding issues not argued in the brief are deemed abandoned and precluded from consideration on appeal).

"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). If a complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim. *C & S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986), *modified by Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987). "A mortgage foreclosure is an action in equity." *U.S. Bank Trust Nat'l. Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009). As Wells Fargo's foreclosure allegation is equitable in nature, Smith has the right to a jury trial only if his counterclaim is both legal and compulsory. *See C & S Real Estate Servs., Inc.*, 290 S.C. at 302, 350 S.E.2d at 193.

Characterization of an "action as equitable or legal depends on the appellant's 'main purpose' in bringing the action." *Ins. Fin. Servs., Inc. v. S.C. Ins. Co.*, 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978) (citations omitted).[4] "The main purpose of the action should generally be ascertained from the body of the complaint." *Id.* (citation omitted). "However, if necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." *Id.* (citation omitted). The nature of the issues raised by the pleadings and character of relief sought under them determines the character of an action as legal or equitable. *Bell v. Mackey*, 191 S.C. 105, 119-20, 3 S.E.2d 816, 822 (1939) (citations omitted).

For Smith's counterclaims to be entitled to a jury trial, each counterclaim must be both legal and compulsory.

1. Unconscionability

Smith argues the Master erred in finding he was not entitled to a jury trial on his unconscionability counterclaim. We disagree.

[4] "[T]he 'main purpose' rule evolved from a determination that where a plaintiff has prayed for money damages in addition to equitable relief, characterization of the action as equitable or legal depends on the plaintiff's 'main purpose' in bringing the action." *Floyd v. Floyd*, 306 S.C. 376, 380, 412 S.E.2d 397, 399 (1991) (citations omitted).

a) Common Law Unconscionability[5]

Although Smith's counterclaim for common law unconscionability is compulsory, he is not entitled to a jury trial because this is an equitable claim that does not create a cause of action for damages.

"By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *First-Citizens Bank & Trust Co. of S.C. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991); *see also* Rule 13(a), SCRCP. The test for determining if a counterclaim is compulsory is whether there is a "logical relationship" between the claim and the counterclaim. *Mullinax v. Bates*, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). In *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), our supreme court adopted the "logical relationship" test and held DAV's counterclaim was compulsory because "there [was] a logical relationship between the enforceability of the note which [was] the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture." In essence, the "logical relationship" determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage. *Advance Intern., Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 269-70, 449 S.E.2d 580, 582 (Ct. App. 1994), *aff'd in part, vacated in part*, 320 S.C. 532, 466 S.E.2d 367 (1996).

Here, there is a "logical relationship" between the enforceability of the Note, which is the subject of the foreclosure action, and the allegation that the Mortgage between Wells Fargo and Smith is unconscionable. If Smith prevails on his unconscionability claim, it will affect Wells Fargo's right to enforce the Note and foreclose the Mortgage. Therefore, Smith's common law unconscionability counterclaim is compulsory under the "logical relationship" test.

Even though Smith's common law unconscionability counterclaim is compulsory, because common law unconscionability only provides an equitable relief, Smith is not entitled to a jury trial on his counterclaim. Jurisdictions throughout the country

[5] Smith's counterclaim for unconscionability failed to specify whether it was a claim for common law unconscionability or statutory unconscionability under section 37-5-108 of the South Carolina Code (Supp. 2010). We analyze this issue under both and hold the Master was correct in finding Smith was not entitled to a jury trial under either version of the counterclaim.

agree that common law unconscionability is an equitable cause of action with corresponding relief that is only equitable in nature. *See Doe v. SexSearch.com*, 551 F.3d 414, 419 (6th Cir. 2008) ("At common law, unconscionability is a defense against enforcement, not a basis for recovering damages."); *Super Glue Corp. v. Avis Rent a Car Sys., Inc.*, 517 N.Y.S.2d 764, 766 (N.Y. App. Div. 1987) ("The doctrine of unconscionability is used as a shield, not a sword, and may not be used as a basis for affirmative recovery."); *see, e.g.*, Restatement (Second) of Contracts § 208 (1981) ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."). Despite Smith's request for actual and punitive damages for unconscionability in the body of his pleadings, the primary relief sought is to have the mortgage declared void. Accordingly, Smith seeks relief from a jury that cannot be granted. *See Simpson v. MSA of Myrtle Beach*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007) ("In determining whether a contract was 'tainted by an absence of meaningful choice,' *courts* should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.") (emphasis added); *Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 615, 682 S.E.2d 498, 502 (Ct. App. 2009) ("Rescission is an equitable remedy that attempts to undo a contract from the beginning as if the contract had never existed."); *Loyola Fed. Sav. Bank v. Thomasson Props.*, 318 S.C. 92, 93, 456 S.E.2d 423, 424 (Ct. App. 1995) ("If the claim is equitable, there is no right to a jury trial."). Because the only remedies available for common law unconscionability are equitable, there is no right to a jury trial on this claim. *See Brown v. Greenwood Sch. Dist. 50 Bd. of Trs.*, 344 S.C. 522, 525, 544 S.E.2d 642, 643 (Ct. App. 2001) ("There is no right to a jury trial for equitable remedies such as rescission and restitution."). Accordingly, Smith's common law unconscionability counterclaim is not entitled to a jury trial.

b) Statutory Unconscionability

Applying the same "logical relationship" test, we find Smith's counterclaim for statutory unconscionability is also compulsory. In addition to arising out of the same transaction or occurrence as Wells Fargo's foreclosure action, Smith's counterclaim bears a "logical relationship" to the enforceability of the Note and Mortgage. Accordingly, Smith's statutory unconscionability counterclaim is compulsory under the "logical relationship" test.

