The Supreme Court of South Carolina

In the Matter of Lizabeth W. Littlejohn, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 21, 1985, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Surpreme Court dated August 11, 2005, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Lizabeth W. Littlejohn shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

September 29, 2005

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
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N O T I C E

IN THE MATTER OF GLENN SCOTT THOMASON, PETITIONER

On January 24, 2000, Petitioner was indefinitely suspended from the practice of law. In the Matter of Thomason, 338 S.C. 425, 527 S.E.2d 97 (2000). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than November 29, 2005.

Columbia, South Carolina

September 30, 2005

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Mims Amusement Company, Respondent,

v.

South Carolina Law
Enforcement Division, Appellant.

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

Opinion No. 26046
Heard June 16, 2005 - Filed October 3, 2005

REVERSED

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert D. Cook, Senior Assistant Attorney General C. Havird Jones, Jr., and Assistant Attorney General Elizabeth R. McMahon, all of Columbia, for Appellant.

James M. Griffin, of Columbia, for Respondent.

JUSTICE BURNETT: This appeal raises the novel issue of whether a party has a right to a jury trial, under the state constitution, in a civil forfeiture proceeding involving an allegedly illegal video gaming machine. We certified this case for review from the Court of Appeals

pursuant to Rule 204(b), SCACR, on the motion of Appellant, the South Carolina Law Enforcement Division (SLED). We now reverse the circuit court's ruling that a right to a jury trial exists in such a case.

FACTUAL AND PROCEDURAL BACKGROUND

Law enforcement officials seized a Safari Skill video game belonging to Mims Amusement Co. (Owner) from a sports bar and grill in Berkeley County. SLED agents presented the machine to a magistrate pursuant to S.C. Code Ann. § 12-21-2712 (2000). The magistrate found the machine was an illegal gambling device in violation of S.C. Code Ann. § 12-21-2710 (2000) and ordered its destruction.

Owner moved for a post-seizure hearing and demanded a jury trial on the factual issue of whether the machine was an illegal gambling device. The magistrate granted a post-seizure hearing to Owner, but denied the request for a jury trial. Owner appealed the denial of its request for a jury trial to the circuit court.

The circuit court determined that all devices seized pursuant to Section 12-21-2710 are not necessarily illegal gambling devices because a magistrate must, as required by Section 12-21-2712, make a factual determination on the legality of a particular machine. The circuit court remanded the case to the magistrate, with instructions that when the magistrate finds there is no factual dispute about the illegality of the machine, then it may order the machine destroyed pursuant to the statute. However, when there is a factual dispute about the illegality of a particular machine, Owner is entitled to a jury trial to determine the issue. This appeal follows.

ISSUE

Did the circuit court err in ruling that the owner of a video game machine seized by law enforcement authorities has a constitutional right to a jury trial in a civil forfeiture proceeding to determine whether the machine is an illegal gambling device?

STANDARD OF REVIEW

In a case raising a novel question of law, the Court is free to decide the question with no particular deference to the lower court. The Court must decide the question based on its assessment of which answer and reasoning best comport with the law and public policies of this state and the Court's sense of law, justice, and right. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C. Code Ann. §§ 14-3-320 and -330 (1976 & Supp. 2004), and S.C. Code Ann § 14-8-200 (Supp. 2004)); Osprey, Inc. v. Cabana Ltd. Partnership, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) (same); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (same); Antley v. New York Life Ins. Co., 139 S.C. 23, 30, 137 S.E. 199, 201 (1927) ("In [a] state of conflict between the decisions, it is up to the court to 'choose ye this day whom ye will serve'; and, in the duty of this decision, the court has the right to determine which doctrine best appeals to its sense of law, justice, and right.").

LAW AND ANALYSIS

SLED argues the circuit court erred in ruling the owner of a video gaming machine seized by law enforcement authorities has a constitutional right to a jury trial in a civil forfeiture proceeding to determine whether the machine is an illegal gambling device. SLED contends the ruling was erroneous because (1) a video game machine which violates the statute is contraband *per se*, just as illegal liquor or drugs, because an illegal gambling device does not have a normally lawful purpose; (2) the magistrate's determination of whether a machine is an illegal gambling device is not the type of case in which the right to a jury trial was secured at the time of the adoption of the state constitution; (3) this Court has recognized that illegal gambling devices are contraband *per se*, and the due process required is a post-seizure hearing before a magistrate to show why a particular machine should not be forfeited; (4) the courts have never granted a jury trial in the seizure and destruction of illegal gambling devices; and (5) the forfeiture of illegal gambling devices is a strong deterrent to the possession and operation of such a devices, and granting a right to a jury trial would undermine the

deterrent effect and cause unnecessary delays and problems in enforcement of the law.

In response, Owner contends (1) the State may not deprive an owner of his property without due process of law, which in this instance includes the right to a jury trial; (2) the state constitution, this Court's precedent, and court rules guarantee Owner a right to a jury trial in magistrate's court to determine the legality of a particular machine; (3) a video game machine is not contraband *per se* because it may normally be used for lawful purposes, provided it is not in violation of Section 12-21-2710; and (4) whether a particular machine is an illegal game of chance or a legal game of skill may involve a material factual dispute which a party has a right to ask a jury to resolve.

