OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

June 5, 2002

ADVANCE SHEET NO. 19

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

L-J, Inc., and Eagle Creek Construction Co., Inc., Transcontinental Insurance Company, The Home Indemnity Company and The Maryland Commercial Insurance Group,

Plaintiffs,

of whom
Transcontinental Insurance Company, The Home Indemnity Company and The Maryland Commercial Insurance Group,

Respondents,

v.

Bituminous Fire and Marine Insurance Company,

Appellant.

Appeal From Charleston County
Thomas J. Wills, Special Master

Opinion No. 3505
Heard April 9, 2002 - Filed June 3, 2002

AFFIRMED

Charles E. Carpenter, Jr., Francis M. Mack and S. Elizabeth Brosnan, all of Richardson, Plowden, Carpenter & Robinson, of Columbia, for appellant.

Sean K. Trundy and I. Keith McCarty, both of Pratt-Thomas, Epting & Walker, of Charleston, for respondents.

GOOLSBY, J.: In this declaratory judgment action, Bituminous appeals the circuit court's order that it indemnify Eagle Creek Construction Co., Inc., for a portion of a settlement L-J, Inc., and Eagle Creek reached with Dunes West Joint Venture, a South Carolina General Partnership. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On July 14, 1989, Eagle Creek Construction Co., Inc., a subsidiary of L-J, Inc. contracted with Dunes West Joint Venture to develop the site and construct the roads for the Dunes West subdivision at a cost of $3,632,458.75. Eagle Creek hired subcontractor, U.S. Construction Co., Inc., to clear, grub, rough grade, fine grade, and construct the sub-base and base for roads within the project. U.S. Construction, in turn, hired Site Prep, Inc., and Destiny Construction, Inc., to perform some of these tasks. Eagle Creek also subcontracted for Tidelands Utilities Co., Inc., to construct and install a water drainage system. Another subcontractor, Sanders Brothers Construction, Inc., paved the roads.

The subcontractors completed the roads in 1990. By 1994, the road surfaces had deteriorated and failed. Testimony indicated drainage problems and an inadequate subgrade due primarily to tree stumps left in the roadbed. The stumps prevented the soil from being adequately compacted and allowed surface water and moisture to seep into the road base, deteriorating the pavement.

Dunes West filed an action in 1994 against Eagle Creek and L-J alleging inter alia breach of contract, breach of warranty, and negligence. L-J and Eagle Creek filed a third-party complaint against several of the project designers and subcontractors engaged to work on the Dunes West construction.

In 1997, L-J settled with Dunes West and agreed to pay $750,000.00. L-J requested that its four insurers from 1989 until 1996 indemnify it for the settlement amount. During the time period in which Dunes West alleged the damage to the roads occurred, L-J was insured by several different commercial insurers: Transcontinental Insurance Company, Bituminous Fire and Marine Insurance Company, The Home Indemnity Company, and The Maryland Commercial Insurance Group. All insurance companies except Bituminous agreed to indemnify L-J for a portion of the settlement amount. The insurers paid $362,500.00, and the project designers and subcontractors paid $387,500.00.

L-J, Eagle Creek, Transcontinental Insurance, The Home Indemnity, and The Maryland Commercial Insurance brought a declaratory judgment action against Bituminous. L-J and Eagle Creek sought indemnification for all defense costs and settlement payments. The three insurance carriers also sought contribution from Bituminous for defense costs and any settlement payment made in the Dunes West litigation. The matter was referred to a special master with finality, and a hearing was held on April 27, 2000.

The special master found the allegations of negligence set forth in Dunes West's complaint met the definition of "occurrence" under Bituminous's policy with L-J. The special master further found the failure of the road did not constitute damage "expected or intended" by Eagle Creek. The special master noted Bituminous's argument at the hearing that Dunes West's complaint alleged property damage to Eagle Creek's work "arising out of it and included in the products completed operations hazard," which is excluded from coverage under exclusion (l) of the policy. The special master, however, found the policy exclusion was inapplicable because the exclusion specifically provides it does not apply to damages resulting from work performed by a subcontractor and all the parties agreed the work to the roads was exclusively performed by

subcontractors.

The special master awarded the other carriers a proportionate contribution from Bituminous. The special master found that the years 1989 to 1996 represented a total of seven "policy years," and that Bituminous provided coverage to L-J for two years. Taking the total $362,500.00 paid by the other three carriers and dividing it by seven years of coverage, the special master determined that each carrier owed $51,785.71 per policy year. Thus, Bituminous owed the other carriers $103,571.42 for two years of coverage.

Bituminous appeals.

DISCUSSION

Bituminous argues the master erred in finding it had a duty to indemnify L-J because: (1) faulty workmanship cannot constitute an "occurrence" under the policy; (2) the policy excludes claims for faulty workmanship; and (3) exclusion (l) did not "extend" coverage for faulty workmanship.

"Questions of coverage and the duty of a liability insurance company to defend a claim brought against its insured are determined by the allegations of the third-party's complaint."[1] The underlying complaint alleged inter alia negligence, breach of contract, and breach of warranty.

L-J seeks a declaratory judgment to compel indemnification under an insurance policy. A declaratory judgment action to determine coverage under an insurance contract is an action at law.[2] In an action at law, referred to a

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[1] Isle of Palms Pest Control Co. v. Monticello Ins. Co., 319 S.C. 12, 15, 459 S.E.2d 318, 319 (Ct. App. 1994), aff'd, 321 S.C. 310, 468 S.E.2d 304 (1996) (citing C.D. Walters Constr. Co. v. Fireman's Ins. Co. of Newark, N.J., 281 S.C. 593, 316 S.E.2d 709 (Ct. App. 1984)).

[2] Travelers Indem. Co. v. Auto World of Orangeburg, 334 S.C. 137, 511 S.E.2d 692 (Ct. App. 1999).

master for entry of final judgment, the appellate court will not disturb the findings of fact unless there is no evidence that reasonably supports them.[3] Our scope of review in this case is therefore limited to correcting errors of law.[4]

Bituminous first contends the master erred in finding there was an "occurrence" under the policy because faulty workmanship can never constitute an "occurrence."

> Insurance policies are subject to the general rules of contract construction. The Court must give policy language its plain, ordinary, and popular meaning. When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. Furthermore, exclusions in an insurance policy are always construed most strongly against the insurer.[5]

We thus look to the language of the policy to determine whether the deterioration and failure of the roads from repeated water runoff is an "occurrence." The policy provides coverage for property damage caused by an "occurrence" and defines "property damage" as:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured.

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[3] Townes Assocs. Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

[4] Id.

[5] Century Indem. Co. v. Golden Hills Builders, Op. No. 25426 (S.C. Sup. Ct. filed March 11, 2002) (Shearouse Adv. Sh. No. 7 at 24, 30) (citations omitted).

> All such loss shall be deemed to occur at the time of the "occurrence" that caused it.

There is no coverage for property damage that is "expected or intended from the standpoint of the insured." The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." In this case, it is undisputed that repeated exposure to surface water runoff caused the pavement to fail. The pavement is tangible property. The policy provides coverage for continuous and repeated exposure to harmful conditions causing damage to tangible property. Under the clear language of the policy, the repeated exposure to water is an "accident" and therefore an "occurrence."

It is further undisputed L-J did not perform the work on the sub-road. The work was performed by subcontractors. There is no evidence L-J knew of the problems with the sub-road until the surface pavement damage became apparent years later. Because L-J did not improperly construct the sub-road or have knowledge of the improper construction, there is no evidence that L-J expected or intended that the pavement would fail. Under the plain and unambiguous language of the policy, there is an "occurrence."[6]

Bituminous argues, however, that the policy language regarding the definition of "occurrence" should be construed in light of the business risk doctrine.

> The business risk doctrine is the expression of a public policy applied to the insurance coverage provided under commercial general liability policies. Reduced to its simplest terms, the risk that an insured's product will not meet contractual standards is a business risk not covered by a general liability policy.

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[6] See Kalchthaler v. Keller Constr. Co., 591 N.W.2d 169 (Wis. Ct. App. 1999) (finding water damage to interior of building from defectively installed window was an "occurrence").

* * *

> Significantly, under the business risk doctrine, harm to the property of a third party caused by the insured's defective work is *not* excluded from coverage.[7]

Relying on this doctrine, Bituminous disregards the damage to the pavement and contends that faulty workmanship alone is at issue and that there was therefore no "occurrence."[8] Bituminous also argues that faulty workmanship can never be an "occurrence" under a comprehensive general liability (CGL) policy.

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[7] Thommes v. Milwaukee Mut. Ins. Co., 622 N.W.2d 155, 158-59 (Minn. Ct. App. 2001), review granted, (Minn. May 15, 2001) (emphasis in original) (citations omitted).

[8] As noted in a recent article:

> The CGL policy expressly states that it is the "property damage" for which the plaintiff seeks recovery that must not be expected or intended – not the construction activity that causes that property damage.
>
> * * *
>
> The [insurance] industry has now taken to arguing that whenever a claim of defective construction is alleged against an insured, the claim is automatically barred from coverage as not constituting an "occurrence." The position is nothing more than a rehash of the "business risk" doctrine, whose success depends entirely on courts ignoring the actual language of the CGL policy.

James Duffy O'Connor, What Every Construction Lawyer Should Know About CGL Coverage for Defective Construction, 21-WTR Constr. Law. 15, 17 (2001) (citation omitted).

We agree that faulty workmanship, standing alone, does not constitute an "accident" and cannot therefore be an "occurrence." In Isle of Palms Pest Control Co.,[9] this court construed identical policy definitions and found that faulty workmanship alone is not covered but faulty workmanship that causes an accident is covered. In that case, the court found that later termite damage to property caused by Isle of Palms's negligent failure to identify the presence of termites during its inspection was an "accident." The court noted "[h]ad there been preexisting termite damage, but no active termite infestation, the Purchaser's claim against Isle of Palms would have been one for faulty workmanship resulting in only economic losses."

Similarly, in this case, had the pavement not failed and Dunes West brought an action to recover the cost of removing the tree stumps from the roadbed, the defective work, standing alone, would not have been "property damage" or an "occurrence" under the policy. The damages, however, extend beyond the cost of removing the tree stumps because the failure to properly compact the roadbed led to property damage, namely, the failure of the road surfaces. These remote damages were an "accident" not expected or intended by the insured.

Having found there was an "occurrence" under the policy, we look to the policy exclusions. Exclusion j(6) states the insurance does not cover "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work'[10] was incorrectly performed on it." This is a standard CGL

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[9] 319 S.C. 12, 459 S.E.2d 318 (Ct. App. 1994).

[10]

> "Your work" means:
>
> a. Work or operations performed by you or on your behalf; and
>
> b. Materials, parts or equipment furnished in connection with such work or operations.

business risk exclusion[11] and would appear to bar coverage in this case. But the policy further states, "[p]aragraph (6) of this exclusion does not apply to 'property damage' included in the 'products-completed operations hazard.'"

The products-completed operations hazard provision includes:

all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned.

b. "Your work" will be deemed completed at the earliest of the following times:

(1) When all of the work called for in your contract has been completed.

(2) When all of the work to be done at the site has been completed if

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"Your work" includes:

a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and

b. The providing of or failure to provide warnings or instructions.

[11] See Thommes, 622 N.W.2d at 159-160 (stating an identical provision "may be read as the embodiment of the business risk doctrine principles" and exclusions (j), (k), (l), (m), and (n) are commonly recognized as the "business risk" exclusions) (citations omitted).

your contract calls for work at more than one site.

(3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed. (Emphasis added).

The roads were competed in July 1990. Bituminous insured L-J from May of 1990 to May of 1992. The special master found there was property damage during this time. The "products-completed operations hazard" provision is therefore applicable.

Resuming our examination of the policy, we come to exclusion (l). This exclusion bars coverage for "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard". (sic).

Once again an exclusion appears to bar coverage, but reading further we see the "your work" exclusion "does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." It is undisputed in this case that the defective work was performed by a subcontractor. This clear and unambiguous policy language restores coverage.

The exception to the "your work" exclusion did not appear in CGL policies prior to 1986.[12] The effect of this exception on a CGL policy is a novel question in this state. Bituminous argues this provision cannot "extend" coverage. Because the same CGL policies are found throughout the country, we look to other jurisdictions for guidance. The Wisconsin Court of Appeals in

[12] Kalchthaler v. Keller Constr. Co., 591 N.W.2d 169.

Kalchthaler v. Keller Construction Company[13] concluded:

> For whatever reason, the industry chose to add the new exception to the business risk exclusion in 1986. We may not ignore that language when interpreting case law decided before and after the addition. To do so would render the new language superfluous. We realize that under our holding a general contractor who contracts all the work to subcontractors, remaining on the job in a merely supervisory capacity, can insure complete coverage for faulty workmanship. However, it is not our holding that creates this result: it is the addition of the new language to the policy. We have not made the policy closer to a performance bond for general contractors, the insurance industry has.[14]

In another case construing an identical provision, O'Shaugnessy v. Smuckler Corp.,[15] the court held:

> Here, we are faced not with an omission, but an affirmative statement on the part of those who drafted the policy language, asserting that the exclusion does not apply to damages arising out of the work of a subcontractor. It would be willful and perverse for this court simply to ignore the exception that has now been added to the exclusion.
>
> We cannot conclude that the exception to exclusion (l) has no meaning or effect. The CGL policy already covers damage to the property of others. The exception to the exclusion, which addresses "'property damage' to 'your work,'" must therefore apply to damages to the insured's own work that arise out of the work of a

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[13] Id.

[14] Id. at 174 (citation omitted).

[15] 543 N.W.2d 99 (Minn. Ct. App. 1996).

> subcontractor. Thus, we conclude that the exception at issue was intended to narrow the Business Risk Doctrine.[16]

The O'Shaugnessy court cautioned, however, that its holding did not obviate the necessity that the subcontractor's faulty workmanship cause property damage.[17]

We find the above reasoning persuasive and conclude in this case that the products-completed operations hazard provision and the exception to exclusion (l) restore coverage. This is not, as Bituminous argues, an "extension" of coverage. In reaching this conclusion, we follow the analysis laid out by our supreme court in Century Indemnity. In that case the court looked to the policy language to determine whether the products-completed operations hazard provision "restored" coverage. We note the Century case did not involve an exception to the business risk exclusion for work performed by a subcontractor. Nonetheless, we employ the same approach to policy language as our supreme court in that case.