Although the statutory unconscionability counterclaim is compulsory, section 37-5-108 of the South Carolina Code (Supp. 2010) requires the determination of whether an agreement is unconscionable to be a matter of law for the court. *See Tilley v. Pacesetter Corp.*, 333 S.C. 33, 38, 508 S.E.2d 16, 18 (1998) ("If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning."). In section 37-5-108, the General Assembly explicitly chose the use of the term "court" to unequivocally demonstrate that the matter is not to be resolved by a jury, but by the court. *See* § 37-5-108(1) ("[I]f the *court* as a matter of law finds . . . the agreement or transaction to have been unconscionable . . . the *court* may refuse to enforce the agreement.") (emphasis added); *see also* § 37-5-108(3) ("If it is claimed or appears to the *court* that the agreement or transaction or any term or part thereof may be unconscionable . . . the parties shall be afforded a reasonable opportunity to present evidence . . . to aid the *court* in making the determination.") (emphasis added). Therefore, section 37-5-108 does not provide a right to a jury trial for a statutory unconscionability cause of action. Accordingly, we affirm the Master's decision to strike Smith's request for a jury trial on his unconscionability counterclaim.

2. Violation of the Attorney Preference Statute

To determine whether Smith is entitled to a jury trial on his allegation that Wells Fargo violated the Attorney Preference statute, we again must determine if this counterclaim is both legal and compulsory. *See C & S Real Estate Servs., Inc.*, 290 S.C. at 302, 350 S.E.2d at 193. We conclude Smith's counterclaim is permissive because a violation of the Attorney Preference statute would not affect the enforceability of the Note and Mortgage.

Section 37-10-102(a) of the South Carolina Code (Supp. 2010) provides, in pertinent part:

> Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose . . . [t]he creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction . . . .

The complaint alleges that to secure payment of this Note, Smith gave Wells Fargo a real estate Mortgage covering his real estate property as well as a mobile home. As a result, Smith was entitled to choose an attorney of his preference for the closing of the transaction pursuant to section 37-10-102(a). A violation of the Attorney Preference statute is enforced by section 37-10-105(A) of the South Carolina Code (Supp. 2010). The enforcement provision of the Attorney Preference statute provides, in pertinent part:

> If a creditor violates a provision of this chapter, the debtor has a cause of action . . . to recover actual damages and also a right in an action . . . to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars.

S.C. Code Ann. § 37-10-105(A) (Supp. 2010). A review of this statute demonstrates Smith's counterclaim has no "logical relationship" to the enforceability of the Note and Mortgage. Moreover, even if a violation of the statute occurred, Smith would only be entitled to actual damages and a possible penalty between $1,500 to $7,500. The statute, however, does not permit rescission of the Note and Mortgage for its violation. *See* § 37-10-105(A). As Smith's counterclaim bears no "logical relationship" to the enforceability of the Note and Mortgage, we conclude Smith's counterclaim is permissive. Therefore, Smith waived his right to a jury trial by asserting it in the foreclosure action. *See N.C. Fed. Sav. & Loan Ass'n*, 294 S.C. at 30, 362 S.E.2d at 310 ("[W]here a defendant in an action begun in equity asserts a permissive counterclaim that is legal in nature, the defendant is deemed to have waived the right to a jury trial on the issues raised by the counterclaim."). Accordingly, we affirm the Master's decision to strike Smith's request for a jury trial on his counterclaim for a violation of the Attorney Preference statute.

C. Scope of Motion to Strike Jury Demand

Smith contends the Master exceeded the scope of Wells Fargo's motion to strike by making findings of fact and conclusions of law based on documents and information not in evidence. We agree.

A reversal is required when the trial court's ruling exceeds the limits and scope of the particular motion before it. *Skinner v. Skinner*, 257 S.C. 544, 549-50, 186 S.E.2d 523, 526 (1972).

After a brief non-evidentiary motion hearing, the Master requested Smith submit authority to support his assertion he was entitled to a jury trial. A review of the Master's order demonstrates his ruling went beyond the permissible scope of Wells Fargo's motion. The order granting Wells Fargo's motion to strike had the effect of granting judgment and making findings of fact based on information not admitted or decided by the pleadings. In short, the Master's order on the motion to strike the jury demand makes findings of fact and rules that a cause of action is meritless without evidentiary support, constituting an abuse of discretion.[6] *See Edwards v. Edwards*, 384 S.C. 179, 183, 682 S.E.2d 37, 39 (Ct. App. 2009) ("The [trial] court abuses its discretion when factual findings are without evidentiary support or a ruling is based upon an error of law."). We conclude these impermissible findings of fact and conclusions of law are prejudicial to Smith, thus warranting reversal. *See Watts v. Bell Oil Co. of Ocean Drive, Inc.*, 266 S.C. 61, 63, 221 S.E.2d 529, 530 (1976) (holding a trial court will only be reversed when the record shows not only error but also prejudice).

CONCLUSION

In summary, the Master had subject matter jurisdiction to rule on Wells Fargo's motion to strike the jury demand. Additionally, the Master's ruling on Smith's unconscionability and attorney preference statute counterclaims is affirmed. The Master's order, to the extent that it details specific findings of fact and conclusions of law, is reversed and the case remanded to the Master for a bench trial on the merits of all causes of action alleged.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

GEATHERS and LOCKEMY, JJ., concur.

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[6] The Master made certain findings of fact that go to the substance and merits of Smith's claims and well beyond the scope of the motion to strike, including: "Smith's counterclaim has no merit," and "[b]ecause Smith would not be entitled to relief as against Wells Fargo on his counterclaim, it can hardly be said he would be entitled to a jury trial on it."