We decide this case in light of the recent history of video gambling in South Carolina, which mushroomed from a rather clandestine and inauspicious beginning in 1986 into a multi-billion dollar business by its demise in July 2000. See *e.g.* Johnson v. Collins Entertainment Co., 88 F. Supp. 2d 499 (D.S.C. 1999) (outlining the below-the-radar development of $2.5 billion video poker industry in South Carolina, legislative attempts to regulate it, and state appellate court decisions on issues relating to the industry), vacated by Johnson v. Collins Entertainment Co., 199 F.3d 710 (4th Cir. 1999) (vacating district court's order because it improperly ruled on unsettled issues of state law); Westside Quik Shop, Inc. v. Stewart, 341 S.C. 297, 534 S.E.2d 270 (2000) (tracing history of anti-gambling statutes and subtle development of video poker industry); Johnson v. Collins Entertainment Co., 349 S.C. 613, 564 S.E.2d 653 (2002) (addressing various certified questions from district court relating to special inducements and cash payouts by video poker operators); Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 528 S.E.2d 647 (1999) (Court enjoined a public referendum as an unconstitutional delegation of legislative authority; Court further held statutory ban on cash payouts by video poker operators was

severable from unconstitutional provision and thus enforceable as of July 1, 2000).[1]

Gaming devices in general have long been recognized as legitimately within the police power of the State to control or take by forfeiture. Westside Quik Shop, Inc. v. Stewart, 341 S.C. 297, 303, 534 S.E.2d 270, 273 (2000) (citing Lawton v. Steele, 152 U.S. 133, 136 (1894)). Gaming machines have been illegal and subject to forfeiture as contraband in this state since the 1930s. *Id.* at 300, 534 S.E.2d at 271. This Court consistently has deferred to the Legislature's determination of which gaming devices must be sacrificed for the public welfare. Furthermore, forfeiture serves a deterrent purpose both by preventing the further illicit use of the property and by imposing an economic penalty, thereby rendering the illegal behavior unprofitable. *Id.* at 304, 534 S.E.2d at 273 (citing Bennis v. Michigan, 516 U.S. 442, 452 (1996) and Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686-87 (1974)).

An action for forfeiture of property is a civil action at law. 192 Coin-Operated Video Game Machines, 338 S.C. at 184, 525 S.E.2d at 876; State v. Petty, 270 S.C. 206, 208, 241 S.E.2d 561, 562 (1978). Under S.C. Code Ann. § 12-21-2712 (2000),[2] video gaming machines that are operated

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[1] South Carolina media have published and aired an untold number of reports on video poker and the debate surrounding it since the 1990s. A Columbia newspaper recently highlighted the history and apparent demise of the business, but noted SLED has seized hundreds of allegedly illegal video gambling machines in thirty-eight counties during the past eighteen months. Clif LeBlanc, Gambling in S.C.: The Debate Rages On, The State D1 (June 26, 2005).

[2] Section 12-21-2712 provides:

> Any machine, board, or other device prohibited by Section 12-21-2710 must be seized by any law enforcement officer and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately examine it, and if satisfied that it is in

continued . . .

or possessed in violation of S.C. Code Ann. § 12-21-2710 (2000)[3] are subject to forfeiture as contraband *per se*. Westside Quik Shop, 341 S.C. at 303, 534 S.E.2d at 273; 192 Coin-Operated Video Game Machines, 338 S.C. at 189, 525 S.E.2d at 879. A claimant's right to due process of law in the seizure of video game machines is satisfied when he receives a post-seizure hearing, and due process does not mandate a pre-seizure hearing. 192 Coin-Operated Video Game Machines, 338 S.C. at 196-97, 525 S.E.2d at 883. Thus, we have decided that machines declared illegal by a magistrate or conceded to be

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violation of Section 12-21-2710 or any other law of this State, direct that it be immediately destroyed.

[3] Section 12-21-2710 provides:

It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance. Any person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned for a period of not more than one year, or both.

illegal by the owner are contraband *per se*, and a claimant is entitled only to a post-seizure hearing.

In support of its argument, Owner points to this Court's observation in State v. Kizer, 164 S.C. 383, 162 S.E. 444 (1932), that owners of nickel slot machines could have brought a claim and delivery action, to be tried before a jury, rather than continually and improperly seeking injunctions to prevent law enforcement authorities from seizing particular machines. We have overruled Kizer "to the extent it permits the destruction of allegedly illegal property without *any* opportunity for the owner to contest the magistrate's determination of illegality." 192 Coin-Operated Video Game Machines, 338 S.C. at 196-97, 525 S.E.2d at 883 (emphasis added). We held in 192 Coin-Operated Video Game Machines that examination of a video gaming machine in magistrate's court, with the availability of a post-seizure hearing, provides adequate due process to the machine's owner; consequently, a claim and delivery action is neither necessary nor allowed. Neither Kizer nor more recent authority resolves the issue at hand, which is whether a claimant has a right to demand that a jury, instead of only a judge, determine whether a particular machine is illegal and therefore subject to seizure and destruction as contraband *per se*.

The South Carolina Constitution provides "the right of trial by jury shall be preserved inviolate." S.C. Const. art. I, § 14. The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868. Medlock v. 1985 Ford F-150 Pickup, 308 S.C. 68, 70-71, 417 S.E.2d 85, 86 (1992). The right to a jury trial encompasses forms of action that have arisen since the adoption of the Constitution in those cases where the later actions are of like nature to actions which were triable at common law at the time of the adoption of the Constitution. *Id.*

The Legislature may not abrogate the right to a jury trial simply by designating a proceeding as a civil action without a jury. 1985 Ford F-150 Pickup, 308 S.C. at 72, 417 S.E.2d at 87. The Court has the final responsibility of construing the constitution and laws of this state, and must do so without concern for political or popular opinion. *E.g.* Martin v.

Condon, 324 S.C. 183, 189, 478 S.E.2d 272, 275 (1996); Evatte v. Cass, 217 S.C. 62, 65, 59 S.E.2d 638, 639 (1950); see also Marbury v. Madison, 5 U.S. 137, 2 L.Ed. 60 (1803).