CONCLUSION

We affirm the master's finding that there was an "occurrence" under the policy and that Bituminous is liable for water damage to roads in the Dunes West subdivision occurring during its policy period. We note that Bituminous does not appeal the master's factual finding of property damage during this time. As such, that finding is the law of the case.[18]

We further find that the products-completed operations hazard and subcontractor exception provisions restore coverage that would otherwise have been excluded by the "your work" provision.

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[16] Id. at 104-05.

[17] Id. at 105.

[18] See Charleston Lumber Co. v. Miller Housing Corp., 338 S.C. 171, 525 S.E.2d 869 (2000) (holding an unappealed ruling becomes the law of the case).

AFFIRMED.

HOWARD, J., concurs. HEARN, C.J., dissents in a separate opinion.

HEARN, C.J.: I respectfully dissent. Although I agree with the majority that exclusion (l) does not bar coverage here, I would not reach that question because I believe there was no occurrence.

Under the policy, there must be an occurrence to trigger insurance coverage. The policy defines occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Here, faulty construction resulted in the collapse of the construction project itself. Under our case law, faulty workmanship alone is not an occurrence; there must also be an accident. Isle of Palms Pest Control Co. v. Monticello Ins. Co., 319 S.C. 12, 16, 459 S.E.2d 318, 320 (Ct. App. 1994), aff'd 321 S.C.310, 468 S.E.2d 304 (1996).

With respect to whether ordinary negligence of the insured or his agent is an accident, there is a decided split of authority among the states. See generally J.P. Ludington, Annotation, Liability Insurance: "Accident" or Accidental" as Including Loss Resulting from Ordinary Negligence of Insured or His Agent 7 A.L.R.3d 1262 (1966 & Supp. 2000). Some jurisdictions have found that injury caused by the insured's negligence is not an accident if the loss is a natural and probable consequence of the negligence. Id. at § 6. Other jurisdictions have found that the term accident is broad enough to cover negligence if the injury or damage was not intentional. Id. at § 5. I would hold that South Carolina falls into the first group.

The Fourth Circuit, construing South Carolina law, has found:

> In our case, neither the means nor the result was accidental, since the acts which caused the damage were persistently and continuously done and the results were the normal consequences of the acts. We do not mean to say that there may not be an accident as a

> result of negligence, but there was no such result in this case and it cannot be held that negligence is synonymous with accident.

C. Y. Thomason Co. v. Lumbermens Mut. Cas. Co., 183 F.2d 729, 732-33 (4th Cir. 1950) (citations omitted) (finding no coverage for negligent excavation of a ditch resulting in flooding and debris build-up in garage or for creating bump which damaged cars entering garage). In another case applying our law, the Fourth Circuit found that there was no accident for purposes of coverage where negligence was followed by a foreseeable consequence "for then neither the cause nor the effect is unexpectable. [sic]" Baker v. Am. Ins. Co. of Newark, NJ, 324 F.2d 748, 750 (4th Cir. 1963) (finding coverage in case of negligently built retaining wall because century high rainfall exacerbated damage). These interpretations are consistent with South Carolina case law's definition of accident. See Ducker v. Cent. Sur. & Ins. Corp., 234 S.C. 228, 230-31, 107 S.E.2d 342, 343 (1959) (adopting the following definition: "An effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and cannot be charged with the design of producing, . . . is produced by accidental means."); Mfrs. & Merchants Mut. Ins. Co. v. Harvey, 330 S.C. 152, 159, 498 S.E.2d 222, 225 (Ct. App. 1998).

I disagree with the majority's characterization of the damages here as remote and unexpected. The only damages in this case were the natural and proximate result of the faulty work. See Stroup Sheet Metal Works, Inc. v. Aetna Cas. & Sur. Co., 268 S.C. 203, 213, 232 S.E.2d 885, 888-89 (1977) (finding no coverage for faulty workmanship because the damage could not be considered "neither expected nor intended. . . ."). The record contains no allegations of an intervening and superseding cause that might be classified as accidental.

The majority contends that under Isle of Palms the damage here was caused by an occurrence. However, the facts and the focus of the inquiry there differ markedly from the instant case. In Isle of Palms, a termite inspector negligently failed to discover existing termite damage. The analysis

centered on how that failure resulted in property damage as opposed to purely economic loss. In this case, there is no question about whether there was property damage; we are instead called to determine whether there was an occurrence. Moreover, the consequences and expectations in a negligent inspection scenario are not the same as those in a negligent construction case. I find the case of Indiana Insurance Co. v. Hydra Corp., 615 N.E.2d 70 (Ill. App. Ct. 1993) instructive because, unlike many of the other cases interpreting whether damage was caused by an accident, all of the damages were directly tied to the construction project. There, the court found no occurrence and thus no coverage because "the cracks in the floor and the loose paint on the exterior of the building are the natural and ordinary consequences of installing defective concrete flooring and applying the wrong type of paint." Id. at 73. The same reasoning applies here because neither the cause of the problem nor the damage that followed was unforeseeable.[19]

Accordingly, I would reverse.

[19]For this reason, I believe Kalchthaler v. Keller Construction Co., 591 N.W.2d 169 (Wis. Ct. App. 1999) is distinguishable. In that case, the court found coverage when leaky windows damaged the drapery and wallpaper of the completed building; thus, the damages extended beyond the scope of the contractor's original work.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Thorn Williams,

Appellant.

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

Opinion No. 3506
Submitted March 25, 2002 - Filed June 3, 2002

AFFIRMED

Chief Attorney Daniel T. Stacey, of SC Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General Christie Newman Barrett, all of Columbia; and Solicitor Walter M. Bailey, Jr., of

Summerville, for respondent.

GOOLSBY, J.: Thorn Williams appeals his conviction and sentence for possession of a stolen vehicle in violation of S.C. Code Ann. § 16-21-80 (Supp. 2000).[1] He contends the trial judge should have directed a verdict in his favor because the evidence was insufficient to show that he knew the motorcycle was stolen. We affirm.[2]

When reviewing the denial of a directed verdict motion, this court must view the evidence in the light most favorable to the State and uphold the denial of the motion if there is any evidence, direct or circumstantial, that reasonably tends to prove the guilt of the accused.[3]

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[1] S.C. Code Ann. § 16-21-80 (Supp. 2000) reads as follows:

> A person not entitled to the possession of a vehicle who receives, possesses, conceals, sells, or disposes of it, knowing it to be stolen or converted under circumstances constituting a crime, is guilty of a:
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> . . . .
>
> (3) felony and upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both, if the value of the vehicle is five thousand dollars or more.

[2] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

[3] State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999); State v. Hammitt, 341 S.C. 638, 535 S.E.2d 459 (Ct. App. 2000).

On July 17, 2001, in the early morning, Larry Hamilton saw four males get out of a white Oldsmobile with shiny hubcaps and run toward a neighbor's house. Later that morning he discovered the two motorcycles that he owned and kept stored in an open garage were missing. Before contacting the sheriff's office, he and his wife found one motorcycle in a field behind their house. He could not find the other, a Suzuki for which Hamilton paid over $5,900.

The next day, July 18, 2001, Hamilton received a page on his beeper from his niece, telling him that his Suzuki had been spotted on Alva Street in Orangeburg. After calling the sheriff's office, Hamilton and his wife drove to Alva Street. As they came down the street, a motorcycle and a rider emerged from a side street. Hamilton immediately recognized the motorcycle as his Suzuki.

The Hamiltons followed the motorcycle down the street. Hamilton's wife recognized the rider as Thorn Williams after he turned around and faced the Hamiltons' car. When Williams saw the Hamiltons, he "reared the bike up" and "took off," with its "wheels spinning." The Hamiltons, in a Ford Explorer, gave pursuit, but Williams soon "lost" them.

After again calling the sheriff's office, the Hamiltons circled back and drove to where Williams lived on Alva Street with a woman who patronized the beauty shop owned by Hamilton's wife. Williams frequently visited the beauty shop. The Hamiltons saw parked in Williams's yard a white Oldsmobile with shiny hubcaps. Hamilton's wife had seen Williams driving it. Motor vehicle records showed the car registered to Rhoda Williams, who lived with Williams at the Alva Street address.

Williams came out of the residence, wearing a cap and a different shirt. He had a large scrape on his right forearm and had been bleeding. It appeared to be a "road rash," a type of wound that could be caused by gravel damage suffered by one involved in a motorcycle wreck.

Following his arrest a few days later, Williams gave a written statement in which he told of driving three friends out to the Hamiltons' neighborhood and

dropping them off. He said he thought they were going to the house of one of his friend's mother. Thirty minutes to an hour later, however, they returned to his place on Alva Street with a motorcycle. After his friends had the motorcycle for, Williams said, "about three days" and no one came looking for it, Williams "figured it was a legal bike." He admitted riding the motorcycle the day the deputy sheriff and the Hamiltons met him at his residence.

The Suzuki was not recovered.

There are five elements to the offense of possession of a stolen vehicle: (1) there must be a vehicle; (2) it must be stolen; (3) a person must possess the vehicle; (4) the person must not be one entitled to its possession; and (5) the person possessing the vehicle must know it was stolen.[4] Only the last element is at issue here.

There is evidence, albeit circumstantial, from which a jury could reasonably infer that Williams knew the motorcycle was stolen.[5] Soon after the Suzuki was stolen, he was seen with it in his possession.[6] Additionally,

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[4] See S.C. Code Ann. § 16-21-80; State v. McNeil, 314 S.C. 473, 445 S.E.2d 461 (Ct. App. 1994).

[5] See 76 C.J.S. Receiving Stolen Goods § 26, at 33 (1994) (the burden is on the prosecution to show that the accused knew the property was stolen property at the time he possessed it, and an inference of the accused's knowledge can be drawn from the surrounding facts and circumstances); id. § 28b, at 37 ("As in other criminal prosecutions where guilty knowledge is the gist of the offense, in prosecutions for receiving stolen property and related offenses any evidence tending to prove . . . knowledge of accused that the goods received were stolen is admissible.").

[6] See State v. Lyles, 211 S.C. 334, 45 S.E.2d 181 (1947) (the possession of recently stolen property is an evidential fact from which the possessor's guilt may be inferred); State v. Lee, 147 S.C. 480, 145 S.E. 285 (1928) (in holding a defendant may offer testimony tending to explain his possession of recently

Williams took flight when he chanced upon the owner and his wife and realized they had spotted him riding it. Indeed, he was in such a hurry to flee from the Hamiltons that he might have injured himself in the process.[7] Under these circumstances, it is little wonder that the jury, which it was free to do,[8] did not

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stolen goods, the court noted that in a prosecution for receiving stolen goods guilty knowledge can be proved by showing a person was found in possession of recently stolen goods); 50 Am. Jur. 2d Larceny § 153, at 142 (1995) (a jury may properly "consider the defendant's possession of recently stolen property as a relevant circumstance in determining whether the defendant was guilty of the crimes" of larceny and burglary where they "occurred as part of the same criminal enterprise"); id. § 166, at 153-54 ("The possession of stolen property by the defendant soon after the commission of the alleged crime is merely an evidentiary fact tending to establish guilt which should be submitted to the jury, to be considered in connection with all the other facts and circumstances disclosed by the evidence."); 66 Am. Jur. 2d Receiving Stolen Property § 25, at 25 (2001) ("Evidence of the unexplained possession of recently stolen goods by one charged with unlawfully receiving them is admissible in a prosecution for the offense and is a strong circumstance to be considered with all the evidence in the case on the question of guilty knowledge.").

[7] See 50 Am. Jur. 2d Larceny § 155, at 144 (1995) ("Evidence of flight of the accused is admissible in a theft prosecution."); 29 Am. Jur. 2d Evidence § 532, at 608 (1994) ("Flight, concealment, or analogous conduct, when unexplained, is admissible as indicating consciousness of guilt, for it is not to be supposed that one who is innocent and conscious of that fact would flee."); 52A C.J.S. Larceny § 123, at 627 (1968) (evidence regarding the conduct of the accused after a larceny "may be proved against him if the acts testified to have a legal tendency to connect him with the crime").

[8] See 50 Am. Jur. 2d Larceny § 169, at 157 (1995) ("What amounts to such an explanation of the possession as will rebut the probative force of the possession must necessarily depend upon the circumstances of each case; . . . and possession may be regarded as unexplained notwithstanding the defendant's evidence in explanation, for the jury is at liberty to disregard or disbelieve such

buy Williams's statement that he did not think the motorcycle was stolen because no one came inquiring about it after a while. Particularly is this so when one also considers that the friends whom Williams drove in the early morning hours to the neighborhood in which the motorcycle was stolen returned to his house within the hour with the motorcycle and that any explanation as to how his friends came to have it that morning was notably absent from Williams's statement.

AFFIRMED.

CONNOR and ANDERSON, JJ., concur.

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evidence and to give credence instead to the testimony of the owner and the witnesses for the state.") People v. Everett, 180 N.E.2d 556, 560 (N.Y.) (in which the court upheld a "charge that recent possession, if unexplained or falsely explained, justifies the 'inference of the commission of a larceny by the defendant'"), cert. denied, 370 U.S. 963 (1962) .

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Peter H. Arnoti, Justin B. Arnoti, Ben D. Campbell, and Barbara N. Campbell,

Respondents,

v.

Darryl L. Lukie and Ketekash Crump-Lukie,

Appellants.

Appeal From Greenwood County
Joseph J. Watson, Circuit Court Judge

Opinion No. 3507
Submitted March 25, 2002 - Filed June 3, 2002

AFFIRMED

Robert E. Stepp, of Sowell, Gray, Stepp & Laffitte, of Columbia, for appellants.

Charles M. Watson, Jr., of Greenwood, for respondents.

GOOLSBY, J.: The Arnotis and the Campbells (collectively, "Neighbors") brought this action against the Lukies to enforce a restrictive covenant prohibiting modular homes in their subdivision. The trial judge granted Neighbors an injunction, and the Lukies appeal. We affirm.