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Maria T. Curiel and Martin L. Curiel, Respondents,

v.

Hampton County E.M.S., Appellant.

Appellate Case No. 2011-194827

Appeal From Hampton County
Perry M. Buckner, Circuit Court Judge

Opinion No. 5065
Heard October 30, 2012 – Filed December 19, 2012

AFFIRMED

Marshall H. Waldron, Jr. and Matthew David Cavender, both of Griffith Sadler & Sharp, PA, of Beaufort, for Appellant.

John S. Nichols, of Bluestein Nichols Thompson & Delgado, LLC, of Columbia; H. Woodrow Gooding and Mark Brandon Tinsley, both of Gooding & Gooding, PA, of Allendale, for Respondents.

KONDUROS, J.: Hampton County E.M.S. (Hampton) appeals the trial court's grant of summary judgment in favor of Maria and Martin Curiel, arguing the trial court erred in finding it was not entitled to tort immunity pursuant to the South Carolina Tort Claims Act. S.C. Code Ann. § 15-78-70(6) (2005). We affirm.

FACTS

On November 22, 2008, Maria was driving Martin's car on a two-lane road in Hampton County. Emergency Medical Technician (EMT) Jason Schroyer was driving the ambulance with his partner, Shannon Crouch. They were driving in the same direction on the same road as Maria and approached her vehicle from behind. The ambulance was in route to a structure fire where a burn victim was in need of care.

Schroyer claimed he was driving forty-five miles-per-hour in a fifty-five miles-per-hour zone, as he approached Maria. He stated he had the emergency lights and siren on. Both vehicles slowed down and Schroyer believed Maria had stopped. Both Schroyer and Crouch stated Schroyer sounded his horn and began to pass Maria. When Schroyer crossed the center yellow line to pass Maria's vehicle, Maria turned left into her driveway. Schroyer steered right, but was unable to avoid colliding with Maria.

Both parties filed motions for summary judgment. On January 25, 2011, the trial court denied Hampton's motion for summary judgment and did not rule on the Curiels' motion. Hampton filed a motion for reconsideration, and the trial court held a hearing on March 15, 2011. The trial court filed an order on June 8, 2011, denying Hampton's motion for reconsideration and granted the Curiels' motion for summary judgment. The trial court's order stated, "It is the opinion of this [c]ourt that neither the words or the statute nor the intent of the statute were intended to apply to the facts in the case." Footnote 3 of the order states, "Furthermore, as the burden of proof is on the governmental entity asserting a limitation upon liability, this [c]ourt finds that Hampton County E.M.S. has failed to meet its burden of showing that Plaintiffs' allegations fall within this exception to the wavier of immunity." No further motion for reconsideration was filed. This appeal followed.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). 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; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004).

LAW/ANALYSIS

Hampton argues the trial court erred in determining Hampton's ambulance was not engaging in "fire protection" pursuant to section 15-78-60(6) of the South Carolina Code (2005). We disagree.

The Tort Claims Act "is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b)." *Wells v. City of Lynchburg*, 331 S.C. 296, 302, 501 S.E.2d 746, 749 (Ct. App. 1998); *see* S.C. Code Ann. § 15-78-200 (2005) ("Notwithstanding any provision of law, this chapter, the 'South Carolina Tort Claims Act', is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty."). The Act provides: "The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C., 279, 290, 628 S.E.2d 496, 502 (Ct. App. 2006) (quoting S.C. Code Ann. § 15-78-40 (2005)). "The Tort Claims Act waives sovereign immunity for torts committed by the State, its political subdivisions, and governmental employees acting within the scope of their official duties." *Id.* at 291, 628 S.E.2d at 502.

"The Tort Claims Act is a limited waiver of governmental immunity." *Hawkins v. City of Greenville*, 358 S.C. 280, 293, 594 S.E.2d 557, 564 (Ct. App. 2004). Under the Act, a governmental entity is not liable for a loss resulting from certain enumerated events including "civil disobedience, riot, insurrection, or rebellion or

the failure to provide the method of providing police or fire protection." S.C. Code Ann. § 15-78-60(6) (2005). "The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense." *Proctor*, 368 at 292, 628 at 503; *see Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 324, 566 S.E.2d 536, 540 (2002) ("The governmental entity claiming an exception to the waiver of immunity under the Tort Claims Act has the burden of establishing any limitation on liability.").

"The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Sloan Constr. Co. v. Southco Grassing, Inc.*, 395 S.C. 164, 170, 717 S.E.2d 603, 606 (2011). "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.'" *Id.* (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 582 (2000)). When interpreting a statute, the court "must read the language 'in a sense that harmonizes with its subject matter and accords with its general purpose.'" *Ranucci v. Crain*, 397 S.C. 168, 172, 723 S.E.2d 242, 244 (Ct. App. 2012) (quoting *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)). An "inclusion in [a] statute of certain specified exclusions leaves the inference that the Legislature intended no other exclusions from the exemption." *W. Va. Pulp & Paper Co. v. Riddock*, 225 S.C. 283, 288, 82 S.E.2d 189, 190 (1954).

By including police and fire protection as exceptions to the State's waiver of immunity, but not specifically listing emergency medical services, the Legislature did not intend to include emergency medical services as an exception to the waiver of immunity in section 15-78-60(6). Accordingly, the trial court did not err in granting the Curiels' summary judgment motion. Therefore, the trial court's decision is

AFFIRMED.

SHORT and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William M. Rhett and Nancy R. Rhett, Appellants/Respondents,

v.