Courts have recognized two classes of contraband subject to forfeiture by statute. The first class is contraband *per se*, which are things that may be forfeited because they are illegal to possess and not susceptible of ownership. This class includes illegal gambling devices such as roulette wheels or craps tables, "moonshine" liquor, illegal narcotic drugs, or unregistered guns. The second class is derivative contraband, which are things that may be forfeited because they are instrumentalities of a crime, but which ordinarily are not illegal to possess. This class includes items such as currency, vehicles, or real property used in the commission of a crime or traceable to the proceeds of criminal activity. See State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 189, 525 S.E.2d 872, 879 (2000) (discussing two classes of contraband and determining that video game machines found by magistrate to be illegal gambling devices or conceded by owner to be such are contraband *per se*); U.S. v. Rodriguez Aguirre, 264 F.3d 1195, 1213 n.13 (10th Cir. 2001) (cocaine is contraband *per se*; automobile used in bank robbery is derivative contraband); State v. Edwards, 787 So.2d 981, 988-89 (La. 2001) (discussing two classes of contraband); People ex rel. O'Malley v. 6323 North LaCrosse Ave., 634 N.E.2d 743, 746 (Ill. 1994) ("Contraband *per se* consists of items which are inherently illegal to possess. There is a vast difference between the forfeiture of contraband *per se* and the forfeiture, by an innocent third party, of legal property – in this case a residence."); People v. One 1941 Chevrolet Coupe, 231 P.2d 832, 843 (Cal. 1951) (distinguishing between derivative contraband such as automobile and contraband *per se* or public nuisances *per se* such as gambling paraphernalia, counterfeit coins, diseased cattle, or decayed fruit and fish); State ex rel. Brett v. Four Bell Fruit Gum Slot Machines, 162 P.2d 539 (Okla. 1945) (slot machines are contraband *per se*); Frost v. People, 61 N.E. 1054, 1056 (Ill. 1901) (craps tables and roulette wheel are contraband *per se* because they "had no value or use for any other purpose than that of gambling"); City of Chicago v. Taylor, 774 N.E.2d 22, 31 (Ill. App. 1 Dist.

2002) (unregistered gun is contraband *per se* in locality which requires registration of guns).[4]

A property interest in derivative contraband is not extinguished automatically if the property is used unlawfully; therefore, forfeiture of such property is permitted only as authorized by statute and in compliance with the safeguards of due process. See U.S. v. $8,850 in U.S. Currency, 461 U.S. 555 (1983) (eighteen-month delay by government in filing civil forfeiture action did not constitute violation of due process under circumstances of case); U.S. v. $23,407.69 in U.S. Currency, 715 F.2d 162 (5th Cir. 1983) (due process requires government to explain and justify substantial delay in seeking civil forfeiture of seized property); Aguirre, 264 F.3d at 1213 n.13 (same);); State v. Curran, 628 P.2d 1198, 1203 (Or. 1981) (distinguishing between contraband *per se* and derivative contraband, with the latter afforded

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[4] The government's seizure of alleged contraband may arise in the context of a civil or criminal forfeiture proceeding. This appeal involves a civil forfeiture proceeding, not a criminal forfeiture proceeding which generally arises during the criminal prosecution of a person. "The critical difference between civil forfeiture and criminal forfeiture is the identity of the defendant. In civil forfeiture, the Government proceeds against a thing (*rem*). In criminal forfeiture, it proceeds against a human being (*personam*). Any differences between civil forfeiture and criminal forfeiture arise from the practical and theoretical considerations implicated when the Government proceeds against an inanimate object or a person." U.S. v. Croce, 345 F. Supp. 2d 492, 494 (E.D. Pa. 2004); see also U.S. v. Gilbert, 244 F.3d 888, 918-20 (11th Cir. 2001) (discussing history of forfeiture law and traditional distinctions between civil forfeiture proceeding against a thing and criminal forfeiture proceeding against a person); State v. Edwards, 787 So.2d 981, 990-91 (La. 2001) (discussing differences between civil and criminal forfeiture); State v. Petty, 270 S.C. 206, 208-09, 241 S.E.2d 561, 562 (1978) (action for forfeiture of property is civil, in rem proceeding against the property itself).

greater legal protection than property which is inherently injurious to public welfare).

In 1985 Ford F-150 Pickup, we addressed the owner's right to a jury trial in the civil forfeiture of a pickup truck, an item of derivative contraband which normally is used for lawful purposes. The State seized the truck pursuant to a statute forfeiting property used to produce or distribute illegal drugs. We held that a right to a jury trial in such a proceeding existed when the state Constitution was adopted in 1868. 1985 Ford F-150 Pickup, 308 S.C. at 70-71, 417 S.E.2d at 86.

We further reasoned that, while an owner generally has the statutory right to replevy against the state for property wrongfully detained, items seized as a result of illegal drug offenses are not subject to replevin. Instead, the items are considered to be in the custody of the department making the seizure, subject only to the orders of the court having jurisdiction over the forfeiture proceeding. Property described in the drug forfeiture statute is forfeited and transferred to the government at the moment of illegal use, and the subsequent seizure and forfeiture proceeding merely confirm the transfer. *Id.* at 71-72, 417 S.E.2d at 87. Consequently, owners of seized property have a right to a jury trial in a civil forfeiture proceeding involving derivative contraband, *i.e.*, when the property subject to forfeiture normally is used for lawful purposes. *Id.*; Gossett v. Gilliam, 317 S.C. 82, 87, 452 S.E.2d 6, 8 (Ct. App. 1994) (recognizing same principle).

In 1985 Ford F-150 Pickup, we adopted the majority view on the issue of jury trials in civil forfeiture proceedings involving derivative contraband. See *e.g.* State v. One 1981 Chevrolet Monte Carlo, 728 A.2d 1259 (Me. 1999) (party in interest to an *in rem* civil forfeiture proceeding involving a vehicle and money, seized as a result of drug law violations, has a right to a jury trial under Maine Constitution); Idaho Dept. of Law Enforcement By and Through Cade v. Free, 885 P.2d 381, 386 (Idaho 1994) (finding a right to jury trial in civil forfeiture proceeding because that right existed at common law when Idaho Constitution was adopted); People ex rel. O'Malley v. 6323 North LaCrosse Ave., 634 N.E.2d 743 (Ill. 1994) (in civil forfeiture proceeding involving real property used to facilitate drug

We conclude, based on our precedent addressing an owner's right to adequate due process in the forfeiture of a machine and the statutory regulation of the video gaming business, that a video gaming machine constitutes contraband *per se* at the moment it is seized by authorities. Section 12-21-2710 provides that

> it is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any . . . video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value . . . for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling . . . or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine . . . ."