FACTS

The parties to this action all own lots in the Baywood Subdivision of Greenwood County. Lots in the subdivision are subject to restrictive covenants, which provide in pertinent part: "No modular homes or mobile homes are permitted in the subdivision."

The restrictive covenants were recorded in the office of the Clerk of Court for Greenwood County on May 31, 1991 at Deed Book 360, page 634. The covenants contain a provision stating they are to remain in force "unless an instrument signed by the then owners of three-fourths (3/4) of the lots is recorded, agreeing to change said covenants and restrictions in whole or in part." The covenants further provide all lot owners in the subdivision have the right to enforce compliance with the restrictions by seeking an injunction.

In May 1999, the Lukies purchased two adjacent lots in the Baywood Subdivision for $36,000. The Lukies admittedly were given a copy of the restrictive covenants at the time they purchased the lots, and they were aware of the prohibition on modular homes.

The Lukies considered having a "stick built" or "site built" home constructed on the larger of the two lots, but discovered the price would be anywhere from $120,000 to $150,000. However, they found they could have a comparably-sized modular home[1] installed for around $75,000. The Lukies

[1] According to Mr. Lukie, a modular home is built elsewhere and then transported to the owner's lot, where it is installed on top of a foundation that is poured at the home site.

decided to proceed with installing a modular home due to its lower cost.

The Lukies obtained a building permit on July 22, 1999. Shortly thereafter, the foundation was poured and the home was delivered to the site for installation. When Neighbors became aware of the Lukies' plan to install a modular home, they brought this action for an injunction in August 1999.[2] The day after the action was filed, Mr. Campbell personally delivered to Mr. Lukie an envelope containing a copy of the complaint. Mr. Lukie admits receiving the envelope and taking it to his attorney, but states he never opened it. The Lukies continued their work on the home although they knew this lawsuit was pending.

After a bench trial, the judge concluded the Lukies' modular home violated the restrictive covenants of the Baywood Subdivision. The judge granted Neighbors' request for a permanent injunction and ordered the Lukies to remove the modular home by October 18, 2001.

STANDARD OF REVIEW

A suit seeking an injunction to enforce restrictive covenants is an action in equity.[3] On appeal of an equitable action tried by the judge alone, this Court may take its own view of the preponderance of the evidence.[4]

LAW/ANALYSIS

On appeal, the Lukies contend the trial judge erred in concluding their

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[2] Neighbors' complaint initially sought an injunction and damages, but they subsequently limited their request to an injunction only.

[3] Taylor v. Lindsey, 332 S.C. 1, 498 S.E.2d 862 (1998); Gibbs v. Kimbrell, 311 S.C. 261, 428 S.E.2d 725 (Ct. App. 1993).

[4] Townes Assocs. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976); see also Gambrell v. Schriver, 312 S.C. 354, 440 S.E.2d 393 (Ct. App. 1994).

home was constructed in violation of the restrictive covenants, and that "the balance of the equities" requires reversal of the trial judge's ruling. We disagree.

At the bench trial, Neighbors Ben Campbell and Peter Arnoti testified they had purchased homes in the Baywood subdivision valued in excess of $200,000. Each stated that, although they have no grievance personally against the Lukies, they seek enforcement of the restrictive covenants in order to protect their investments as there are other persons desiring to install modular homes and mobile homes on lots in the subdivision, and they will proceed if the restrictive covenants are not enforced. Arnoti, in particular, testified that he was "more concerned about more than one mobile home being out there than just one" and that the prohibition on modular and mobile homes was a "[v]ery important" factor in his decision to purchase a lot in the Baywood Subdivision. Both Campbell and Arnoti testified there are no other modular homes in the subdivision.

Mr. Lukie admitted that he was aware of the restrictive covenants at the time he purchased the lots, and he was aware of the prohibition on modular homes. Mr. Lukie also acknowledged that he continued with the installation of the home even though he had actual knowledge of this lawsuit.

Mr. Lukie testified that he checked with the original developer of the subdivision, Abney Wallace, who told him he personally had no objection to modular homes, but he had sold his interest to "Brothers and Harrison," a real estate company in Greenwood County. After speaking to Wallace, Mr. Lukie spoke to "Dewey Brothers," which owned an interest, and they purportedly had no objections to the modular home. Mr. Lukie acknowledged at trial, however, that amendment of the restrictive covenants required the vote of three-fourths of the property owners, and conceded there was nothing in the covenants that gave the developers the right to change the provisions of the restrictive covenants.

The trial judge concluded the injunction should be granted. The judge

found Neighbors built their homes in reliance upon the restriction that no modular homes or mobile homes would be permitted, and noted their concern that other individuals would proceed with plans to install such homes if the covenants were not enforced. Although the judge acknowledged the Lukies will suffer a severe hardship if they are required to remove their modular home, the judge determined Neighbors do not have an adequate remedy at law. Further, the judge found the Lukies had actual knowledge of the prohibition on modular homes at the time they purchased their lots and they proceeded with the installation of the modular home even though they knew Neighbors had filed this lawsuit seeking an injunction.

The judge additionally observed that Mr. Lukie is a member of the Board of Zoning Appeals in Greenwood County and, based on his position and experience on the Board, "Mr. Lukie is well aware that he has to comply with applicable rules and that he has to follow proper procedures to obtain permission to vary from those rules." The judge stated although the subdivision developers apparently did not object to the Lukies' modular home, "there is nothing in the restrictions which allows amendments or variances by a developer. For that matter, neither developer even owns a lot in the subdivision." The judge observed, "Amendments to the restrictions require the signed, written approval of the owners of three-fourths (3/4) of the lots. The Defendants had no right to rely on any statements by the developers concerning the installation of a modular home in violation of the restrictions." The judge rejected Mr. Lukie's argument that the property values of Neighbors had not decreased after the installation of his modular home, finding this fact was not determinative of whether Neighbors were entitled to relief because it was possible that Neighbors did not obtain the full increase in value they would have otherwise received.

On appeal, the Lukies assert the trial judge erred in finding their modular home violated the restrictive covenants "because under section 23-43-130 of the South Carolina Code of Laws (Supp. 2000), their home is, in fact, a 'site-built' structure - a structure that is not expressly or impliedly prohibited by the Restrictions." The Lukies acknowledge this argument was never ruled on by the trial judge, but maintain it was argued at trial and raised in their motion to alter or amend the judgment.

Initially, we question whether this issue was preserved for review as Mr. Lukie admitted in his deposition and at trial that the home was a modular home. Although the Lukies did briefly assert at trial that section 23-43-130 required modular homes and mobile homes to be treated the same as site-built homes, they never argued the home was, in fact, a site-built home.

In any event, we find no merit to this assertion. Section 23-43-130, part of the South Carolina Modular Buildings Construction Act, provides in relevant part:

> Modular building units bearing evidence of approval must be acceptable in all localities as meeting the requirements of this chapter and must be considered and accepted equivalent to a site-built structure as meeting the requirements of safety to life, health, and property imposed by any ordinance of any local government if the units are erected or installed in accordance with all conditions of the approval.[5]

We conclude section 23-43-130 applies to the requirements imposed by local governments, primarily for the purpose of ensuring compliance with safety requirements, and the statute does not prohibit homeowners from agreeing on private restrictive covenants. Just as homeowners can agree to be bound by certain design requirements that would never be imposed by governmental authorities, they may also, for reasons of aesthetics or the maintenance of similar property values, contractually agree to restrict the installation of modular homes that would otherwise comply with local building requirements. Thus, the restrictive covenants of Baywood Subdivision are not invalidated by section 23-43-130.

We likewise reject the Lukies' contention that the restrictive covenants are ambiguous. This argument is without merit as the covenants expressly state that modular homes and mobile homes are prohibited, and the Lukies clearly

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[5] S.C. Code Ann. § 23-43-130 (Supp. 2001) (emphasis added).

understood this prohibition at the time they purchased their lots.[6]

Finally, to the extent the Lukies argue "the balance of the equities" requires reversal, we agree with the trial judge that, while removal of the completed home unfortunately will result in a hardship to the Lukies, it was caused by the Lukies' own actions in knowingly failing to either comply with the restrictions of the subdivision or seek, through proper means, an amendment of the restrictions. Accordingly, we affirm the trial judge's determination that the modular home violates the restrictive covenants of the Baywood Subdivision and that Neighbors are entitled to a permanent injunction requiring removal of the modular home.

AFFIRMED.

CONNOR and ANDERSON, JJ., concur.

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[6] See Heape v. Broxton, 293 S.C. 343, 345, 360 S.E.2d 157, 158 (Ct. App. 1987) ("Where the language used in a restrictive covenant is unambiguous, there is no room for construction and the language must be enforced in accordance with its plain meaning."); cf. Henry v. Chambron, 304 S.C. 351, 404 S.E.2d 518 (Ct. App. 1991) (noting a restrictive covenant's prohibition on mobile homes did not contain a clear intent to exclude modular homes).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jarrod Sellers, Employee, Claimant,

Respondent,

v.

Pinedale Residential Center, Employer, and Hartford Accident & Indemnity, Carrier,

Appellants.

Appeal From Horry County
Paul M. Burch, Circuit Court Judge
Howard P. King, Circuit Court Judge

Opinion No. 3508
Heard January 10, 2002 - Filed June 3, 2002

AFFIRMED

Samuel T. Brunson, of Florence, for appellants.

Hugo M. Spitz, David T. Pearlman and J. Kevin Holmes, of Charleston, for respondent.

HUFF, J.: Pinedale Residential Center and Hartford Accident & Indemnity (collectively "Employer") appeal the order of the Workers' Compensation Commission adjusting Jarrod Sellers' average weekly wage and compensation rate based on his future earning capacity. We affirm.

FACTS

Sellers suffered an admitted injury by accident on December 12, 1992, when he was involved in an automobile accident while working for Employer. At the time of the accident, Sellers was sixteen years old and a high school student. As a result of the accident, Sellers suffered injuries to his spine and spinal cord which rendered him a paraplegic.

On March 15, 1993, Sellers signed a Form 15, which estimated his average weekly wage at $100.00 and his compensation rate at the minimum compensation rate of $75.00 pending further determination by the Commission. Subsequently, on March 29, 1993, Ninkie Mack, a claims examiner with the Workers' Compensation Commission calculated Sellers' average weekly wage from his employment at Bojangles to be $40.74. On April 7, 1993, Mack calculated Sellers' average weekly wage from his employment with Employer to be $92.24 resulting in a combined average weekly wage from both part-time jobs of $132.98, giving Sellers a combined compensation rate of $88.66.

On April 13, 1993, Sellers filed a Form 50 Request for a Hearing alleging that Employer had failed to pay the proper compensation rate and Sellers' average weekly wage had not been calculated. On May 11, 1993, Employer filed a Form 51, Employer's Answer to Request for a Hearing, denying that Sellers' average weekly wage had not been properly calculated. On May 15, 1993, Sellers filed an Amended Form 50 also alleging that he was entitled to home renovations to accommodate his paraplegia.

The hearing of these matters was set for August 2, 1993. The parties appeared on that date and agreed to a continuance. Sellers also submitted additional wage information from another part-time job with Winn-Dixie

Supermarket. On September 21, 1993, Mack calculated Sellers' average weekly wage based on all three jobs Sellers had held during the year prior to his accident and found the average weekly wage to be $136.55 with a compensation rate of $91.04. Subsequent to this determination, Sellers signed another Form 15 Agreement for Compensation providing for a compensation rate of $91.04.

A hearing was held on Sellers' Form 50 and Employer's Form 51 on February 1, 1994. In his order, from which no appeal was taken, the single commissioner noted that "[t]he matters as to the Claimant[']s weekly compensation benefits have been resolved." The only issue before the single commissioner was that of renovations to Sellers' home.

In May of 1997, Sellers filed an additional Form 50 alleging that exceptional reasons existed warranting an adjustment of his average weekly wage and compensation rate to reflect the probable future wages he would be earning but for his injuries. In response, Employer filed a Form 51 contending that Sellers' compensation rate had been properly calculated and pleading res judicata, collateral estoppel, laches and the statute of limitations as affirmative defenses.

The single commissioner heard this matter in November of 1997. He rejected Employer's arguments that Sellers' claim for an adjustment to his compensation rate was barred by the statute of limitations, res judicata, estoppel or laches. The commissioner issued an order adjusting Sellers' average weekly wage and compensation rate based on his future earning capacity as an apprentice, journeyman, and master electrician. He provided for compensation on the following graduated scale: from July 1, 1994 to December 31, 1994 compensation at the rate of $148.87; from January 1, 1995 to June 30, 1995 compensation at the rate of $182.75; from July 1, 1995 to December 31, 1995 compensation at the rate of $184.09; from January 1, 1996 to June 30, 1996 compensation at the rate of $220.11; from July 1, 1996 to December 30, 1996 compensation at the rate of $235.31; from January 1, 1997 to June 30, 1997 compensation at the rate of $249.99; from July 1, 1997 to December 31, 1997 compensation at the rate of $264.66; from January 1, 1998 to June 30, 1998 compensation at the rate of $292.67; from July 1, 1998 to June 30, 2002

compensation at the rate of $294.01; and after June 20, 2002, compensation at the maximum rate for the year 1992 at $379.82 continuing until further order of the commission.

Employer appealed this order to the full commission. On June 8, 1998, the full commission affirmed the single commissioner with the exception of the single commissioner's above ruling with regard to future earning capacity. The full commission held there is no legal basis for speculation as to the future earning capacity of Sellers. It then calculated Sellers' average weekly wage based on a forty-hour work week, which he most likely would have worked had he not been a full time student. The full commission further found that Sellers was earning $4.35 per hour at the time of his accident and calculated his average weekly wage at $174.00 with a compensation rate of $116.00.

Both parties appealed the full commission's decision to the circuit court. The Honorable Paul Burch reversed the full commission and remanded the case to the full commission. Employer appealed this order to the Supreme Court. That appeal was assigned to this court. By order dated September 24, 1999, this court dismissed the appeal without prejudice so that the matter could go to the full commission as ordered by Judge Burch.