Jonathan H. Gray, Respondent/Appellant.

Appeal From Beaufort County
Marvin H. Dukes, III, Master-in-Equity

Opinion No. 5066
Heard April 26, 2012 - Filed December 19, 2012

AFFIRMED IN PART AND REVERSED IN PART

Charles E. Carpenter, Jr., and Carmen V. Ganjehsani, both of Columbia; H. Fred Kuhn, Jr., of Beaufort, for Appellants/Respondents.

Harold A. Boney, Jr., of Beaufort; James B. Richardson, Jr., of Columbia, for Respondent/Appellant.

KONDUROS, J.: This is an appeal arising out of claims by William M. and Nancy R. Rhett (collectively the Rhetts) to two easements on Jonathan H. Gray's property. The Rhetts appeal the master-in-equity's finding that one of the easements was abandoned. They also appeal the master's not allowing them to use the other easement to access all of their property. They further appeal the master's denial of their request for attorney's fees. Gray appeals the master's finding the Rhetts could use the other easement to access part of their property to which it is not appurtenant. We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

In March 1981, the Rhetts purchased one acre of land located in Beaufort County from the heirs of Tarquin Smalls. The deed contained no reference to any easement. This property was bounded on the west and south by twenty acres[1] William's mother owned and on the north and east by property owned by heirs of Tarquin. The Rhetts built their principal residence on the property and accessed the property through William's mother's property, via Conch Point Lane, a private driveway extending from Trotters Loop. In December 1981, the Rhetts bought a second acre from Tarquin's heirs, which surrounded their previously purchased acre. This conveyance also did not involve any easements.

In 1982, Veronica Washington Smalls, an heir of Tarquin, received a tract from the Tarquin Smalls property containing 5.97 acres, which was adjacent to the Rhetts' property. The property deeded to Veronica did not contain an express easement but the plat referred to in the deed contained a fifty-foot access easement along the property owned by another of Tarquin's heirs, which had a terminus on Veronica's property. Veronica divided her tract into two parts; she conveyed a 1.25-acre piece to Yancey O'Kelley and

[1] At the time, this tract was believed to be eighteen acres but was later determined to be twenty acres.

the remaining 4.12 acres[2] to the Rhetts, which was adjacent to their current property. The fifty-foot easement abutted the 1.25-acre tract but not the 4.12-acre tract. The Rhetts accessed their 4.12 acres the same way they accessed their other two acres. In 1984, the Rhetts purchased the 1.25-acre tract from O'Kelley. The deed conveyed "all of the right, title and interest in the easement for ingress and egress as shown on said plat."

Thelma Owens Smalls obtained one-acre tract of land from Nathan Smalls, an heir of Tarquin, in 1986. In 1987, Nathan conveyed an express easement that was thirty feet wide, extending from Trotters Loop across his land to Thelma's land. The Rhetts purchased the one-acre tract of land from Thelma. The deed conveyed "all of the rights in the existing fifty (50') foot and thirty (30') foot easement extending from the county road as shown on the above referenced plat." The Rhetts then sold 0.85 acres of that property to Gene Meador, retaining the 0.15-acre portion south of the slough[3] for themselves that included the easement.

In 1988, Nathan sold a 4.95-acre tract, which was encumbered by both easements, to R. Milledge Morris, IV. Morris sold an abandoned house on his property to the Rhetts, which they moved to the 4.12 acres they had purchased from Veronica. The Rhetts restored the house and refer to it as the cottage.[4] In 1992, Gray bought the 4.95-acre tract[5] and an additional 0.95 acre tract from Morris. The plat showed both easements encumbering Gray's property. William and Gray decided to purchase the 0.85-acre tract William had previously sold to Meador. William swapped his half interest in the property with Gray in exchange for the part of Gray's property southeast of the ditch and south of the slough. The Rhetts' surveyor, David S. Youmans, prepared a plat showing the swap. The plat shows the thirty-foot easement on

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[2] This adds up to 5.37, not 5.97, but no one disputes that the property was split into only these two pieces.

[3] A slough is "[a]n arm of a river, separate from the main channel" or "[a] bog; a place filled with deep mud." Black's Law Dictionary 1515 (9th ed. 2009).

[4] Currently, the Rhetts' adult son lives in the cottage.

[5] The deed listed the property as 5.06 acres, determined from a survey.

the portion to be owned by Gray and states "EASEMENT TO BE ABANDONED" on the portion of the property the Rhetts acquired. William testified the portion of the easement on Gray's property was abandoned because Gray did not need the easement because his property was next to the road.

In 1994, Gray placed on his property a mobile home, where he and his family lived. In 1997, Gray moved into a home built on his property. Around 1997 or 1998, Gray put a wire pasture fence on part of his property in which to keep his farm animals. Also in 1997, Gray separated a portion of his property for his parents and they built a house there in 1998. Gray's mother continued to reside there after Gray's father passed away in 1999.

In 2000 Gray put a farm gate at Trotter's Loop, at the easement area, and secured it with a lock. In 2005, Gray replaced the farm gate with a wrought iron gate, which he also kept locked. In March 2007, Gray placed a load of fill dirt in the easement area as well as some hay bales. In May 2007, the Rhetts bought William's mother's eighteen-acre tract. The Rhetts considered developing the property at that time but later decided to sell it instead. In December 2007, the Rhetts' attorney sent Gray a letter requesting that he remove the gate and dirt piles.