Section 12-21-2710 exempts from its provisions legal vending machines which give a uniform and fair return in value for each coin deposited and in which there is no element of chance. It is apparent, however, that an allegedly illegal video gaming machine is deemed an unlawful gambling device at the moment of seizure, *i.e.*, the machine is contraband *per se* because it is illegal to possess and not susceptible of ownership. Moreover, this conclusion is appropriate in light of South Carolina's long-established statutory prohibitions on the ownership or use of specified gambling devices, including video gambling devices developed in recent years. See Johnson, 88 F. Supp. 2d at 502 n.1 ("[l]egislation designed to control 'the mischiefs of gambling' was enacted by the South Carolina colonial legislature in 1712"). Accordingly, we conclude that a seized video gaming machine constitutes contraband *per se* in the nature of a roulette wheel, and is not in the nature of derivative contraband such as a vehicle or parcel of real property normally used for lawful purposes.

The owner of an item deemed contraband *per se* does not enjoy a constitutional right to a jury trial. In Frost v. People, 61 N.E. 1054 (Ill. 1901), the appellant argued he had a right to a jury trial in the seizure and destruction of illegal gambling devices, which included two craps tables and a roulette wheel. The Illinois Supreme Court disagreed.

> Trial by jury was never a right in summary proceedings, and the legislature did not violate the constitution by providing that gaming implements and apparatus should be destroyed, after a hearing, under the direction of the judge, justice, or court . . . . The legislature has determined that gambling implements and apparatus are pernicious and dangerous to the public welfare, and the keeping of them is an offense prohibited by law. They are therefore not lawful subjects of property, which the law protects, but have ceased to be regarded or treated as property, and are liable to seizure, forfeiture, and destruction without violating any constitutional provision.

Id. at 1056; accord People v. One Pinball Machine, 44 N.E.2d 950, 957 (Ill. App. Dist. 2 1942) ("the seizure of property employed as a gambling device in violation of a statute is a proceeding *in rem*, and being contraband, the provisions of the Constitution relating to trial by jury and depriving one of his liberty or property without due process of law are inapplicable"); Furth v. State, 78 S.W. 759 (Ark. 1904) (rejecting claimant's demand for jury trial in forfeiture of roulette wheel and other illegal gambling devices under rationale of "fish net case," which allows seizure and destruction of property without jury trial when it is of little value or of no practical use except for illegal gambling); State v. Klondike Machine, 57 A. 994 (Vt. 1904) (seizure and destruction of gambling machine kept in public place is valid without the requirement of a jury); Kite v. People, 74 P. 886 (Colo. 1903) (claimant does not have right to jury trial in forfeiture of roulette wheel, which could only be used for illegal gambling); Annots., Right to Jury Trial In Case of Seizure of Property Alleged To Be Illegally Used, 17 A.L.R. 568 § VI (1922) and 50 A.L.R. 97 § VI (1927); Annot., Constitutionality of Statutes Providing for Destruction of Gambling Devices, 14 A.L.R.3d 366 § 4 (1967).

We recently held that a magistrate's ruling on legality applies only to the machine before the court. We further observed that a particular video gaming machine may be manipulated so as to change its nature from lawful to unlawful, which is one reason why the legality of a particular machine must be determined on an individual basis at the time of seizure and examination. Allendale County Sheriff's Office v. Two Chess Challenge II, 361 S.C. 581, 587, 606 S.E.2d 471, 474 (2004). We were not faced with the issue of a right to a jury trial in Allendale and our observation in that case is not dispositive. While a machine ultimately may be shown to be lawful in a post-seizure hearing before a magistrate, it is nevertheless deemed contraband *per se* at the moment of seizure. We conclude an owner's right to due process in the civil forfeiture of a video gaming machine under the state constitution and pertinent statutes is satisfied when he is given a post-seizure hearing before the magistrate, with the right to appeal that ruling to circuit and appellate courts. See S.C. Code Ann. § 18-7-20 (Supp. 2004), § 14-5-340 (1976), § 14-3-330 (1976 & Supp. 2004), and § 14-8-200 (Supp. 2004).

CONCLUSION

The owner of a video game machine seized by law enforcement authorities does not have a constitutional right to a jury trial in a civil forfeiture proceeding to determine whether the machine is an illegal gambling device because the device, at the moment of seizure, is deemed an item of contraband *per se*. The owner's constitutional right to due process of law is satisfied by a post-seizure hearing before the magistrate to determine the legality of a machine, with the right to appeal the ruling to higher courts.

REVERSED.

TOAL, C.J., MOORE and WALLER, JJ., concur.
PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jenny C. Mishoe, Respondent,

v.

QHG of Lake City, Inc., Appellant.

Appeal From Williamsburg County
Clifton Newman, Circuit Court Judge

Opinion No. 4027
Heard June 15, 2005 – Filed October 3, 2005

AFFIRMED

Charles E. Carpenter, Jr. and S. Elizabeth Brosnan, both of Columbia and Douglas C. Baxter, of Myrtle Beach, for Appellant.

Ronnie Alan Sabb and W. E. Jenkinson, III, both of Kingstree, for Respondent.

HEARN, C.J.: In this civil action, QHG of Lake City, Inc. appeals the award of $750,000 in actual damages and $1,250,000 in punitive damages in favor of Jenny C. Mishoe. QHG alleges a new trial should be granted as a result of an improper closing argument and the circuit court's erroneous restriction of the scope of QHG's cross-examination of Mishoe. Moreover, QHG argues the evidence does not support an award of punitive damages. We affirm.

FACTS

On June 3, 1998, Jenny C. Mishoe visited her grandmother at Carolinas Hospital System, a wholly owned facility of QHG of Lake City, Inc. After the visit, Mishoe left the hospital via the emergency room exit and proceeded to her car across the horseshoe drive area in front of the emergency room doors. While walking across the pavement near the emergency room exit, Mishoe's left foot got caught in a hole. Mishoe suffered serious injuries to both her left ankle and right knee.

QHG was required to perform regular, twice-yearly safety inspections of its premises to maintain its accreditation. On July 1, 1997, the head of maintenance for the hospital, Edward McDonald, provided the hospital with a written report stating a hole existed in the pavement near the emergency room exit. The hospital took no action to repair the hole or warn visitors and patients of the hole's existence.