On remand, the full commission reinstated the findings and decision of the single commissioner. Employer appealed to the circuit court. The Honorable Howard King found that he did not have the authority to review the order of Judge Burch and, therefore, affirmed the order of the full commission without prejudice to Employer's right to seek appellate review. This appeal followed.

STANDARD OF REVIEW

In reviewing a decision of the Workers' Compensation Commission, this court will not set aside its findings unless they are not supported by substantial evidence or they are controlled by error of law. See Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981); Lyles v. Quantum Chem. Co., 315 S.C.

440, 434 S.E.2d 292 (Ct. App. 1993); S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2001). Substantial evidence is evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion that the full commission reached. Lark, 276 S.C. at 135, 276 S.E.2d at 306. The possibility of drawing two inconsistent conclusions from the evidence does not prevent the commission's findings from being supported by substantial evidence. Tiller v. National Health Care Ctr., 334 S.C. 333, 513 S.E.2d 843 (1999).

LAW/ANALYSIS

Employer contends that the commission and the circuit court erred in finding Sellers' request for an adjustment of his average weekly wage and compensation rate to reflect his probable future wages was not barred by the doctrines of res judicata and/or collateral estoppel.[1] We disagree.

South Carolina Code Annotated § 42-17-10 (1985) provides in pertinent part:

> All such agreements shall be subject to adjustment and correction as to the compensable rate if subsequent to filing with the Commission it is determined that such rate does not reflect the correct average weekly wage of the claimant. If approved by the Commission, the

[1] Employer also argues in its statement of the issues that the adjustment of the average weekly wage and compensation rate is barred by the doctrine of laches. However, it does not argue this issue. Accordingly, the argument is abandoned. See First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994) (issues not argued in the brief are deemed abandoned and will not be considered on appeal).

memorandum shall for all purposes be enforceable by a court's decree as specified in this title.

The commission promulgated a regulation preserving the right of either the claimant or the employer to seek an adjustment of a temporary total compensation rate. This regulation, in effect at the time of Sellers' injury, provided:

> A. The temporary total compensation rate recorded on a Form 15 or temporary partial compensation rate on a Form 16 entered into consent is subject to adjustment and correction.
>
> B. If it is determined that the compensation rate does not reflect the claimant's correct average weekly wage, the employer's representative may prepare an amended form reflecting the correct compensation rate. . . .
>
> C. If the employer's representative does not agree as in section B above, the claimant may request a hearing. . . .

S.C. Code Ann. Regs. 67-508 (1990) (repealed 21 S.C. Reg. No. 6, pt. 2, eff. June 27, 1997).

Regulation 67-508 clearly authorizes an adjustment in Sellers' temporary total compensation rate as set forth in the Form 15. The commission found Sellers' average weekly wage and temporary total compensation rate have not been previously adjudicated in this claim. Although a hearing was scheduled on this issue to be heard before the single commissioner on August 2, 1993, the hearing was continued. The parties then resolved the issue and Sellers signed another Form 15. The only issue before the single commissioner at the reconvened hearing was that of the renovations to Sellers' home. We agree with the Commission that Sellers' average weekly wage and temporary

total compensation rate have never been adjudicated. Accordingly, we find the doctrines of res judicata and collateral estoppel do not bar an adjustment.

Employer argues there is no statutory authority for the Commission to adjust Sellers' wages to provide for progressively higher wages based upon probable future earnings. It asserts the average weekly wage must be based upon prior earnings. We disagree.

South Carolina Code Annotated § 42-1-40 sets forth several different methods for calculating the average weekly wage.[2] In the second

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[2] At the time of Sellers' injury, this section provided,

> "Average weekly wages" means the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury . . . divided by fifty-two. If the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such fifty-two weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. When the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, so long as results fair and just to both parties will be obtained. Where, by reason of shortness of time during which the employee has been in the employment of his employer or the casual nature and terms of his employment, it is impracticable to compute the average weekly wages as defined in this section, regard is to be had to the

paragraph of the statute, the legislature recognized that these methods of calculation may not always be adequate. Accordingly, the statute provides:

> When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

S.C. Code Ann. § 42-1-40 (1985).

The statute provides an elasticity or flexibility with a view toward always achieving the ultimate objective of reflecting fairly a claimant's probable future earning loss. Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978). "The objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings." Id. at 98-99, 245 S.E.2d at 131; see Stokes v. First Nat'l Bank, 306 S.C. 46, 410 S.E.2d 248 (1991) (upholding an award where an employee's future earning capacity was one of the factors the commissioner in deciding upon an award).

The full commission committed an error of law in its original order when it held there was no legal basis for speculating as to the future earning

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> average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

S.C. Code Ann. § 42-1-40 (1985) (revised 1996 Act No. 424, § 1, eff. June 18, 1996).

capacity of the claimant. In its amended order, the full commission adopted the single commissioner's order finding exceptional circumstance. Sellers' age and the extent of his injury warrant this finding. The commission was clearly authorized to consider Sellers' probable future earning capacity in determining an average weekly wage that is "nearly approximate the amount which [Sellers] would be earning were it not for the injury."

Employer also argues that the commission should not have considered any evidence of Sellers' future earnings because it was too speculative. We disagree.

As the commission found, "[b]ut for the severe injury, [Sellers] clearly demonstrated the interest, aptitude, and ability to become an electrician. At the time of his injury, Sellers was a full-time student and was working several part-time jobs. He had worked with his father, who is an electrician, since he was twelve years old. After the accident, he graduated from high school. He attended technical college for two semesters but was unable to complete his studies due to a lack a concentration caused by his head injury. Sellers testified that his career plan before the accident was to become an electrician like his father and uncles. He stated his goal was to become a master electrician. Larry Bellamy, Sellers' father's former employer, testified that Sellers would accompany his father to work and help. He stated, "Sellers was very energetic. He wanted to learn, unlike most kids these days. He had a very determined approach that he wanted to learn the electrical trade, and follow pretty much and do the same thing his dad was doing."

The Commission based the pay scale on the testimony of a vocational expert. Employer offered no evidence to contradict this testimony.

We find substantial evidence in the record to support the commission's determination that Sellers most probably would have been earning and was thus entitled to a compensation rate of an electrician were it not for his spinal cord injury.

AFFIRMED.

CONNOR and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James Stewart,

Appellant,

v.

Richland Memorial Hospital,

Respondent.

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

Opinion No. 3509
Heard May 7, 2002 - Filed June 3, 2002

AFFIRMED

Arthur K. Aiken, of Hammer, Hammer, Carrigg & Potterfield; and Charles L. Henshaw, Jr., of Furr & Henshaw, both of Columbia, for appellant.

Charles E. Carpenter and S. Elizabeth Brosnan, of Richardson, Plowden, Carpenter & Robinson, of Columbia, for respondent.

STILWELL, J.: James Stewart brought this negligence action against Richland Memorial Hospital (RMH) alleging the nurse on duty breached the professional standard of care by removing his restraints and failing to monitor him, thereby providing substandard care. Stewart appeals the jury verdict for RMH, asserting the trial court erred in ruling that Stewart had to prove gross negligence in order to prevail and therefore improperly charged the jury. We affirm.

FACTS

While Stewart was in the hospital recovering from surgery, a respiratory therapist went to his room to administer a breathing treatment at approximately 12:15 a.m. Stewart was uncooperative and wanted to get out of bed. As a result of his combative and agitated behavior, the nurse who was assigned to care for Stewart that night placed him in four point restraints. At 12:30 a.m., the nurse contacted Stewart's doctor, who ordered medication changes and instructed her to continue the restraints. At 1:45 a.m., the nurse noted Stewart was resting quietly and she continued to monitor him. At 2:45 a.m., she noted Stewart was alert and responsive and released him from the restraints. At some point between 6:00 a.m. and 7:00 a.m., Stewart fell from his bed and was discovered on the floor of his room around 7:00 a.m.

Later that day, Stewart's doctor ordered an x-ray of his knee and hip, which did not indicate any fractures or dislocation. Over a month later, Stewart was diagnosed with a left hip fracture. His expert testified that his hip fracture was likely caused by his fall at RMH. The trial judge ruled that section 15-78-60(25) provided RMH with immunity unless gross negligence was proven, and accordingly charged the jury that Stewart had to prove RMH was grossly negligent in breaching the professional nursing standard of care.

LAW/ANALYSIS

I. Application of Tort Claims Act

Stewart argues the trial court erred in charging the jury that the gross

negligence standard under section 15-78-60(25) of the South Carolina Tort Claims Act applied. Stewart contends this exception to sovereign immunity does not apply because the nurse had a duty to render services consistent with the professional standard of care and was not exercising a duty involving only supervision, custody, control, or protection. We disagree.

The Tort Claims Act provides that the State, its agencies, political subdivisions, and other governmental entities "are liable for their torts in the same manner and to the same extent as a private individual under like circumstances," subject to certain limitations and exemptions within the Act. S.C. Code Ann. § 15-78-40 (Supp. 2001). Section 15-78-60 sets out exceptions to this waiver of sovereign immunity, which act as limitations on the liability of a governmental entity. S.C. Code Ann. § 15-78-60 (Supp. 2001). Section 15-78-60 (25) provides that a governmental entity is not liable for a loss resulting from the "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner." S.C. Code Ann. § 15-78-60(25) (Supp. 2001) (emphasis added).

"The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 121 (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." Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995).

Section 15-78-60(25) specifically limits government liability regarding the supervision, protection, and control of a patient. Stewart's complaint alleges that the nurse violated the applicable standard of care by not properly restraining Stewart and failing to adequately supervise him while he was under her care at RMH. Clearly, RMH was exercising a duty involving the supervision and control of Stewart when he fell out of his hospital bed. Because the pleadings place the case squarely within the statutory language, the standard of care was

properly a question of law for the judge rather than a question of fact for the jury. "[T]he issue of interpretation of the statute is a question of law for the court." Gorman v. S.C. Reinsurance Facility, 333 S.C. 696, 699, 511 S.E.2d 98, 100 (Ct. App. 1999). Therefore, the judge correctly charged the jury under the gross negligence standard.

Both below and on appeal, Stewart urges that whether a hospital is a private or governmental entity should not produce such a disparity in medical malpractice cases, especially with the prevalence of public hospitals which would then be subject to a lesser standard of care. Stewart cites Gardner v. Biggart for the proposition that where an independent professional standard of care applies, section 15-78-60(25) should be construed narrowly to apply only to policies and procedures, lest an unrestricted interpretation swallow all claims and absolve such entities of any liability. Gardner v. Biggart, 308 S.C. 331, 333-34, 417 S.E.2d 858, 859-60 (1992). The plain language of the statute contains no such limitation, and we find Gardner's holding clearly distinguishable from the present facts. Gardner injured his knee when the school bus on which he was riding lurched forward. Our supreme court distinguished an earlier case, Richardson, which applied the gross negligence standard to the school's supervision, control, and protection of students in failing to conduct random ID checks. Gardner at 334, 417 S.E.2d at 860; Richardson v. Hambright, 296 S.C. 504, 374 S.E.2d 296 (1988). The supreme court set forth the lynchpin for distinguishing when the higher standard will apply.

> Here, the school bus driver was not exercising any duty involving supervision, custody, control or protection at the time of the accident. The mere fact that Gardner was in "custody" of the driver as a passenger on the bus is insufficient.

Gardner at 334, 417 S.E.2d at 860 (emphasis in original). Here, the nurse was alleged to have improperly supervised, protected, controlled, or confined Stewart, bringing this case squarely within the terms of the statute. Contrary to Stewart's claims, this does not absolve the hospital of all liability for any acts, only those coming within the terms of the statute.

Section 15-78-70 (b) & (c) specifically states the liability of licensed physicians and dentists is not affected by the South Carolina Tort Claims Act. The omission of any reference to a licensed nurse's standard of care indicates that their liability is affected and, in this case, determined by the South Carolina Tort Claims Act. "'"The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed."'" Riverwoods, LLC v. County of Charleston, Op. No. 25462 (S.C. Sup. Ct. filed May 6, 2002) (Shearouse Adv. Sh. No. 14 at 58, 64) (quoting Hodges v. Rainey, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000)).

II. Burden of Proof

Stewart also argues the trial court erred in failing to instruct the jury that RMH bore the burden of proving it did not exercise its duty to protect Stewart in a grossly negligent manner. We disagree.

In a negligence action, the plaintiff must establish a duty of care, breach, and resulting damages. Arthurs ex rel. Munn v. Aiken, 346 S.C. 97,103, 551 S.E.2d 579, 582 (2001). As such, a plaintiff in a negligence cause of action must prove all elements of that action, including the standard of care. Although a governmental entity has the initial "burden of establishing a limitation upon liability or an exception to the waiver of immunity" applies, the plaintiff must still prove that the governmental entity has waived immunity. Niver v. S.C. Dep't of Highways & Pub. Transp., 302 S.C. 461, 463, 395 S.E.2d 728, 730 (Ct. App.1990). Thus, it was RMH's burden to establish that the limitation on liability applied, and Stewart's burden to establish that RMH exercised its responsibilities or duties in a grossly negligent manner. Therefore, once RMH prevailed in asserting its affirmative defense, the judge correctly charged the jury that the burden of proving gross negligence remained on the plaintiff.

III. Strict Liability Charge

Lastly, Stewart argues the trial court erred in failing to instruct the jury

that RMH had a duty to protect Stewart as a matter of law. We disagree.

When reviewing a jury charge for alleged error, an appellate court must consider the "charge as a whole in light of the evidence and issues presented at trial." Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999). "A jury charge is correct if '[w]hen the charge is read as a whole, it contains the correct definition and adequately covers the law.'" Id. at 496, 514 S.E.2d at 574 (quoting State v. Johnson, 315 S.C. 485, 487 n.1, 445 S.E.2d 637, 638 n.1 (1994)). A jury charge which is substantially correct and covers the law does not require reversal. Id. at 496-98, 514 S.E.2d at 575. The judge correctly and substantially charged the professional nursing standard of care as well as charging plaintiff's burden to prove gross negligence by defendant under the South Carolina Tort Claims Act in breach of that standard. The trial court's instructions to the jury adequately conveyed to the jury RMH's duty to protect Stewart.

AFFIRMED.

CURETON and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Julius Green, Jr.,

Appellant.