On March 31, 2008, the Rhetts filed a complaint against Gray, alleging Gray had "unreasonabley interfered with [their] full and free use and enjoyment of [the thirty-foot and fifty-foot easements] by placement of obstructions upon the easement, including but not limited to a gate, and a mound of dirt." The Rhetts sought an injunction against Gray, "barring and prohibiting [Gray] from closing, obstructing, or interfering in whole or in part with [the Rhetts'] full and free use of the entire easement, and ordering and compelling [Gray] to forthwith remove all obstructions and barriers placed by [Gray] with the confines of the easements." The Rhetts further sought damages, actual and punitive, as well as attorney's fees incurred by them in connection with the enforcement of their easement rights.

On June 10, 2008, Gray filed an answer denying the allegations of the Rhetts' complaint and asserting affirmative defenses. On June 19, 2008, the Rhetts filed a motion for a temporary injunction. On July 10, 2008, Gray filed an amended answer and counterclaim, denying the allegations of the complaint and seeking a declaratory judgment that the easements were abandoned in the 1992 land swap. Gray further contended that even if the easements were not abandoned, his gating of the easements was not an unreasonable interference with the Rhetts' rights. Gray also alleged the Rhetts' claims for damages were barred by the statute of limitations. Gray asserted estoppel and laches as defenses. Additionally, Gray contended the Rhetts intended to use the easements as a subdivision road for the development of their property, including acreage to which the easements were not appurtenant. Gray sought a declaratory judgment that the Rhetts' intended use of development would constitute an unintended, unreasonable, and unlawful burden on his property. Gray further sought an injunction prohibiting the Rhetts from using the easements for access to any of their land other than the pieces to which it was originally appurtenant and from constructing a subdivision road over Gray's property.

The case was referred to a master by consent order. Following the trial, the master issued an order finding (1) the thirty-foot easement was appurtenant to the one-acre Thelma parcel and was abandoned; (2) the fifty-foot easement was an implied easement appurtenant to the 1.25-acre O'Kelley parcel and was not abandoned; (3) the Rhetts may only use the fifty-foot easement to access the 5.97-acre parcel, which included the 1.25 acres that was appurtenant, and are enjoined from using it to access the remainder of their property; (4) Gray's gate at the entrance to the fifty-foot easement is necessary for Gray's preservation and use of his property and is located, maintained, and constructed to not interfere with the Rhetts' right to use the easement; (5) Gray may keep the gate locked as long as he provides the Rhetts a key or other means to open the gate when they desire; and (6) Gray shall remove the dirt pile, the hay bales, and board fence enclosing his horse paddock. The master denied the Rhetts' claim for attorney's fees. Both Gray and the Rhetts moved the master to reconsider. The trial court denied both motions. This appeal followed.

STANDARD OF REVIEW

"The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." Hardy v. Aiken, 369 S.C. 160, 165, 631 S.E.2d 539, 541 (2006) (citation and quotation marks omitted). "In a law case tried by the judge without a jury, this court reviews for errors of law and reviews factual findings only for evidence which reasonably supports the court's findings." Eldridge v. City of Greenwood, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (Ct. App. 1998).

"However, the determination of the scope of the easement is a question in equity." Hardy, 369 S.C. at 165, 631 S.E.2d at 541. On appeal in an action in equity, the appellate court may find facts in accordance with its views of the preponderance of the evidence. Grosshuesch v. Cramer, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005). Thus, this court may reverse a factual finding by the trial court in such cases when the appellant satisfies us the finding is against the greater weight of the evidence. Campbell v. Carr, 361 S.C. 258, 263, 603 S.E.2d 625, 627 (Ct. App. 2004). This broad scope of review does not require the appellate court to disregard the findings of the trial court, which saw and heard the witnesses and was in a better position to evaluate their credibility. Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000). Furthermore, the appellant is not relieved of the burden of convincing this court the trial court committed error in its findings. Pinckney v. Warren, 344 S.C. 382, 387-88, 544 S.E.2d 620, 623 (2001).

LAW/ANALYSIS

I. The Rhetts' Appeal

A. Abandoned Easement

The Rhetts contend the master erred in finding the thirty-foot easement was abandoned because (1) when they obtained ownership to the land

through which the easement ran, their ownership rights became fee simple absolute; (2) the plat prepared by the their surveyor unambiguously shows they only intended to abandon the easement because it ceased to exist because of merger on the Rhetts' property but it was not abandoned as to Gray's property; and (3) the plat is ambiguous as to whether the surveyor's language meant only a portion or all of the easement was meant to be abandoned and parol evidence should have been admitted to determine the intent. We agree the master erred in finding the easement abandoned.

An easement is a right to use the land of another for a specific purpose. Steele v. Williams, 204 S.C. 124, 132, 28 S.E.2d 644, 647 (1944). This right of way may arise by grant,[6] from necessity, by prescription, or by implication by prior use. Boyd v. Bellsouth Tel. Tel. Co., 369 S.C. 410, 416, 633 S.E.2d 136, 139 (2006); Steele, 204 S.C at 132, 28 S.E.2d at 647-48. "A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) (quotation marks omitted).

"[T]ermination of an easement by abandonment is a factual question in an action at law . . . ." Eldridge v. City of Greenwood, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (Ct. App. 1998).

> [A]n easement may be lost by abandonment and in determining such question the intention of the owner to abandon is the primary inquiry. The intention to abandon need not appear by express declaration, but may be inferred from all of the facts and circumstances of the case. It may be inferred from the acts and conduct of the owner and the nature and situation of the property, where there appears some

[6] "A reservation of an easement in a deed by which lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the lands." Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965).

> clear and unmistakable affirmative act or series of acts clearly indicating, either a present intent to relinquish the easement, or purpose inconsistent with its further existence.