The matter proceeded to trial and the jury returned a verdict in Mishoe's favor in the amount of $750,000 actual damages and $1,250,000 punitive damages. The jury found Mishoe ten percent comparatively negligent, and the circuit court reduced the actual damages accordingly. QHG made a motion for a directed verdict and judgment notwithstanding the verdict on the issue of punitive damages, which the circuit court denied. The circuit court also denied QHG's motion for reconsideration. This appeal followed.

LAW/ANALYSIS

I. Punitive Damages

QHG alleges the circuit court erred in denying its motion for a directed verdict and judgment not withstanding the verdict on the issue of punitive damages.[1] Specifically, QHG argues the circuit court erred because there was no clear and convincing evidence the hospital's actions constituted willful, wanton, or reckless conduct. We disagree.

In reviewing the denial of a motion for directed verdict or JNOV, the appellate court applies the same standard as the circuit court. Gilliland v. Doe, 357 S.C. 197, 199, 592 S.E.2d 626, 627 (2004). When ruling on directed verdict or JNOV motions, the circuit court must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. Sabb v. South Carolina State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created and the motion should be denied. Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995).

On appeal from the denial of a motion for directed verdict or JNOV, the appellate court may only reverse if there is no evidence to support the circuit court's ruling. South Carolina Prop. & Cas. Guar. Ass'n v. Yessen, 345 S.C. 512, 521, 548 S.E.2d 880, 885 (Ct. App. 2001). Neither the circuit court nor the appellate court has the authority to decide credibility issues or resolve conflicts in testimony. Garrett v. Locke, 309 S.C. 94, 99, 419 S.E.2d 842, 845 (Ct. App. 1992).

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[1] QHG does not ask this court to review the circuit court's Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991), punitive damages analysis. Although QHG takes issue with opposing counsel's comment during closing argument regarding the $2.8 million sale of the hospital, it does so only by arguing a mistrial should have been granted. See infra. QHG does not assert the use of the $2.8 million sales price was an improper method to value QHG's net worth.

In order to receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or with reckless disregard for the plaintiff's rights. S.C. Code Ann. § 15-33-135 (2004); Taylor v. Medenica, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). A conscious failure to exercise due care constitutes willfulness. Welch v. Epstein, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000). When evidence exists that suggests a defendant is aware of a dangerous condition and does not take action to minimize or avoid the danger, sufficient evidence exists to create a jury issue as to whether there is clear and convincing evidence of willfulness. See McGee v. Bruce Hosp. Sys., 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996). The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton. Welch, 342 S.C. at 301, 536 S.E.2d at 419.

The amount of damages, actual or punitive, remains largely within the discretion of the finder of fact, as reviewed by the trial judge. Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991). The trial judge is vested with considerable discretion over the amount of a punitive damages award, and this court's review is limited to correction of errors of law. Welch, 342 S.C. at 305, 536 S.E.2d at 421. Moreover, the appellate court must affirm the circuit court's punitive damages finding if any evidence reasonably supports the court's factual findings. Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 314, 594 S.E.2d 867, 875 (Ct. App. 2004).

Here, the evidence demonstrates the head of maintenance for QHG provided actual, written notice of the existence of the hole in question to the CEO of the hospital on July 1, 1997, almost one year before the accident occurred. QHG took no action to repair the hole after receiving notice of its existence. Moreover, the hospital took no precautions to warn visitors or patients of the existence of the hole. Therefore, we find the evidence of this written notice is sufficient to submit the issue of QHG's willful, wanton, reckless, or malicious conduct to the jury.

At that time, counsel for QHG objected, and stated:

> QHG: Your Honor, I'd object to any testimony about how much money the hospital sold for, and everybody knows-
>
> The Court: The objection is-
>
> QHG: -the price of the deal
>
> The Court: Yes, sir.
>
> QHG: And I would move for a mistrial.
>
> The Court: Pardon?
>
> QHG: I'd move for a mistrial.
>
> The Court: Ladies and gentlemen, the objection is sustained and you are to disregard the last argument by counsel. And, counsel, you are not to argue that particular issue. The motion is otherwise denied.

After the curative instruction was given, no additional objection was made by QHG.

The circuit court followed the procedure established in McElveen. The judge ruled on QHG's objection, offered a curative instruction to the jury, and admonished Mishoe's counsel not to mention the sales price and the fact it was "our money" again. See McElveen, 299 S.C. at 381, 385 S.E.2d at 41. The curative instruction adequately corrected the statement and advised the jury to disregard. Moreover, the sales price of the hospital had already been admitted, and the jury heard the amount during the trial. QHG cannot demonstrate evidence of a prejudicial effect warranting a mistrial. See Creighton, 334 S.C. at 118, 512 S.E.2d at 521. Therefore, we find the trial judge did not abuse his broad discretion in denying the mistrial motion.

III. Scope of cross-examination

QHG also argues the trial court erred in limiting the scope of its cross-examination of Mishoe. Specifically, QHG asserts the circuit court erred in prohibiting it from questioning Mishoe on her prior litigation history as it was relevant to her credibility. We disagree.

The admission and rejection of testimony is largely within the trial judge's sound discretion and will not be disturbed on appeal absent a showing that the trial court abused its discretion or its decision was controlled by an error of law. Ippolito v. Hospitality Mgt. Assocs., 352 S.C. 563, 569, 575 S.E.2d 562, 566 (Ct. App. 2003).

In this case, QHG argues the medical records of Dr. Hazelwood, a treating physician, are important to prove that Mishoe's medical condition had nothing to do with the fall at the hospital. The trial judge allowed QHG to introduce the majority of the medical records of Dr. Hazelwood. The trial judge allowed into evidence the portion of the records relevant to QHG's argument. The evidence in those records was relevant to the issue of whether Mishoe sought treatment from Dr. Hazelwood for injuries unrelated to the fall at the hospital was admitted. The only sentence the trial judge did not admit was Dr. Mendes "refused to see her again because of her prior experience with litigation." The trial judge allowed QHG to cross-examine Mishoe on her relevant medical history. Therefore, we hold the trial judge did not abuse his discretion in limiting the scope of the cross-examination.