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

Opinion No. 3510
Submitted February 4, 2002 - Filed June 3, 2002

AFFIRMED

Dwight C. Moore, of Moore Law Firm, of Sumter, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh and Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Randolph Murdaugh, III, of Hampton, for respondent.

SHULER, J.: A jury convicted Julius Green, Jr., of trafficking in cocaine, trafficking in crack cocaine, and distribution of each within one-half mile of a school, and the trial court sentenced him to concurrent ten-year terms of imprisonment on each count. Green appeals, arguing the trial judge erred in denying his motions for directed verdict and judgment notwithstanding the verdict (JNOV). We affirm.

FACTS/PROCEDURAL HISTORY

On the afternoon of December 1, 1998, Alan Horton and Johnny Goebel of the Beaufort County Narcotics Enforcement Team were patrolling undercover on Lady's Island in an unmarked pickup truck. On Gumwood Drive, a small dirt road, the officers observed two cars parked in opposite directions in the middle of the road. Julius Green was driving one of the vehicles, a rented Chrysler convertible. As Horton and Goebel approached, Green turned his car around and began following the other vehicle. Both vehicles soon drove into a grassy area between two homes; the officers pulled in behind.

Horton exited the pickup and started walking toward the two vehicles. According to Horton, by the time he reached the cars, "Green is running. He's at a full-out sprint, running to a clear-cut field right behind where these two houses are where the car's [sic] parked." Horton did not identify himself as a law enforcement officer at that point. Green continued to flee but eventually stopped at a trash pile. As Horton later testified:

> [Green] stopped and he looked around on the ground. He was right near a trash pile and he placed an object that I couldn't tell at that time what it is, but he placed an object on the ground right next to that trash pile and it was placed down on the ground very carefully.

Following a short pause, Green fled again. Horton stopped at the trash pile long enough to view a plastic bag containing a "white powder substance and white rock type substance," then resumed his chase and eventually lost sight of Green.

Several minutes later Goebel discovered Green, shirtless, hiding in a garage. Horton placed him under arrest. Nearby, they found the clothes Green had been wearing, a cellular telephone, $330.00 in cash, and a set of car keys. The officers also seized a set of digital scales Green had thrown on the ground by the convertible. Upon a search of the vehicle, Goebel and Horton recovered small metallic hand scales and two Midland radios.

The police retrieved the bag that Green left at the trash pile. Inside were eleven "smoke-colored ziploc bags" of what was later determined to be powder cocaine weighing a total of 11.52 grams, a plastic bag containing a 16.09-gram rock of crack cocaine, and thirty "tiny ziploc bags," each containing "crack cocaine in the amount of 4.38 grams."

On January 11, 1999, a Beaufort County grand jury indicted Green for trafficking in cocaine and crack cocaine and distribution of both within one half-mile of a school. Following a trial on August 21, 2000, a jury convicted Green on all charges, and the trial court sentenced him to four concurrent ten-year terms of imprisonment. This appeal followed.[1]

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[1] Although Green asserts eight separate issues on appeal, they may be stated essentially as two arguments, i.e., whether the trial court erred in refusing his motions for directed verdict because 1) the evidence was obtained in violation of the Fourth Amendment and/or state constitution and 2) the State failed to prove the necessary elements of S.C. Code Ann. § 44-53-445 (2002) regarding distribution within one-half mile of a school. In addition, we note that Green's reference to his motions for JNOV, a civil post-trial motion, is misplaced; in a criminal case, a new trial motion "is the only available post-trial motion addressing the sufficiency of evidence." State v. Miller, 287 S.C. 280, 287 n.2, 337 S.E.2d 883, 887 n.2 (1985). We address Green's arguments, however, because he also properly moved for a new trial.

LAW/ANALYSIS

When reviewing the denial of a motion for directed verdict in a criminal case, this Court views the evidence in the light most favorable to the State. State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997); State v. Green, 327 S.C. 581, 491 S.E.2d 263 (Ct. App. 1997). The issue is the existence or non-existence of evidence, not its weight. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); Green, 327 S.C. at 586, 491 S.E.2d at 265. Accordingly, if there exists any direct or substantial circumstantial evidence reasonably tending to prove guilt, the Court must find the motion was properly denied. Kelsey, 331 S.C. at 62, 502 S.E.2d at 69; Huggins, 325 S.C. at 110, 481 S.E.2d at 118.

I. Fourth Amendment Violation

Green first argues the trial court erred in denying his motions on all charges because the State obtained the evidence against him in violation of the state and federal constitutions. This argument is not preserved, as the record reflects no attempt by Green at trial to suppress any evidence on constitutional grounds. Instead, Green attempted to raise the propriety of the police actions in a motion for directed verdict, which was clearly improper.

"A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001); see Rule 19(a), SCRE ("[T]he court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment."). A motion for directed verdict, therefore, contests the *sufficiency* of the State's *properly admitted* evidence. On the other hand, the appropriate vehicle for challenging the admissibility of evidence based on an alleged search and seizure violation is a motion to suppress. See generally Mapp v. Ohio, 367 U.S. 643 (1961) (holding the exclusionary rule barring admission of evidence procured in violation of the Fourth Amendment applicable to the states).

At trial, Green did not move, either in limine or during an evidentiary

hearing pursuant to Blassingame,[2] to suppress the evidence recovered by Horton and Goebel. Moreover, he failed to object at any time to its admissibility; save for the evidence pertaining to the Midland radios, the State's evidence, including the cocaine, was introduced without objection. As a result, Green failed to preserve anything for this Court to review. See State v. Brannon, 347 S.C. 85, 552 S.E.2d 773 (Ct. App. 2001) (finding Fourth Amendment issue not preserved where defendant failed to join in a motion to suppress); State v. Primus, 341 S.C. 592, 603, 535 S.E.2d 152, 158 (Ct. App. 2000) ("It is a fundamental principle that a contemporaneous objection is required at trial to properly preserve an error for appellate review.").

II. Sufficiency of Evidence Under S.C. Code Ann. § 44-53-445

Green next argues the trial court erred in refusing to direct a verdict on the two counts of distribution of a controlled substance within the proximity of a school. We disagree.

At the close of the State's case, Green moved for a directed verdict on the ground that the State failed to prove Beaufort Academy was a school. When all agreed the proof was lacking, the trial court permitted the State to re-open its case and present testimony that Beaufort Academy is a school offering education from kindergarten through twelfth grade. Green asserts this was error.

The decision to permit the State to re-open its case and present evidence lies within the sound discretion of the trial court. State v. Humphery, 276 S.C. 42, 274 S.E.2d 918 (1981); State v. Hammond, 270 S.C. 347, 242 S.E.2d 411

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[2] See State v. Blassingame, 271 S.C. 44, 47-48, 244 S.E.2d 528, 530 (1978) ("Whenever evidence is introduced that was allegedly obtained by conduct violative of the defendant's constitutional rights, the defendant is entitled to have the trial judge conduct an evidentiary hearing out of the presence of the jury *at this threshold point* to establish the circumstances under which it was seized.") (emphasis added), modified by State v. Patton, 322 S.C. 408, 472 S.E.2d 245 (1996).

(1978). Because proof that Beaufort Academy is a school was an essential fact related to an element of each offense under § 44-53-445, the trial court did not err in allowing the State to re-open the evidence. See Humphery, 276 S.C. at 43, 274 S.E.2d at 918 ("The trial court did not abuse its discretion in allowing the State to reopen and prove value – an essential element of grand larceny."); State v. Harrison, 236 S.C. 246, 113 S.E.2d 783 (1960) (finding it within the trial court's discretion to permit reopening and allow the State to offer evidence on an essential fact it was required to prove).

Green further asserts the trial court should have directed a verdict on the proximity charges because the State failed to prove he possessed any controlled substances within one-half mile of any portion of Beaufort Academy property actually used for school purposes. Section 44-53-445(A) provides in pertinent part:

> It is a separate criminal offense for a person to distribute, sell, purchase, manufacture, or to unlawfully possess with intent to distribute, a controlled substance while in, on, or within a one-half mile radius of the *grounds* of a public or private elementary, middle, or secondary school . . . .

S.C. Code Ann. § 44-53-445(A) (2002) (emphasis added).

At trial, Scott Luallin, an employee of the Beaufort County Emergency Management Department trained in the use of global positioning systems, testified the distance from the trash pile to the property line of Beaufort Academy was 300 feet. He also stated the distance from a spot 20 feet from the front door of Beaufort Academy to the trash pile was 2,743 feet, and that a half mile equals 2,640 feet.

To prove Green committed the offenses, the State was required to establish that he possessed the powder and crack cocaine with an intent to distribute while he was within a one-half mile radius of the grounds of an elementary, middle, secondary or vocational school. See id.; Brown v. State,

343 S.C. 342, 540 S.E.2d 846 (2001). Green argues that because the State's evidence failed to show he was within a one-half mile distance from the Beaufort Academy school *buildings*, he was entitled to a directed verdict of acquittal. According to Green, "the clear intent of the [L]egislature in enacting § 44-53-445(A) was to prohibit the distribution of drugs within one-half mile of that portion of the school regularly – or at least occasionally – used for school activities and where it could reasonably be assumed students would be present." We disagree.

A penal statute is construed strictly in favor of the defendant and against the State. Brown, 343 S.C. at 348, 540 S.E.2d at 849. This Court's primary purpose in construing a statute, however, is to ascertain the intent of the Legislature. Id.; State v. Johnson, 347 S.C. 67, 552 S.E.2d 339 (Ct. App. 2001). In so doing, "words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). When a statute's terms are clear and unambiguous, they must be applied according to their literal meaning. Id.; Brown, 343 S.C. at 348, 540 S.E.2d at 850.

Section 44-53-445 clearly and unambiguously prohibits distribution of a controlled substance within a one-half mile radius of school *grounds*. The term "grounds," in common and ordinary usage, means the "land surrounding or attached to a house or other building." Webster's New World College Dictionary 627 (4th ed. 1999). We therefore find the term as used in § 44-53-445(A) includes all school-owned property contiguous to or surrounding the school's physical plant. To hold otherwise would impermissibly expand the meaning of the statute's clear terms. See Brown, 343 S.C. at 349, 540 S.E.2d at 850.[3]

[3] If the Legislature had intended the statute to apply only to areas where school activities are actually conducted, it certainly could have done so. See, e.g., State v. Ivory, 592 A.2d 205, 206-07 (N.J. 1991) (discussing New Jersey statute prohibiting distribution of controlled substances "while on any school property used for school purposes").

Moreover, this construction is consistent with the purpose and policy underlying drug-free "safety zone" statutes. See generally 28A C.J.S. Drugs & Narcotics § 275 (1996) ("The purpose of such a statute is not only to create a drug-free atmosphere on school grounds, but also to create a permanent drug free buffer zone around these areas."). As the New Jersey supreme court has noted:

> Although the Legislature surely intended to prevent people from selling drugs to and around school children, it also meant to ensure "that areas surrounding schools must be kept drug free if they are to serve as the primary medium for educating young people as to the dangers of drug use." The insulation of those children was to be complete and total. [I]t is no defense that children were not present, school was not in session, or that [the] defendant was unaware of his/her proximity to school property.

State v. Ivory, 592 A.2d 205, 211 (N.J. 1991) (internal citations omitted).

Because Green admits the evidence established the trash pile was within one-half mile of the Beaufort Academy property line, the trial court did not err in denying his motion for directed verdict on the proximity charges.

AFFIRMED.

HEARN, C.J., and CONNOR, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ReDonna Maxwell and George Maxwell,

Appellants,

v.

Beverly M. Genez and John Doe,

Respondents.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 3511
Heard April 10, 2002 - Filed June 3, 2002

REVERSED AND REMANDED

Jeffrey Scott Weathers, of Peagler & Weathers, of Moncks Corner, for appellants.

Charles H. Gibbs, Jr., of Haynsworth, Sinkler, & Boyd, of Charleston, for respondent Beverly M. Genez.

Max G. Mahaffee, of Grimball & Cabaniss, of Charleston, for respondent Joe Doe.

ANDERSON, J.: ReDonna Maxwell and her husband appeal from an order of the Circuit Court denying their motion to restore their case to the Circuit Court docket. We reverse and remand.

FACTS/PROCEDURAL HISTORY

On March 17, 1995, ReDonna Maxwell was involved in an automobile accident with Beverly Genez and John Doe. In April 1997, Maxwell and her husband filed a complaint against Genez asserting various causes of action against her arising from the accident. In February 1998, the complaint was amended to include defendant Doe. Pursuant to Rule 40(j), SCRCP, the Maxwells moved to strike the matter from the docket to allow for further discovery and additional time to fully develop the issues of the case. On April 12, 1999, the Honorable A. Victor Rawl signed an order granting the motion to strike the matter, which provided:

> If the claim is restored upon motion made within one (1) year of the date stricken, the statute of limitations shall be tolled as to all parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. Upon motion to restore this case, the moving party shall provide all parties with notice of the motion to restore at least (10) days before it is heard. Upon being restored, this case shall be placed on the General Docket and proceed from that date as provided in Rule 40, SCRCP.

Following issuance of this order, the parties engaged in limited discovery and correspondence regarding ReDonna Maxwell's medical records and injuries. The Maxwells, however, did not file a motion to restore the case until May 1, 2000, more than a year from the date the case was stricken. On May 15,

2000, the Maxwells filed a "Notice of Motion and Motion for Enlargement of Time" pursuant to Rule 6(b), SCRCP. In a supporting memorandum, the Maxwells argued Rule 6(b) authorized the Circuit Court to extend the time to restore a case to the roster for "**good cause**," which the Maxwells maintained existed. The Maxwells' counsel submitted an affidavit stating that because of changes in paralegals in her office, the due date of April 12, 2000, for the motion to restore was not calendared and that she filed a motion to restore immediately after discovering the omission by her staff.

Additionally, the Maxwells argued the defendants waived the defense of the statute of limitations and were estopped from opposing the motion to enlarge and restore because the defendants' conduct induced them to believe that the motion to restore was merely an "administrative/procedural step" to facilitate the parties' intention to continue the case until trial.