Carolina Land Co. v. Bland, 265 S.C. 98, 109, 217 S.E.2d 16, 21 (1975). The burden of proof is upon the party asserting abandonment to show the abandonment by clear and unequivocable evidence. Id. Mere nonuse of an easement created by deed will not amount to an abandonment. Witt v. Poole, 182 S.C. 110, 115, 188 S.E. 496, 498 (1936).

> In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy. In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law. The intention of the grantor must be found within the four corners of the deed.

Windham v. Riddle, 381 S.C. 192, 201, 672 S.E.2d 578, 582-83 (2009) (hereinafter Windham II) (citations and quotation marks omitted), aff'g Windham v. Riddle, 370 S.C. 415, 418, 635 S.E.2d 558, 559 (Ct. App. 2006) (hereinafter Windham I).

When the Rhetts and Gray swapped property, they no longer owned the part of the easement on their own property but each would have been entitled to the easement across the other's new property barring them abandoning the easement. However, Gray had no reason for an easement on the Rhetts' new property because he no longer needed to cross the Rhetts' property. In contrast, the Rhetts still needed the easement on Gray's new property to access their property. Youmans, the Rhetts' surveyor, testified the Rhetts did not intend for the easement to remain on their new property but did intend to continue using the easement on Gray's new property. Further, Gray and his wife testified the Rhetts occasionally used both easements and

when Gray placed a locked gate across the easement, had inquired about being able to use his key from time to time and in case of an emergency. As the party asserting the easement was abandoned, Gray had the burden to provide clear and unequivocal evidence the Rhetts abandoned the easement. The plat states the easement is abandoned only on the portion showing the Rhetts' new property, not the entire easement. Accordingly, we find the master erred in finding the thirty-foot easement was abandoned.

B. Fifty-Foot Easement Appurtenant

The Rhetts assert the master erred in finding the fifty-foot easement was only appurtenant to the 1.25-acre piece and not the 4.12-acre piece. We disagree.

Determining whether an easement is in gross or appurtenant is a question in equity because it involves the extent of a grant of an easement. Windham I, 370 S.C. at 418, 635 S.E.2d at 559; see also Heritage Fed. Sav. & Loan Ass'n v. Eagle Lake & Golf Condos., 318 S.C. 535, 539, 458 S.E.2d 561, 564 (Ct. App. 1995) ("The interpretation of a deed is an equitable matter.").

"The general rule is that the character of an express easement is determined by the nature of the right and the intention of the parties creating it." Plott v. Justin Enters., 374 S.C. 504, 514, 649 S.E.2d 92, 96 (Ct. App. 2007) (quotation marks omitted). "[E]asements in gross are not favored by the courts, and an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate." Smith v. Comm'rs of Pub. Works of City of Charleston, 312 S.C. 460, 467, 441 S.E.2d 331, 336 (Ct. App. 1994) (citing 25 Am. Jur. 2d Easements & Licenses § 13 (1966)).

> The character of an express easement is determined by the nature of the right and the intention of the parties creating it. An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer. In contrast, an

> appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. It also passes with the dominant estate upon conveyance. Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross. Where language in a plat reflecting an easement is capable of more than one construction, that construction which least restricts the property will be adopted.

Windham II, 381 S.C. at 201-02, 672 S.E.2d at 583 (citations and quotation marks omitted).

In Windham II, the court noted that because the party claiming an appurtenant easement had other irrigation options, whether an appurtenant easement was essentially necessary to the enjoyment of the property was questionable. Id. at 204, 672 S.E.2d at 584 (citing Kershaw v. Burns, 91 S.C. 129, 133, 74 S.E. 378, 379 (1912) ("The principle is well settled that a right of way appurtenant cannot be granted, unless it is essentially necessary to the enjoyment of the land to which it appertains."); Ballington v. Paxton, 327 S.C. 372, 380, 488 S.E.2d 882, 887 (Ct. App. 1997) ("An appendant or appurtenant easement must inhere in the land, concern the premises, have one terminus on the land of the party claiming it, and be essentially necessary to the enjoyment thereof.")).

The master correctly found the easement was only appurtenant to the 1.25 acres and not to the 4.12 acres. Although Veronica's property contained an easement for her entire 5.97 acres, when she granted 4.12 acres of it to the Rhetts, that grant did not contain an easement. However, the 1.25 acres she granted to O'Kelley did contain an easement. Once the Rhetts acquired the 1.25 acres, this did not resurrect the easement for the entire tract. Therefore, we affirm the master's decision that the fifty-foot easement was only appurtenant to the 1.25-acre tract.

C. Access to All Twenty-Eight Acres from Easements

The Rhetts argue the master erred in issuing an injunction that they can only use the easements to access the 5.97 acres of their property and not the entire twenty-eight acres when their use of them to enter the remainder of their property will not increase the burden on Gray's estate. We disagree.

"'[T]he owner of the easement cannot materially increase the burden of the servient estate or impose thereon a new and additional burden.'" Clemson Univ. v. First Provident Corp., 260 S.C. 640, 650, 197 S.E.2d 914, 919 (1973) (quoting 25 Am. Jur. 2d Easements and Licenses § 72 at 478). Although to the extent of the easement, the rights of the easement owner are paramount to those of the landowner, the easement owner's rights are not absolute but are limited, so the owners of the easement and the servient tenement may have reasonable enjoyment. Id. (citation omitted). The owner of an easement has all rights incident or necessary to its proper enjoyment, but nothing more. Id.