CONCLUSION

For the aforementioned reasons, the decision of the circuit court and award of punitive damages is hereby

AFFIRMED.

BEATTY and SHORT, JJ., concur.

BEATTY, J.: Fred Collins, Jr., appeals from a jury award in favor of Marshall Armstrong on causes of action for fraud, constructive fraud, negligent misrepresentation, breach of fiduciary duty, breach of contract, and breach of contract accompanied by a fraudulent act. Collins argues the trial court erred in: (1) failing to direct a verdict as to all causes of action; (2) allowing Armstrong to amend his complaint to include the two breach of contract claims; and (3) failing to grant Collins a continuance based on the late amendment. We affirm.

FACTS

Collins is the sole owner of Collins Entertainment, Inc., a conglomerate that owns and operates video games. Armstrong began working for Collins Entertainment in 1980, and he became president of the corporation in charge of day-to-day operations in 1998. Armstrong and Collins became friends, and prior to the litigation, Collins included Armstrong as a beneficiary under his will.

During the 1990s, video poker machines yielded Collins Entertainment gross annual revenues of about $63 million and net profits of $12 or $13 million per year. Video poker was Collins Entertainment's core product, from which it derived eighty percent of its gross revenues. In the early 1990s, Collins Entertainment borrowed $12 million from SouthTrust Bank to finance a public stock offering. SouthTrust secured its loan by taking a security interest in all of Collins Entertainment's business assets.[1] However, when cash payouts for video poker were outlawed effective July 1, 2000, Collins Entertainment was left without its most profitable product. See Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 650, 528 S.E.2d 647, 655 (1999) (upholding the portion of the legislative act banning cash payouts effective July 1, 2000). Collins Entertainment owed SouthTrust somewhere between $13 and $20 million in principal and interest.

[1] Collins was not personally liable on this debt.

During this period, an idea was developed to alter old, existing bingo machines such that they could generate additional revenue. Armstrong testified that he came up with the idea when he noticed that the supreme court's opinion in Joytime excluded Class III Bingo machines. Although the licensing fee for Class III Bingo machines was $2000 per year, Armstrong discovered that older machines could be modified and licensed under a different class that had only a $100 per year licensing fee.

Armstrong testified that he discussed his idea with Collins, who was unconvinced at first. Collins allowed Armstrong to use some old machines that Collins owned personally to construct working models. Armstrong worked on the project during hours that he was not working for Collins Entertainment. Armstrong stated that he made four modifications to the machines, including adding an electronic circuit board, a flipper to bring the machine within the "game of skill" requirement for the lower licensing fee, and a printer to print tickets showing credits won which would be redeemable for merchandise. Armstrong applied for a patent for the new Skillpins machine.

Armstrong was interested in going into business for himself and wanted to work about fourteen more years before retirement. Because Collins Entertainment was so heavily laden with debt, Armstrong testified that Collins proposed that a separate entity be created to market the Skillpins machines. The new corporation would be ninety percent owned by Collins and ten percent owned by Armstrong. Armstrong would also be guaranteed a salary of $150,000 a year. Armstrong would later resign from Collins Entertainment and run the new corporation. Additionally, Armstrong testified that Collins agreed to personally borrow $1,000,000 from the bank, with Armstrong co-signing, to fund the endeavor. The agreement, however, was never reduced to writing.

Collins instructed Armstrong to go to Europe to secure exclusive distribution agreements for the new venture, later called Skillpins, Inc. The trips were successful, resulting in agreements with G.A.A., Seeben, and Splin S.A. The agreements were executed in the Skillpins name, as instructed by Collins. Skillpins was to use separate contracts, delivery slips, and work

slips. Collins Entertainment paid for the trips, but Skillpins was to reimburse Collins Entertainment once it became profitable. Employees of Collins Entertainment also accompanied Armstrong on the trip. Dennis Cosentino, one of the employees who traveled with Armstrong, testified that during the trip, Armstrong was the most excited he had seen him in twenty years because Armstrong was going to be a part owner. Armstrong testified that he would not have made these trips but for the promise of part ownership.

When the corporation later began operating, separate contracts were employed for Skillpins machines, even if Collins Entertainment machines were already operating at the location. Collins had never previously created a corporation for a specific product in South Carolina. Armstrong continued to work on the Skillpins project during hours he was not working for Collins Entertainment, and he executed agreements using the Skillpins name.

Tim Youmans, an attorney working for Collins Entertainment and later for Armstrong, testified that Collins told him that he had decided to give Armstrong ten percent of the new corporation that was to be separate and unencumbered by the SouthTrust debt. According to both Youmans and Armstrong, Collins instructed Youmans to find a shell corporation owned by Collins personally that was not encumbered with the SouthTrust debt. Youmans found a corporation meeting the criteria, and the corporation's name was changed to Skillpins, Inc. On the same date, another corporation under the Collins Entertainment umbrella was renamed Skill Flippers, LLC. This entity was to be the distribution vehicle for Skillpins, Inc. However, it was never used for that purpose.

The agreement between Armstrong and Collins was to be reduced to writing later by Richard Cox, an outside attorney for Collins Entertainment. Eventually, Armstrong and Collins met with Cox. According to Armstrong, Collins informed Cox that Skillpins was to be an entity completely separate from Collins Entertainment, that Armstrong would own ten percent of the corporation, and that Collins wanted to be a silent partner. Cox testified that the parties' intent was to set up an independent entity with each having an ownership position. Collins gave Armstrong constant assurances that the paperwork would soon be generated. Cox never prepared the documents.

Collins held a meeting at Collins Entertainment with upper level management and he discussed Skillpins. Armstrong's recollection of the meeting was that Collins informed the other employees that Skillpins was Armstrong's idea, and that a separate corporation was to be formed of which Armstrong would own ten percent. Collins recalled stating that he had offered Armstrong ten percent of Collins Entertainment, not ten percent of Skillpins.