The presiding circuit judge, the Honorable R. Markley Dennis, Jr., denied the Maxwells' motion, finding the Maxwells failed to move to restore the case within the one-year period as provided by Rule 40(j). Judge Dennis further found he did not have the authority or discretion to enlarge the period of time for filing because "it is the long-standing rule in this State that a Circuit Judge cannot modify or reverse an order of another Circuit Judge." As a result of Judge Dennis' ruling, the applicable statue of limitations for this action was not tolled.

LAW/ANALYSIS

I. Rule 6(b)/Rule 40(j)

The Maxwells contend Rule 6(b) allows the Circuit Court to enlarge the time to file a motion to restore beyond the one year limitation of Rule 40(j) for "good cause," and that they established "good cause" for their failure to timely file a motion to restore.

Rule 6(b), SCRCP states:

> When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the time may be extended by written agreement of counsel for an additional period not exceeding the original time provided in these rules, or the court for cause shown may at any time in its discretion (1) with or without written motion or notice order the period enlarged if request therefor is made before the expiration of the period as originally prescribed or extended or (2) **upon motion made after the expiration of the specified period, for good cause shown, permit the act to be done**. The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them. The time for filing notice of intent to appeal is jurisdictional and may not be extended by consent or order.

(emphasis added).

"In interpreting the language of a court rule, we apply the same rules of construction used in interpreting statutes. Therefore, the words of [the rule] must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule." State v. Brown, 344 S.C. 302, 307, 543 S.E.2d 568, 571 (Ct. App. 2001) (quoting Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994)).

Although there is no specific case in South Carolina addressing the applicability of Rule 6(b) to a Rule 40(j) situation, this Court has ruled that Rule 6(b) does apply in situations pertaining to extensions of time for answering a complaint. Beckham v. Durant, 300 S.C. 329, 387 S.E.2d 701 (Ct. App. 1989). Rule 6(b) authorizes the court to enlarge the period of time in which an act is required to be performed under the rules of civil procedure for "good cause." Rules 50(b), 52(b), 59, and 60(b) are specified exceptions listed in Rule 6(b). Rule 40(j) is not included in that list. Therefore under the plain and ordinary meaning of Rule 6(b), the Circuit Court has the discretion to enlarge the period

of time for filing a motion to restore beyond one year and to toll the statute of limitations.

II. "Good Cause"

We agree with the Maxwells that Rule 6(b) is applicable to motions filed pursuant to Rule 40(j). The appellants assert that "good cause" is shown as to justify the restoration of their case to the docket. The official notes to Rule 6(b) state that the "good cause" standard for enlargement is the same standard applied in setting aside an entry of default pursuant to Rule 55(c), SCRCP. The seminal case articulating the application of "good cause" under Rule 55(c) to a factual scenario is Wham v. Shearson Lehman Brothers, Inc., 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989). Wham provides:

> Under S.C.R.Civ.P. 55(c), as under F.R.CIV.P. 55(c), the standard for granting relief from an entry of default is "good cause." The decision of whether to grant relief from an entry of default is solely within the sound discretion of the trial court. An order based on an exercise of that discretion, however, will be set aside if it is controlled by some error of law or lacks evidentiary support.
>
> . . . .
>
> In deciding the question of whether to grant the motion by Shearson Lehman for relief from the entry of default, the master did not employ the "good cause" standard. Instead, the master erroneously applied the more rigorous standard of "excusable neglect," a standard used under Rule 60(b). He did this even though he recognized the "good cause" standard was applicable.
>
> We therefore remand for redetermination by the master the issue of whether Shearson Lehman should be relieved from the entry of default. In determining this issue, the master, exercising a broader, more liberal discretion than he otherwise would under Rule 60(b), shall consider the following factors: (1) the timing of

> Shearson Lehman's motion for relief; (2) whether Shearson Lehman has a meritorious defense; and (3) the degree of prejudice to Wham if relief is granted.

Id. at 465, 381 S.E.2d at 501-02 (citations omitted).

Rule 55(c) should be liberally construed so as to promote justice and dispose of cases on the merits. In re Estate of Weeks, 329 S.C. 251, 495 S.E.2d 454 (Ct. App. 1997). The decision of whether to grant relief from an entry of default is solely within the sound discretion of the trial court. Wham, 298 S.C. at 465, 381 S.E.2d at 501; see also Pilgrim v. Miller, Op. No. 3435 (S.C.Ct.App. filed January 14, 2002) (Shearouse Adv.Sh. No. 1 at 76); Ammons v. Hood, 288 S.C. 278, 341 S.E.2d 816 (Ct. App. 1986). An order based on this discretion will not be set aside absent an error of law or lack of evidentiary support. Wham, 298 S.C. at 465, 381 S.E.2d at 501; see also Stanton v. Town of Pawley's Island, 309 S.C. 126, 420 S.E.2d 502 (1992) (stating the appellate court will not disturb a discretionary ruling unless the ruling is without evidentiary support or is controlled by an error of law); Ricks v. Weinrauch, 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987) (holding abuse of discretion in setting aside a default judgment occurs when order was controlled by some error of law or, based upon factual — as distinguished from legal conclusions — was without evidentiary support); New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47, 435 S.E.2d 377 (Ct. App. 1993).

Williams v. Vanvolkenburg, 312 S.C. 373, 440 S.E.2d 408 (Ct. App. 1994), holds that the appellate court reviews an evidentiary record under the "good cause" standard by determining whether the trial judge's determination is supportable by the evidence and not controlled by an error of law.

Indubitably, a "good cause" analysis under Rule 55(c) ordinarily is made by the trial judge. In this case, the attorneys in oral argument consented to a "good cause" analysis by this Court because the affidavit filed by the Maxwells' attorney presented the evidentiary basis for "good cause."

Adverting to the merits, a "good cause" review of the evidentiary record is necessary and essential. The Wham factors are addressed:

A. Timing of the Moving Party's Motion for Relief

The Maxwells' attorney filed the motion to restore the case nineteen days late under the terms of the Rule 40(j) consent order. This brief period reveals the action and response of the attorney was significant and prompt upon discovering the failure to file the motion to restore within the proper time. The reaction by the Maxwells' attorney to the consent order imbroglio is imbued with alacrity and urgency.

B. Whether the Moving Party has a Meritorious Claim

It is apodictic that the Maxwells have a meritorious claim because the record is convincing that discovery activities were substantial and the medical condition of the injured plaintiff is well documented.

C. Degree of Prejudice to the Other party if Relief is Granted

There is absolutely no prejudice suffered or sustained by the two defendants in regard to the restoration of the case to the trial docket. Extensive preparation activities for trial had been undertaken by the defendants. There is no showing by the defendants that evidence is not available or has been impaired by this brief delay or hiatus from the trial docket.

In her brief, Genez cites Dixon v. Besco Engineering, Inc., 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995), for the general proposition that "good cause" does not exist to excuse a plaintiff's failure to timely move to restore the case to the trial docket. Dixon is inapposite to the factual scenario depicted in this record. In Dixon, a former employee of an engineering company brought an action against the company, alleging the company's negligence as a bailee caused the theft of the employee's machinist tools. The judge entered a default against the company because it failed to answer the employee's complaint until

over **seventy-five days** after the extended time agreed upon by the parties. The company attributed its delay to problems relating to the retention of counsel willing to take the case. In the instant case, the record demonstrates a markedly more expedited response on the part of the Maxwells' attorney upon discovering the lapse in timely moving to restore the case.

Secondly, Dixon does not address a motion to restore a case to the docket under a Rule 40(j) consent order. There is no case in this state relating to a "good cause" analysis under Rule 55(c) to a Rule 40(j) consent order.

III. Waiver

The Maxwells argue Genez and Doe waived any opposition to the motion to enlarge and restore the case, as well as asserting the statute of limitations because of conduct the parties engaged in during the period the case was stricken. We disagree.

"Waiver is a voluntary and intentional abandonment or relinquishment of a known right." Murdock v. Murdock, 338 S.C. 322, 333, 526 S.E.2d 241, 247 (Ct. App. 1999) (citing Parker v. Parker, 313 S.C. 482, 443 S.E.2d 388 (1994) and Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). "Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." Id. (quoting Janasik, 307 S.C. at 344, 415 S.E.2d at 387-88).

The Maxwells contend the letters written by the attorneys for Genez and Doe relating to discovery matters induced them to believe that a motion to restore the case was merely a technicality and that all of the parties intended to continue the case until trial. The correspondence of the parties, however, involved routine discovery issues relating to medical records. We find no evidence that either Genez or Doe indicated an intention to waive their rights to assert the statute of limitations nor do we find any evidence the defendants induced the Maxwells not to file a timely motion to restore.

CONCLUSION

We hold that Rule 6(b) is applicable to motions filed pursuant to Rule 40(j). Rule 6(b) authorizes the court to enlarge the period of time in which an act is required to be performed under the Rules of Civil Procedure for "**good cause**." The "good cause" standard for enlargement of time is the same standard applied in setting aside an entry of default under Rule 55(c), SCRCP. Here, the Maxwells' showing did constitute "**good cause**."

Accordingly, we **REVERSE** Judge Dennis' denial of the Maxwells' Motion to Restore and Motion for an Enlargement of Time and **REMAND** to the Circuit Court with instructions to restore their case to the trial docket.

REVERSED AND REMANDED.

CURETON, J., and THOMAS, Acting Judge, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case No. 98-CP-32-0098

Cheap-O's Truck Stop, Inc.,

Respondent,

v.

Chris Cloyd and United Oil Marketers, Inc.,

Appellants.

Case No. 98-CP-32-0099

Midland Gaming, Inc.,

Respondent,

v.

Chris Cloyd, United Oil Marketers, Inc., and United Gaming,

Appellants.

Appeal From Lexington County
James W. Johnson, Jr., Circuit Court Judge
Kenneth G. Goode, Circuit Court Judge

Opinion No. 3512
Heard April 9, 2002 - Filed June 3, 2002

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Timothy G. Quinn, of Columbia, for Appellants.

S. Jahue Moore, of Moore, Taylor, & Thomas, of W. Columbia, for Respondents.

ANDERSON, J.: Chris Cloyd, United Oil Marketers, Inc., United Gaming (collectively "appellants") entered into an alleged settlement agreement with Cheap-O's Truck Stop, Inc., and Midlands Gaming, Inc. (collectively "respondents"). The appellants appeal the circuit court's order enforcing the settlement agreement, finding Chris Cloyd in contempt, and awarding attorney's fees in the amount of $1,050.00. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL BACKGROUND

Cheap-O's Truck Stop, Inc. and Midland's Gaming, Inc., entered into various business arrangements with Chris Cloyd, United Oil Marketers, Inc., and United Gaming. Midlands Gaming filed a complaint against Cloyd, United Oil Marketers, and United Gaming. Cheap-O's filed a complaint against Cloyd and United Oil Marketers.

The Midlands Gaming case was called for trial on July 17, 2000 in Lexington County before Judge Kenneth Goode. The Cheap O's case was scheduled to be heard the following week. The attorneys struck the jury in

preparation for trial. Before the jury was sworn or opening statements delivered, both cases were settled. The parties put the settlement on the record and announced to the court that the defendants would pay the plaintiffs $80,000.00, of which $60,000.00 would be paid immediately, and $20,000.00 would be paid within two weeks. No order was signed in connection with this matter until August 15, 2000, when Judge Marc Westbrook signed a form order dismissing the case pursuant to Rule 43(k), SCRCP.

Cheap-O's and Midlands Gaming filed a petition to enforce the settlement. In connection with the petition, Judge Goode issued a rule to show cause on August 14, 2000, directing the appellants to show cause why the petition should not be granted. On August 24, 2000, the Supreme Court issued an order vesting Judge Goode with concurrent jurisdiction in Lexington and Fairfield counties on August 24, 2000. Judge Goode held the rule to show cause hearing on that date in Fairfield County.

Judge Goode subsequently entered an order on September 18, 2000, finding the settlement agreement complied with Rule 43(k) and enforcing it. Judge Goode held Chris Cloyd in contempt for refusing to comply with the settlement agreement, willfully disobeying a subpoena, and willfully disregarding the court's order approving the settlement. He also awarded attorney's fees in the amount of $1,050.00. Cloyd, United Oil Marketers, and United Gaming appeal.

LAW/ANALYSIS

I. SUBJECT MATTER JURISDICTION

The appellants argue the circuit court lacked subject matter jurisdiction to issue the rule to show cause, conduct the rule to show cause hearing, and issue the order in connection with the rule to show cause. They contend the circuit judge was required to exercise his judicial powers within the geographical boundaries of Lexington County. We disagree.

The Supreme Court issued the following order in connection with the rule to show cause hearing:

> Pursuant to the provisions of S.C. CONST. Art. V, § 4, IT IS ORDERED that the Honorable Kenneth G. Goode be vested with jurisdiction to hear and dispose of common pleas matters for Lexington County for the day of August 24, 2000. The jurisdiction is concurrent with his previously scheduled assignment to the term of the Court of Common Pleas for Fairfield County which is otherwise unaffected by this Order.
>
> JEAN HOEFER TOAL, CHIEF JUSTICE
> By: s/ Motte Talley
> Motte Talley, Assistant Director
> S.C. Court Administration

"The Chief Justice shall set the terms of any court and shall have the power to assign any judge to sit in any court within the unified judicial system." S.C. Const. Art. V, § 4. Thus, the order vests Judge Goode with jurisdiction for Lexington and Fairfield counties pursuant to the power of the Chief Justice under article V of the South Carolina Constitution.

Judge Goode heard this Lexington County matter on August 24, 2000, in Fairfield County. We find the order does not require Judge Goode to travel to Lexington to hear the Lexington County matter. He had jurisdiction in both counties concurrently. Further, in its order the circuit court stated, "once the court recognized Mr. Quinn was raising a jurisdictional objection it contacted the South Carolina Court Administration and received a directive to proceed with the Rule to Show Cause Hearing."

II. ATTORNEY CONFLICT OF INTEREST

Appellants declare the respondents' attorney should have been disqualified from representing the respondents in this suit. They claim the

attorney's law firm previously represented appellant United Oil Marketers, Inc., in a substantially similar matter. We find this issue is moot.