"As a general rule, an easement appurtenant to one parcel of land may not be extended by the owner of the dominant estate to other parcels owned by him, whether adjoining or distinct tracts, to which the easement is not appurtenant." Brown v. Voss, 715 P.2d 514, 517 (Wash. 1986) (citing Heritage Standard Bank & Trust Co. v. Trs. of Schs., 405 N.E.2d 1196 (Ill. App. Ct. 1980); Kanefsky v. Dratch Constr. Co., 101 A.2d 923 (Pa. 1954); S.S. Kresge Co. of Mich. v. Winkelman Realty Co., 50 N.W.2d 920 (Wis. 1952); 28 C.J.S. Easements § 92, at 772-73 (1941)).

"If an easement is appurtenant to a particular parcel of land, any extension thereof to other parcels is a misuse of the easement." Id. (citing Wetmore v. Ladies of Loretto, Wheaton, 220 N.E.2d 491 (Ill. App. Ct. 1966); Robertson v. Robertson, 197 S.E.2d 183 (Va. 1973); Penn Bowling Rec. Ctr., Inc. v. Hot Shoppes, Inc., 179 F.2d 64 (D.C. Cir. 1949)). "As noted by one court in a factually similar case, '[I]n this context this classic rule of property law is directed to the rights of the respective parties rather than the actual burden on the servitude.'" Id. (quoting Nat'l Lead Co. v. Kanawha Block Co.,

288 F. Supp. 357, 364 (S.D. W. Va. 1968), aff'd, 409 F.2d 1309 (4th Cir. 1969)). The Washington Supreme Court noted:

> Under the express language of the 1952 grant, plaintiffs only have rights in the use of the easement for the benefit of parcel B. Although, as plaintiffs contend, their planned use of the easement to gain access to a single family residence located partially on parcel B and partially on parcel C is perhaps no more than technical misuse of the easement, we conclude that it is misuse nonetheless.

Id. The court qualified that statement, determining:

> [I]it does not follow from this conclusion alone that defendants are entitled to injunctive relief. . . . Some fundamental principles applicable to a request for an injunction must be considered. (1) The proceeding is equitable and addressed to the sound discretion of the trial court. (2) The trial court is vested with a broad discretionary power to shape and fashion injunctive relief to fit the particular facts, circumstances, and equities of the case before it. Appellate courts give great weight to the trial court's exercise of that discretion. (3) One of the essential criteria for injunctive relief is actual and substantial injury sustained by the person seeking the injunction.

Id. at 517.

> The trial court found as facts, upon substantial evidence, that plaintiffs have acted reasonably in the development of their property, that there is and was no damage to the defendants from plaintiffs' use of the easement, that there was no increase in the

> volume of travel on the easement, that there was no increase in the burden on the servient estate, that defendants sat by for more than a year while plaintiffs expended more than $11,000 on their project, and that defendants' counterclaim was an effort to gain "leverage" against plaintiffs' claim. In addition, the court found from the evidence that plaintiffs would suffer considerable hardship if the injunction were granted whereas no appreciable hardship or damages would flow to defendants from its denial. Finally, the court limited plaintiffs' use of the combined parcels solely to the same purpose for which the original parcel was used—i.e., for a single family residence.
>
> Neither this court nor the Court of Appeals may substitute its effort to make findings of fact for those supported findings of the trial court. Therefore, the only valid issue is whether, under these established facts, as a matter of law, the trial court abused its discretion in denying defendants' request for injunctive relief. Based upon the equities of the case, as found by the trial court, we are persuaded that the trial court acted within its discretion.

Id. at 518 (citations omitted).

Enlarging an easement to include adjoining tracts increases the burden. McCammon v. Meredith, 830 S.W.2d 577, 580 (Tenn. Ct. App. 1991).

> A fundamental principle is that an easement for the benefit of a particular piece of land cannot be enlarged and extended to other parcels of land, whether adjoining or distinct tracts, to which the right is not attached. In other words, an easement

> appurtenant to a dominant tenement can be used only for the purposes of that tenement; it is not a personal right, and cannot be used, even by the dominant owner, for any purpose unconnected with the enjoyment of his estate. The purpose of this rule is to prevent an increase of the burden upon the servient estate, and it applies whether the easement is created by grant, reservation, prescription, or implication.

Adams v. Winnett, 156 S.W.2d 353, 357 (Tenn. Ct. App. 1941) (quotation marks omitted).

The reason for the rule preventing an easement for the benefit of a particular piece of land from being extended to other tracts of land "is to prevent an increase of the burden upon the servient estate." Id.; see also Ogle v. Trotter, 495 S.W.2d 558, 565-66 (Tenn. Ct. App. 1973). However, when the reason does not exist, the rule does not apply. Ogle, 495 S.W.2d at 566. Thus, when the burden on the easement has materially decreased or not increased, the easement holder may use the easement to access an adjoining property. Id. When "the additional burden is relatively trifling, the user will not be enjoined; and that, where the owner of a right of way appurtenant to a certain tract uses it for the period of prescription as appurtenant also to another tract, he gains a prescriptive right to such enlarged use." Id. (quotation marks omitted); see also Carbone v. Vigliotti, 610 A.2d 565, 569 (Conn. 1992) ("[W]hen no significant change has occurred in the use of the easement from that contemplated when it was created, . . . the mere addition of other land to the dominant estate does not constitute an overburden or misuse of the easement.").