By November of 2000, two or three hundred Skillpins machines were operating and producing income.[2] At that time, Armstrong discovered information concerning Skillpins was included in Collins Entertainment's profit and loss statement. Armstrong confronted Collins, and Collins confirmed that Skillpins had been brought under the Collins Entertainment umbrella. Collins offered Armstrong ten percent of Collins Entertainment. Armstrong refused, saying he did not want ten percent of the $13 to $20 million debt. Collins laughed and said he did not think Armstrong would. Armstrong immediately resigned.

Skillpins, Inc., purchased all the Skillpins machines. However, Collins Entertainment paid for the machines and booked all the machines as Collins Entertainment assets. Collins Entertainment started another patent application, listing Collins and his son as the inventors. This application was never filed. Within thirty days after litigation ensued, Skillpins, Inc. was dissolved. In 2001, Skillpins machines generated sixty-seven and one-half percent of Collins Entertainment's revenues.

After Armstrong resigned, he formed his own corporation with Youmans as a minority shareholder. At the time of the hearing, Armstrong's corporation operated about 250 Skillpins machines and over 100 video redemption games. However, Armstrong's declining health forced him to stop working full-time after January of 2001.

[2] The goal was to have 2,400 machines in operation after the first two years.

Armstrong brought an action against Collins alleging fraud, constructive fraud, negligent misrepresentation, breach of fiduciary duty, and violation of South Carolina's Unfair Trade Practices Act, and the case was tried before a jury. In his opening statement, counsel for Armstrong stated that the case was "about whether or not there was a contract between Fred Collins and Marshall Armstrong." Counsel further stated that the question for the jury was whether they had a meeting of the minds. However, counsel for Collins later objected to admission of evidence of the financial success of video poker in part on the ground that no breach of contract had been alleged in this case.

At the close of Armstrong's case, he moved to amend the complaint to add causes of action for breach of contract and breach of contract accompanied by a fraudulent act, arguing that the existence of a contract was implicit in the factual basis for the case. Counsel for Collins objected on the ground that they were unable to conduct discovery and cross-examine witnesses with these causes of action in mind. The court granted the amendment, finding no prejudice because the existence of a contract was an integral part of the case. However, the court allowed defense counsel to recall Armstrong for further cross-examination. Collins then moved for a continuance or adjournment, which was denied. Later, Collins testified on direct that he and Armstrong "never had a meeting of the minds" and that their agreement never got past "step two."

Armstrong then rested, and Collins immediately moved for a directed verdict on all causes of action. The trial court granted the motion with respect to the unfair trade practices cause of action but denied the motion on all other causes of action. At the close of the evidence and again after the verdict, defense counsel renewed the motion, and the trial judge reiterated its prior ruling.

The case was submitted to a jury on a special verdict form. The jury found for Armstrong on all six causes of action, awarding $300,000 for each cause of action. The jury also awarded $1.2 million in punitive damages. When asked by the trial court for clarification of the verdict, the foreperson responded that the jury calculated actual damages of over $1.7 million and

rounded up to $1.8 million. They then simply divided the total by six, intending to find for the plaintiff on all causes of action. Without objection, the court enrolled the actual damages as a general verdict for $1.8 million. The court denied all of Collins' other motions. This appeal followed.

STANDARD OF REVIEW

"In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." Sabb v. South Carolina State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). The trial court is only concerned with the "existence or nonexistence of evidence." Long v. Norris & Assocs., 342 S.C. 561, 568, 538 S.E.2d 5, 9 (Ct. App. 2000). "When the evidence yields only one inference, a directed verdict in favor of the moving party is proper." Id. However, "if more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury." Id. On appeal from the denial of a motion for a directed verdict or JNOV, this court will reverse the trial court only when there is no evidence to support the ruling. Creech v. South Carolina Wildlife & Marine Res. Dep't, 328 S.C. 24, 29, 491 S.E.2d 571, 573 (1997).

LAW/ANALYSIS

I. Directed Verdict

Collins argues the trial court erred by failing to grant him a directed verdict because Armstrong failed to prove all the necessary elements for each of the six causes of action that went to the jury. Collins also argues that he should have been granted a directed verdict because the alleged agreement was unenforceable. Collins asserts the parties could not legally have entered into a contract that would deprive SouthTrust Bank of its security interest. We address each of these arguments below.

A. Fraud/Constructive Fraud/Negligent Misrepresentation

Collins argues that Armstrong failed to produce evidence to support fraud, constructive fraud, and negligent misrepresentation because Armstrong had no right to rely upon representations that Skillpins would be separate from Collins Entertainment. Collins argues that any such representation would have been inconsistent with knowledge Armstrong, as president of Collins Entertainment, would have gained regarding the SouthTrust Bank loan. We disagree.

To sustain a claim of fraud, all of the following elements must be proven:

> (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

Regions Bank v. Schmuch, 354 S.C. 648, 672, 582 S.E.2d 432, 444-45 (Ct. App. 2003). "The right to rely must be determined in light of the plaintiff's duty to use reasonable prudence and diligence under the circumstances in identifying the truth with respect to the representations made to him." Id. at 672, 582 S.E.2d at 445. Fraud must be shown by clear and convincing evidence. Ardis v. Cox, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). A party may not rely upon a misstatement of fact when the truth is easily within his reach. King v. Oxford, 282 S.C. 307, 312, 318 S.E.2d 125, 128 (Ct. App. 1984). "It is the policy of the courts not only to discourage fraud, but also to discourage negligence and inattention to one's own interests." Id. However, a party may rely on representations without making further inquiry when a fiduciary or confidential relationship exists between the parties. Epstein v. Howell, 308 S.C. 528, 530-31, 419 S.E.2d 379, 380-82 (Ct. App. 1992).