"An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (citing Jackson v. State, 331 S.C. 486, 489 S.E.2d 915 (1997)). "Mootness has been defined as follows: 'A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for the reviewing Court to grant effectual relief.'" Byrd v. Irmo High School, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) (quoting Mathis v. S.C. State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)).

Because we find the present case was settled and the settlement is enforceable, the issue is moot. See S. C. State Highway Dep't v. McKeown Food Store No. 9, 254 S.C. 180, 183, 174 S.E.2d 342, 343 (1970) (holding a settlement ended the litigation and rendered moot the issue on appeal); Stevens v. Stevens, 272 S.C. 130, 130, 249 S.E.2d 744, 744 (1978) (holding that as the result of a settlement entered into between the parties, all issues were moot in the case except that involving attorney fees).

III. ENFORCEABILITY OF SETTLEMENT AGREEMENT

Appellants argue the circuit court erred in finding the agreement was enforceable under Rule 43(k), SCRCP. They aver the purported settlement agreement was not reduced to writing and the agreement that is on the record does not contain material terms. We disagree.

"No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record." Rule 43(k), SCRCP. Rule 43(k) is applicable to settlement agreements. Ashfort Corp. v. Palmetto Constr. Group, Inc., 318 S.C. 492, 494, 458 S.E.2d 533, 534 (1995). The purpose of rules such as Rule

43(k) is to prevent fraudulent claims of oral stipulations, to prevent disputes as to the existence and terms of agreements, and to relieve the court of the necessity of determining such disputes. Reed v. Associated Invs. of Edisto Island, Inc., 339 S.C. 148, 152, 528 S.E.2d 94, 96 (Ct. App. 2000) (citing Ashfort, 318 S.C. at 495, 458 S.E.2d at 535; 83 C.J.S. Stipulations § 4 (1953)).

Even though the settlement agreement was not in writing, it complied with Rule 43(k) because it was made in open court and noted upon the record. In announcing the settlement, the respondents' attorney stated the following:

> Yes, Sir. The terms are as follows: The defendants in those cases will pay to the plaintiffs in those cases the sum of Eighty-Thousand Dollars ($80,000.00). Sixty-Thousand Dollars ($60,000.00) of that eighty will be paid immediately; twenty thousand will be paid within the next two weeks. So this week, we'll have sixty, the balance will be within the next two weeks. There will be mutual releases, mutual orders for dismissals. Neither party will – after the payment of the eighty-thousand dollars, neither party owes anybody any money. They are completely released from any liability to each other. And the court can go ahead, if it would, and do a form order.

The dissent latches on to the fact that the administrative judge, not the trial judge, signed the Form 4 order. However, the Form 4 order identified the settlement agreement by rule number. It is purely a technical, legalistic review to conclude the settlement agreement is not encapsulated into the Form 4 order. There is a direct correlation of the Form 4 order and the settlement agreement placed on the record in open court.

We find the material terms of the settlement were read into the record and complied with Rule 43(k). Concomitantly, the settlement agreement is enforceable and binding.

IV. FORM 4 ORDER

The appellants maintain the circuit court erred in holding Chris Cloyd in contempt because there was no final order. We disagree.

We hold there is a final order in this case. The appellants misconstrue and misperceive the potency of a Form 4 order. In effect, the argument of the appellants negates practicality and places form over substance.

Facially, factually and legally, the Form 4 order issued by Judge Marc H. Westbrook is a **FINAL ORDER**. Absolutely nothing remained to be done by the circuit judge after the signing of the order.

The Form 4 order provides:

> CHECK ONE:
>
> [ ] **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
>
> [ ] **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
>
> [**X**] **ACTION DISMISSED.** (CHECK REASON):
> [ ]Rule 12(b), SCRCP; [ ] Rule 41(a), SCRCP (Vol. Nonsuit) [**X**] Rule 43(k), SCRCP (Settled);
> [ ]Other_____.
>
> [ ] **ACTION STRICKEN** (CHECK REASON): [ ] Rule 40(j) SCRCP; [ ] Bankruptcy; [ ]Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; [ ] Other_____.

IT IS ORDERED AND ADJUDGED: [ ] See attached order;
[ ] Statement of Judgment by the Court:

Dated at Lexington, South Carolina, this 15th day of August, 2000.

The diagonal line penned by the circuit judge through the space for additional writing or remarks denotes that no further action is forthcoming or contemplated. There is no indicia or inference whatsoever to indicate that another order is necessary. The dismissal under Rule 43(k), SCRCP, is nexed directly to the settlement agreement placed on the record in open court.

As a matter of practice and convenience, a Form 4 order is used on a plethora of occasions as a **FINAL ORDER**. **IF** the Form 4 order is **NOT** efficacious as a final order, the circuit court will specifically and with certitude signify:

(1) a more formal order will be filed; **OR**

(2) the final order will be prepared by Attorney _____; **OR**

(3) through the use of words and phrases what action will follow.

V. CONTEMPT

Contempt is historically and academically bifurcated by courts. The case of Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 915 (1982), is a paradigm of an academic and scholarly review of the law of contempt. Curlee edifies:

> . . . The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. McLeod v. Hite, 272 S.C. 303, 251 S.E.2d 746 (1979);

State v. Goff, 228 S.C. 17, 88 S.E.2d 788 (1955). . . . Contempt results from the willful disobedience of an order of the court, and before a person may be held in contempt, the record must be clear and specific as to the acts or conduct upon which such finding is based. Edwards v. Edwards, 254 S.C. 466, 176 S.E.2d 123 (1970); Bigham v. Bigham, 264 S.C. 101, 212 S.E.2d 594 (1975).

. . . .

Compensatory contempt is a money award for the plaintiff when the defendant has injured the plaintiff by violating a previous court order. The goal is to indemnify the plaintiff directly for harm the contemnor caused by breaching the injunction. Rendleman, Compensatory Contempt: Plaintiff's Remedy When A Defendant Violates An Injunction, 1980 Ill.L.F. 971. Courts utilize compensatory contempt to restore the plaintiff as nearly as possible to his original position. Therefore it is remedial.

We have recognized compensatory contempt in at least two cases. In Ex Parte Thurmond, I Bailey 605 (1830), we stated that when an individual right is directly involved in a contempt proceeding, the court has the power to order the contemnor to place the injured party in as good a situation as he would have been if the contempt had not been committed, or to suffer imprisonment. In Lorick & Lowrance v. Motley, 69 S.C. 567, 48 S.E. 614 (1904), we held that a contemnor may be required to pay damages suffered by reason of his contemptuous action or suffer imprisonment. The defendant was ordered to pay to the plaintiff the value of the trees he had destroyed in disregard of the court's order.

> When . . . property of an individual is taken or destroyed in contempt of the court's order, those interested have a right to ask of the court its restoration or payment of its value at the hands of the offender, and the court requires such restoration as part of the punishment. 49 S.E. at page 615.
>
> Compensatory contempt awards have been affirmed also by the United States Supreme Court.
>
> Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained. Where compensation is extended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss. . . United States v. United Mine Workers of America, 330 U.S. 258, 304-305, 67 S.Ct. 677, 701-702, 91 L.Ed. 884 (1947).
>
> Therefore, the compensatory award should be limited to the complainant's actual loss. Included in the actual loss are the costs in defending and enforcing the court's order, including litigation costs and attorney's fees. The burden of showing what amount, if anything, the complainant is entitled to recover by way of compensation should be on the complainant.

"A determination of contempt ordinarily resides in the sound discretion of the trial judge." State v. Bevilacqua, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994)(citing Whetstone v. Whetstone, 309 S.C. 227, 420 S.E.2d 877 (Ct. App. 1992)). "It is well settled that contempt results from willful disobedience of a court order; and before a person may be held in contempt, the record must be clear and specific as to acts or conduct upon which the contempt

is based." Id. (citing State v. Harper, 297 S.C. 257, 376 S.E.2d 272; Spartanburg County Dep't of Social Services v. Padgett, 296 S.C. 79, 370 S.E.2d 872 (1988); Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 915 (1982)). "A willful act is defined as one done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law." Id. (citing Padgett, 296 S.C. at 82-3, 370 S.E.2d at 874).

The dissent attacks the basis for the order of contempt by stating the "fraudulent behavior" is not included in the petition for contempt. A cardinal rule of law in South Carolina edifies: "When issues not raised in the pleadings are tried by consent, they will be treated as if they had been raised in the pleadings." McCurry v. Keith, 325 S.C. 441, 447, 481 S.E.2d 166, 169 (Ct. App. 1997). Unquestionably, the issue of the fraudulent conduct of Cloyd was tried by consent.

The order of Judge Kenneth G. Goode states:

> . . . Mr. Cloyd acknowledged on the record the validity of the settlement amount. He simply has made no legitimate efforts to comply even though he admittedly had the power to comply at least in part.
>
> I find and conclude that the Defendants have breached the settlement agreement. In addition, they have . . . willfully disregarded the Court's Orders approving the settlement. Further, Mr. Cloyd's telephone call to Mrs. Worrell is an act of bad faith and I find and conclude it was simply an attempt to evade a lawful obligation at the expense at [sic] either the IRS or Attorney Moore.
>
> I find and conclude that the excuses provided by Mr. Cloyd for his noncompliance are baseless. Further,

> there is no legitimate explanation as to the proposals made in the telephone call he placed to Mrs. Worrell.

We are convinced of the validity of the ruling of the circuit judge holding Cloyd in contempt. The evidentiary record justifies the contempt finding. Clearly, Cloyd is in contempt of court.

VI. SANCTIONS

A. Attorney's Fees

In Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 557 S..E.2d 708 (Ct. App. 2001), our Court analyzed civil contempt as juxtaposed to the award of attorney's fees. Harris-Jenkins explicates:

> Courts, by exercising their contempt power, can award attorney's fees under a compensatory contempt theory. Compensatory contempt seeks to reimburse the party for the costs it incurs in forcing the non-complying party to obey the court's orders. See Poston v. Poston, 331 S.C. 106, 114, 502 S.E.2d 86, 90, (1998) ("In a civil contempt proceeding, a contemnor may be required to reimburse a complainant for the costs he incurred in enforcing the court's prior order, including reasonable attorney's fees. The award of attorney's fees is not a punishment but an indemnification to the party who instituted the contempt proceeding.") Lindsay v. Lindsay, 328 S.C. 329, 345, 491 S.E.2d 583, 592 (Ct. App. 1997)("A compensatory contempt award may include attorney fees.") (citation omitted); Curlee v. Howle, 277 S.C. 377, 386-87, 287 S.E.2d 915, 919-20 (1982)("Compensatory contempt is a money award for the plaintiff when the defendant has injured the plaintiff by violating a previous court order. .... Included in the actual loss are the costs of defending

> and enforcing the court's order, including litigation costs and attorney's fees.").

The award of attorney's fees in this case is proper and justified. The amount of the attorney's fees, if anything, is extremely low.

B. Fine

The fine imposed by the circuit judge is Twenty Five Thousand and No/100 ($25,000.00) Dollars. Any component of a sanction must be directly related to the contemptuous conduct and the loss incurred by the offended party. There is no reasonable relationship to the contempt of the defendants and the imposition of a Twenty Five Thousand and No/100 ($25,000.00) Dollar fine. We reverse the fine imposed.

C. Incarceration

Incarceration under certain factual circumstances may be included as a component of civil contempt. Strict parameters should be placed on the use of incarceration as a part of civil contempt. In Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 557 S.E.2d 708 (Ct. App. 2001), this Court enunciated the constitutional concernment of the use of imprisonment under the aegis and ambit of civil contempt. Harris-Jenkins annunciates:

> We note and emphasize that South Carolina law does not permit a person to be held in contempt for failure to pay a civil debt, which has arisen solely out of a contractual obligation. Sanders v. Sanders, 30 S.C. 229, 9 S.E. 97 (1889). Furthermore, the Constitution of South Carolina provides "[n]o person shall be imprisoned for debt except in cases of fraud." S.C. Const. art. I §19; see also Carter v. Lynch, 429 F.2d 154 (4th Cir. 1970); Stidham v. DuBose, 128 S.C. 318, 121 S.E. 791 (1924).

Incarceration should never be imposed due to the simplistic failure of an individual to pay a civil debt. Additionally, imprisonment is not authorized for the failure to comply with a settlement agreement in the absence of fraud or bad faith.

VII. REMAND

We affirm the award of attorney's fees. However, the severity of the sanctions imposed by way of fine or possible incarceration is troubling. Consequently, we reverse the imposition of the fine and possible incarceration. Because we conclude the circuit judge may impose a fine and incarceration in this scenario, we remand to the circuit judge for the purpose of reviewing the imposition of reasonable sanctions for contempt as follows:

> (1) ascertain with exactitude the financial condition of the defendants; and
>
> (2) evaluate defendants' contumacious conduct under the general principles of Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 915 (1982), and Shillitani v. U.S., 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966); and
>
> (3) impose sanctions that are directly and proximately connected to Cloyd's contemptuous conduct.

Irrefutably, sanctions should be imposed upon Cloyd.

CONCLUSION

Accordingly, the decision of the circuit court judge is **AFFIRMED IN PART** and **REVERSED IN PART**. We **REMAND** for consideration of an appropriate contempt sanction.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

THOMAS, Acting Judge, concurs.

CURETON, J., dissents in a separate opinion.

CURETON, J., Dissenting: I respectfully dissent. I would reverse the finding of contempt and the award of attorney fees.

I do not dispute that the Form 4 order is a final order of the court; however, I find the Form 4 order did not incorporate the terms of the settlement, thereby making the settlement agreement an enforceable order of the court. The settlement was announced in open court and noted upon the record. In announcing the settlement, the respondents' attorney stated the following:

> Yes, Sir. The terms are as follows: The defendants in those cases will pay to the plaintiffs in those cases the sum of Eighty-Thousand Dollars ($80,000.00). Sixty-Thousand Dollars ($60,000.00) of that eighty will be paid immediately; twenty thousand will be paid within the next two weeks. So this week, we'll have sixty, the balance will be within the next two weeks. There will be mutual releases, mutual orders for dismissals. Neither party will – after the payment of the eighty-thousand dollars, neither party owes anybody any money. They are completely released from any liability to each other. And the court can go ahead, if it would, and do a form order.