Most of the case law provided by the Rhetts starts with the same principles that South Carolina jurisprudence expresses: an owner of an easement cannot materially increase the burden of the servient estate or impose thereon a new and additional burden. However, other states have determined that expanding the use of an easement to property that is not appurtenant is not worthy of an injunction in situations in which the

expanded use does not increase the burden. South Carolina has not expressed such a principle, but in those cases the decisions were trusted to the trial court's judgment to weigh the particular facts. Here, the master allowed the Rhetts to use the easement for one tract it found was not appurtenant, the 4.12-acre tract, (discussed below in Gray's appeal) and did not allow them to use it for the rest of their twenty-eight acres. The 5.97 acres contained one house, the cottage where their son lives, while the house where they live is located on the remainder of their twenty-eight acres. Thus, it would have increased the usage by one household containing two people. Accordingly, the master did not err in failing to allow the Rhetts to access their property other than the 5.97 acres with the easement.

D. Attorney's Fees

The Rhetts contend the master erred in finding they were not entitled to attorney's fees although Gray placed them in the position of having to bring the lawsuit. We disagree.

Generally, attorney's fees are not recoverable unless authorized by contract or statute. Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 383, 377 S.E.2d 296, 297 (1989). In Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 131, 414 S.E.2d 118, 120 (1992), the court allowed a party to recover attorney's fees and costs expended in defending the negligence of another party when the other party negligently performed its contract with the first party and because of that negligence and breach of contract directed toward the first party, the first party was forced to defend an action brought by a third party.

In Addy v. Bolton, 257 S.C. 28, 33, 183 S.E.2d 708, 709 (1971), the court found

> the l[e]ssors seek to recover from the contractor the attorneys' fees incurred by them in defending themselves against the claim asserted by the tenants. The weight of authority sustains their right of

> recovery, either on the theory of an implied contract to indemnify, or because they were put to the necessity of defending themselves against the lessees' claim by the tortious conduct of the contractor, or by his breach of contract.

The court noted:

> "It is generally held that where the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expense to protect his interest, such costs and expenses, including attorneys' fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages. In order to recover attorneys' fees under this principle, the plaintiff must show: (1) that the plaintiff had become involved in a legal dispute either because of a breach of contract by the defendant or because of defendant's tortious conduct; (2) that the dispute was with a third party-not with the defendant; and (3) that the plaintiff incurred attorneys' fees connected with that dispute. If the attorneys' fees were incurred as a result of a breach of contract between plaintiff and defendant, the defendant will be deemed to have contemplated that his breach might cause plaintiff to seek legal services in his dispute with the third party."
>
> "In actions of indemnity, brought where the duty to indemnify is either implied by law or arises under a contract, reasonable attorney fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses."

Id. at 33, 183 S.E.2d at 709-10 (quoting 22 Am. Jur. 2d Damages § 166 at 235-36).

"[I]n actions of indemnity, brought where the duty to indemnify is either implied by law or arises under contract, and no personal fault of the indemnitee has joined in causing the injury, reasonable attorneys' fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses." Id. at 34, 183 S.E.2d at 710.

"In order to sustain a claim for equitable indemnity, the existence of some special relationship between the parties must be established." Toomer v. Norfolk S. Ry. Co., 344 S.C. 486, 492, 544 S.E.2d 634, 637 (Ct. App. 2001). "[A] sufficient relationship exists [for indemnification] when the at-fault party's negligence or breach of contract is directed at the non-faulting party and the non-faulting party incurs attorney fees and costs in defending itself against the other's conduct." Winnsboro, 307 S.C. at 132, 414 S.E.2d at 121.

The cases the Rhetts cite are distinguishable from the present situation because they are all cases of implied indemnity. The current case is not such a case. Accordingly, the master did not err in denying the Rhetts' request for attorney's fees.

II. Gray's Appeal

Gray asserts the master erred in finding the fifty-foot easement could be used to access the 4.12-acre tract to which it is not appurtenant. We disagree.

As discussed above regarding the master's not allowing the Rhetts to access the remainder of their twenty-eight acres, South Carolina has not directly addressed this issue. In the strictest sense, a landowner's use of an otherwise valid easement not technically appurtenant to the land he or she attempts to use it for constitutes misuse. However, other states have affirmed the trial court's findings it was not a misuse when the burden is not substantially increased. Here, although the easement is only appurtenant to

the 1.25-acre tract, it was originally granted to the entire 5.97 acre-tract. Also, it does not seem to impose that much greater of a burden on Gray. Accordingly, we affirm the master's decision to allow the Rhetts to access the additional 4.12 acres.

CONCLUSION

We reverse the master's finding that the thirty-foot easement was abandoned. Additionally, we affirm the master's determination that only the 1.25-acre tract was appurtenant to the fifty-foot easement. Moreover, we affirm the master's decision to allow the Rhetts to use the fifty-foot easement to access 5.97 acres of their property but not the remainder of the twenty-eight acres. Further, we affirm the master's determination that the Rhetts were not entitled to attorney's fees. Accordingly, the master's decision is

AFFIRMED IN PART AND REVERSED IN PART.

GEATHERS, J., concurs.

PIEPER, J., concurring in part and dissenting in part.

I respectfully dissent with the majority's decision to hold the master erred in finding that one of the easements was abandoned. Based upon our standard of review, I would affirm the master's determination of abandonment of the easement, as I would find evidence does exist in the record to support that determination. See Judy v. Kennedy, 398 S.C. 471, 478, 728 S.E.2d 484, 487 (Ct. App. 2012) (providing the "termination of an easement by abandonment is a factual question in an action at law"); Eldridge v. Eldridge, 398 S.C. 113, 118, 728 S.E.2d 24, 26 (2012) ("In an action at law tried by a master, an appellate court will affirm the master's factual findings if there is any evidence in the record which reasonably supports them."). I concur with the majority's decision to affirm the remaining issues on appeal.