A review of the exchange between the attorneys and the circuit court indicates that no one contemplated that the settlement agreement would be incorporated into the court's order and made an order of the court. There was no request by the attorneys that the court approve the agreement, nor was there a request for the terms of the settlement to be made into a final order of the court. In fact the Form 4 order dismissing the case from the roster was not even signed by the judge who presided over court the day the settlement was read into the record. Instead, the Form 4 order was prepared by the chief administrative

judge as a ministerial function– the effect of which was to dismiss the case.

In the present case, Cloyd violated no court order inasmuch as the form order signed by the court on August 15, 2000, merely served to remove the case from the docket. While Cloyd may have failed to comply with the terms of an enforceable settlement agreement, he was not in violation of any specific court order. Therefore, the court did not have authority to hold him in contempt. "A determination of contempt ordinarily resides in the sound discretion of the trial judge." State v. Bevilacqua, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994) (citing Whetstone v. Whetstone, 309 S.C. 227, 420 S.E.2d 877 (Ct. App. 1992)). "It is well settled that contempt results from willful disobedience of a court order; and before a person may be held in contempt, the record must be clear and specific as to acts or conduct upon which the contempt is based." Id. (citations omitted). "A willful act is defined as one done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law." Id. (citing Spartanburg Dep't of Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874).

The circuit court also included language in its order for contempt regarding appellants' possible fraudulent behavior in attempting to circumvent the settlement agreement. I note the language of the petition for contempt and the rule to show cause did not encompass an allegation of fraud. Accordingly, I find notice was not given to the appellants that they would be called upon to defend this allegation, and therefore, this matter was not properly before the circuit court. See Abbott v. Gore, 304 S.C. 116, 119, 403 S.E.2d 154, 156 (Ct. App. 1991) (due process requires that a litigant be placed on notice of the issues which the court will consider to afford the litigant an opportunity to be heard); Bass v. Bass, 272 S.C. 177, 180, 249 S.E.2d 905, 906 (1978) (footnote omitted) (requiring a litigant be placed on notice of the issues which the court is to consider). Moreover, because I find that the Form 4 order does not make a violation of the terms of the settlement agreement enforceable by contempt, the appellants behavior toward the respondents is irrelevant as it pertains to the ability of the court to punish for such behavior. The appellants' alleged behavior can not constitute a basis for contempt.

I would also reverse the circuit court's award of attorney fees to the respondents. I recognize that in a civil contempt proceeding, a contemnor may be required to reimburse a complainant for the costs he incurred in enforcing the court's prior order, including reasonable attorney's fees. See Poston v. Poston, 331 S.C. 106, 114, 502 S.E.2d 86, 90 (1998). However, having concluded the court erred in finding Cloyd in contempt, I find no support for the award of attorney's fees. See Harris-Jenkins v. Nissan Car Mart, 348 S.C. 171, 176-79, 557 S.E.2d 708, 710-12 (Ct. App. 2001)(Attorney fees are recoverable only if authorized by contract, statute or court rule. There is no common law right to recover attorney fees. Where a settlement agreement did not provide for the payment of attorney fees to enforce it, the court could not require the breaching party to pay attorney fees as a sanction.)

Accordingly, I would reverse the circuit court's order finding Cloyd in contempt. I would also reverse the award of attorney fees to the respondent.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Howitt S. Smith and Hazeleen P. Smith,

Respondents,

v.

Newberry County Assessor,

Appellant.

Appeal From Newberry County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 3513
Submitted May 6, 2002 - Filed June 3, 2002

AFFIRMED

Hardwick Stuart, Jr. of Berry, Quackenbush & Stuart, of Columbia, for appellant.

John S. Nichols, of Bluestein & Nichols, of Columbia, for respondents.

HEARN, C.J.: The Newberry County Tax Assessor (Assessor) appeals from a circuit court order affirming the Administrative Law Judge's

(ALJ) valuation of property at $269 per waterfront foot. We affirm.[1]

FACTS

In 1996 Howitt and Hazeleen Smith, purchased a lot and two thirds of an adjoining lot located in Summerset Bay development on Lake Greenwood for $76,000. The Smiths testified that they knew $76,000 was higher than the amount paid for the most attractive lot in the development, but they were not concerned because they purchased their property for sentimental reasons and were not interested in resale.

For the 1999 tax year, Assessor valued the Smiths' property at $85,800. To reach this figure, she conducted a mass appraisal analyzing the resale information for lots contained within Summerset Bay during 1997 and 1998.[2] After reviewing the resale values, she determined that the information showed an annual 4% upward trend in lakefront property values and arrived at a value of $350 per waterfront foot. The $350 valuation fell within the Department of Revenue standards and the Department of Revenue approved the valuation. Assessor then multiplied the Smith's 258 feet[3] of waterfront by $350 per foot to arrive at $85,800.

The Smiths appealed Assessor's valuation to the Newberry County Tax Appeals and Review Board. The Board accepted the value offered by Assessor and denied any change to the valuation of the property. The Smiths then sought review of the Board's decision in front of an ALJ.

The Smiths' independent appraiser, Scott Wishart, testified at

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

[2]A mass appraisal method is one that looks at the sales from a region to determine the value per square foot and applies that value to the square footage of the assessed property.

[3]A later appraisal revealed that the Smith's actually had 248 feet of waterfront instead of 258 feet.

the ALJ hearing that he assessed the value of the property by using the fee appraisal method and conducting a market sales comparison approach.[4] Wishart stated that he identified properties comparable to the Smiths' property within the Summerset Bay development. The properties had similar deed restrictions, they had over 200 feet of waterfront property, and the properties had been sold within 6 to 12 months of the date of his appraisal. Three lots met this criteria.

Wishart testified that the most important component in using a market sales comparison approach is making adjustments to the value of the comparable properties to approximate the value of the property appraised. Wishart stated Comparables 1 and 2 did not require any adjustments and Comparable 3 required a $100 per foot upward adjustment to compensate for its inferior view. After reviewing the sales of the three comparable properties, Wishart valued the Smiths' property at $61,000 based upon a $246 per waterfront foot figure multiplied by 248 feet of waterfront property.

Wishart also performed a regression analysis and found that when a property has more than 200 feet of waterfront, the price per foot decreases to the $240 to $250 range. Wishart offered the regression analysis at the ALJ hearing as additional evidence to support his $246 per waterfront foot figure.

The ALJ rejected Assessor's value and found that the Smiths' market sales appraisal was the most accurate evidence of the property's market value because "no individual evaluation was made of the Taxpayers' property," and "[t]he taxpayers' property was not among the lots evaluated for the mass appraisal." The ALJ found that Wishart's Comparable 3 was the best reflection of the value of the Smiths' property; however, he rejected Wishart's $100 per square foot adjustment and used a $120 upward adjustment from Comparable 3. This resulted in a finding of the value for the Smiths' property of $269 per waterfront foot. The ALJ's assessment of the

[4]A fee appraisal is a method that looks at the resale value of the individual parcel alone to determine its fair market value.

value of the Smiths' property was $66,712 (248 waterfront feet times $269 per waterfront foot).

The Newberry County Tax Assessor appealed the ALJ's findings to the circuit court. The circuit court affirmed the ALJ's decision and dismissed the case. Assessor appeals.

DISCUSSION

I. Subject Matter Jurisdiction

Assessor argues the ALJ lacked the ability to decide the case at the time of the hearing because the Smiths failed to present all of their evidence supporting their appraisal value before the county board. We disagree. A taxpayer who is aggrieved by the Assessor's valuation of his property may appeal the assessment value to the County Board of Assessment Appeals and then to the ALJ Division. S.C. Code Ann. §§ 12-60-2530 through 12-60-2540 (2000). Section 12-60-2540(B) reads in relevant part:

> (B) . . . . If the taxpayer failed to provide the county board with the facts, law, and other authority supporting his position, he shall provide the representative of the county at the hearing with the facts, law, and other authority he failed to present to the county board earlier. The [ALJ] shall then remand the case to the county board for reconsideration in light of the new facts or issues unless the representative of the county at the hearing elects to forego the remand.

(emphasis added).

Assessor argues that when the Smiths presented Wishart's regression analysis as evidence supporting his $246 appraisal value for the first time at the hearing in front of the ALJ, the ALJ should have remanded

the matter back to the County Board of Appeals. After reviewing the record, we find that Assessor failed to object to the admission of evidence or ask the ALJ to remand the matter back to the County Board. Thus, we believe Assessor elected to forgo the remand. Moreover, because there was no objection to the admission of this testimony, we find this issue is not properly preserved. Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000) ("In order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court.").

II. ALJ's Valuation of the Property

Assessor next challenges the circuit court's order affirming the ALJ's decision on three grounds. First, Assessor argues the ALJ lacked the ability to select $269 per waterfront foot as the proper value because neither expert testified that the value of the property should be assessed at $269 and, if the ALJ chose to ignore the expert's proposed values, he should have used the purchase price of the property as the fair market value. Second, she claims there was no substantial evidence in the record to support the ALJ's $269 figure. Lastly, Assessor argues that the ALJ erred when he ruled the market sales comparison approach was the proper valuation method.

A. Standard of Review

The case reached the ALJ as a request for judicial review of the County Board of Assessment Appeals decision upholding Assessor's valuation. When a tax assessment case reaches the ALJ in this posture, the proceeding in front of the ALJ is a *de novo* hearing. See Reliance Ins. Co. v. Smith, 327 S.C. 528, 534, 489 S.E.2d 674, 677 (Ct. App. 1997) ("[A]lthough a case involving a property tax assessment reaches the ALJ in the posture of an appeal, the ALJ is not sitting in an appellate capacity and is not restricted to a review of the decision below. Instead, the proceeding before the ALJ is in the nature of a *de novo* hearing.").

This court must affirm an administrative agency's decision if the decision is supported by substantial evidence and we may not substitute our judgment for that of the agency upon questions for which there is room for

difference of intelligent opinion. Byerly Hosp. v. South Carolina State Health & Human Servs. Fin. Comm'n, 319 S.C. 225, 229, 460 S.E.2d 383, 385-86 (1995). "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 309, 454 S.E.2d 320, 321 (1995).

B. ALJ's Authority to Select Value of Property

Assessor first argues that the ALJ should have selected either her $350 figure as the correct value per waterfront foot, or Wishart's $246 value because they are the only experts in this matter. Alternatively, if the ALJ failed to accept the experts' valuations, he should have used the purchase price as the fair market value for the property. We disagree.

In City of Folly Beach v. Atlantic House Props., Ltd., 318 S.C. 450, 458 S.E.2d 426 (1995), the City's appraiser testified the value of Atlantic House's interest in the property was $31,000 while Atlantic House's appraiser testified the value was $642,000. The jury selected $250,000 as the proper value. The supreme court held the jury was free to determine the value of the property within the range of the evidence presented at trial. Id. at 452-53, 458 S.E.2d at 427. "The record reflects both appraisers encountered difficulty in determining the value of the property because of the unique nature of Atlantic House's [property]. We find no error in the jury finding the value to be $250,000. The unique nature of the property coupled with expert testimony as to its value allowed the jury to determine the fair market value of the property within the range of the evidence presented at trial." Id.

Although the present case does not involve condemnation, we find the analysis of City of Folly Beach instructive. When the Smiths purchased all of lot 46 and two-thirds of lot 47 and combined them into one property, they created a new piece of property which had never before been valued in the market. Both appraisers testified regarding the difficulty of assessing the value of an individual piece of property. The ALJ functioned as the finder of fact and his value fell within the range of values presented by the experts. Therefore, we find no error in the ALJ's valuation.

Furthermore, we find no merit to Assessor's argument that the ALJ should have used the purchase price paid by the Smiths as the fair market value when he rejected the experts' values. While the purchase price of the property is some evidence of the fair market value, it is not conclusive. Belk Dep't Stores v. Taylor, 259 S.C. 174, 179, 191 S.E.2d 144, 146 (1972). Therefore, the ALJ was not bound by the price paid by the Smiths. The Smiths testified they paid more for their property because of sentimental reasons, and also made decisions regarding the property which would not be normal in the marketplace because they were not concerned with the investment value of the property.

C. Substantial Evidence in the Record to Support ALJ's Findings

Assessor next argues the circuit court erred in affirming the ALJ's valuation because there was no substantial evidence to support his decision. We disagree. The ALJ based his valuation on the price per waterfront foot value from Comparable 3. He added $120 to the price as an upward adjustment to compensate for Comparable 3's inferior sight line, while Wishart adjusted its price upward only $100 per waterfront foot. Assessor argues the ALJ had no basis to independently consider the value of Comparable 3 or to adjust upward by $120.

Assessor's and Wishart's respective values of $350 and $246 formed the range of values. Comparable 3 was the only one of Wishart's three comparable properties involving a sale between two parties which was clearly an arm's length transaction. Wishart's adjustment of the value of Comparable 3 by $100 to compensate for the inferior sight line provided the basis for the ALJ to adjust the value of the property. We find substantial evidence existed in the record to support the ALJ's finding. The adjustment fell within the range of values presented by the experts. Since Comparable 3 was the only property sold which was unquestionably an arm's length transaction, the ALJ did not err by basing the Smiths' property value upon its adjusted value. Wishart provided the basis for the ALJ to make his upward adjustment to compensate for the inferior sight line of Comparable 3.

D. Use of Market Sales Comparison Approach

Assessor lastly argues the ALJ lacked substantial evidence in the record to use a market sales comparison approach as opposed to the mass appraisal approach and the circuit court erred when it affirmed the ALJ's decision. We disagree. Wishart testified that the only way to assess the fair market value at that particular time was using a market sales comparison approach. Mrs. Smith, also a licensed appraiser, testified that to accurately assess the fair market value of the subject property, an assessor must use comparable properties and make adjustments to compensate for the differences in the land. Even Assessor acknowledged that property could be valued using a fee appraisal approach. Considering that all three appraisers who testified during the hearing acknowledged the validity of using the market sales comparison approach, we find there was substantial evidence in the record to support the ALJ's decision to value the Smiths' property using that approach. Accordingly, the circuit court did not err when it affirmed the ALJ's findings.

AFFIRMED.

HUFF and HOWARD, JJ. concur.