"'To establish constructive fraud, all elements of actual fraud except the element of intent must be established.'" Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 333, 574 S.E.2d 502, 509 (Ct. App. 2002) (quoting Ardis v. Cox, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993)). "Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud while intent to deceive is an essential element of actual fraud." Ardis, 314 S.C. at 516, 431 S.E.2d at 269-70. Actual fraud is distinguished from constructive fraud by the presence or absence of the intent to deceive. Pitts, 352 S.C. at 334, 574 S.E.2d at 509. "However, in a constructive fraud case, where there is no confidential or fiduciary relationship, and an arm's length transaction between mature, educated people is involved, there is no right to rely." Ardis, 314 S.C. at 516, 431 S.E.2d at 270.

In a negligent misrepresentation action, a plaintiff must prove the following:

> (1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

Brown v. Stewart, 348 S.C. 33, 42, 557 S.E.2d 676, 680-81 (Ct. App. 2001). The key difference between fraud and negligent misrepresentation is that "fraud requires the conveyance of a known falsity, while negligent misrepresentation is predicated upon transmission of a negligently made false statement." Id. "A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction." Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 474, 581 S.E.2d 496, 504 (Ct. App. 2003). "The recovery of damages may be predicated upon a negligently made false statement where a party suffers either injury or loss as a consequence of relying upon the misrepresentation." Winburn v. Ins. Co.

of N. Am., 287 S.C. 435, 441, 339 S.E.2d 142, 146 (Ct. App. 1985). A claim for negligent misrepresentation may be made when the misrepresented facts induced the plaintiff to enter a contract or business transaction. Redwend, 354 S.C. at 474, 581 S.E.2d at 504.

Each of the above causes of action contains the necessary element that the hearer had the right to rely upon the misrepresentation or fraud. Collins argues that Armstrong had no right to rely on the promise that he would be part owner of a corporate entity separate from Collins Entertainment because he was imputed with knowledge of the SouthTrust Bank security interest in any potential new business due to his position as president of Collins Entertainment.

Viewing the evidence in the light most favorable to Armstrong, we find there was sufficient evidence to submit these causes of action to the jury. Armstrong testified that he was only in charge of day-to-day operations of Collins Entertainment, that he had no control over financial matters, and that he did not know what the SouthTrust Bank security agreement covered. Collins, not Armstrong, was a signatory to the agreement with SouthTrust Bank. Collins represented to Armstrong that he intended to create a new corporation, unencumbered by SouthTrust's security interest, in which Armstrong would have ten percent ownership. Great care was taken to locate a corporate shell owned by Collins personally, not by Collins Entertainment, in order to create Skillpins as a separate entity. Although some Collins Entertainment resources were used in sending Armstrong to Europe, there is evidence that Collins, as Armstrong's longtime friend, assured him that Skillpins would be separate from Collins Entertainment. Further, evidence was presented that Collins intended to personally sign a loan for the startup money for Skillpins. Thus, evidence existed that Armstrong had the right to rely upon Collins' promises that Skillpins would be a separate entity.

Because evidence existed to support the element of Armstrong's right to rely, the trial court correctly denied Collins' motions for a directed verdict with regard to fraud, constructive fraud, and negligent misrepresentation. The matter was appropriately sent to the jury.

B. Breach of Fiduciary Duty

Collins asserts the trial court erred in denying his motion for a directed verdict as to Armstrong's cause of action for breach of fiduciary duty. He maintains that no fiduciary relationship existed. We disagree.

> "A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." Island Car Wash, Inc. v. Norris, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987). A relationship must be more than casual to equal a fiduciary relationship. Steele v. Victory Sav. Bank, 294 S.C. 290, 368 S.E.2d 91 (Ct. App. 1988). "Courts of equity have carefully refrained from defining the particular instances of fiduciary relationship in such a manner that other and perhaps new cases might be excluded and have refused to set any bounds to the circumstances out of which a fiduciary relationship may spring." Island Car Wash, Inc., 292 S.C. at 599, 358 S.E.2d at 152; see Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986) ("As a general rule, mere respect for another's judgment or trust in his character is usually not sufficient to establish such a [fiduciary] relationship. The facts and circumstances must indicate that one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party.").

Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 330, 574 S.E.2d 502, 507 (Ct. App. 2002). Thus, to determine whether a fiduciary relationship existed,

this court must look to the particulars of the relationship between the parties. Id.

Viewing the evidence in the light most favorable to Armstrong, there was sufficient evidence to send the cause of action for breach of fiduciary duty to the jury. Evidence was presented at trial that Armstrong and Collins intended Skillpins to be a separate entity from Collins Entertainment. Armstrong testified that Collins assured him that he would create a business entity that would be separate from Collins Entertainment's debts. Armstrong was entrusted to develop the Skillpins product, test it, and obtain manufacturers. Thus, evidence existed that the parties had a special relationship, separate from Collins Entertainment, in which each entrusted the other to act in good faith and with due regard for the interests of the other. Because evidence existed of a fiduciary relationship, the trial court properly denied Collins' motion for a directed verdict.

C. Breach of Contract Claims

Collins next argues that the trial court should have directed a verdict on Armstrong's claims for breach of contract and breach of contract accompanied by a fraudulent act. He argues Collins only promised to give Armstrong a gift in the future that did not amount to a contract. Thus, he argues, there was no contract, and he was entitled to a directed verdict as to both contract causes of action.[3] We disagree.

The required elements of a contract are an offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of South Carolina, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). "A contract is an obligation

[3] Collins also mentions in his brief that there was "no evidence of any accompanying fraud." However, he fails to present any argument or caselaw in support of this assertion. Thus, this argument is abandoned on appeal and we decline to address it. See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting that where a party fails to cite any supporting authority or where the argument is merely a conclusory statement, the issue is deemed abandoned on appeal).

which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997). Valuable consideration may consist of "some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998). A benefit to the promisor or a detriment to the promisee may provide sufficient consideration for a contract. Shayne of Miami, Inc. v. Greybow, Inc., 232 S.C. 161, 167, 101 S.e.2d 486, 489 (1957). If the evidence as to the existence of a contract is conflicting or raises more than one reasonable inference, the issue should be submitted to the jury. Hendricks v. Clemson Univ., 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003). With certain exceptions, a contract need not be in writing to be enforceable. Gaskins v. Firemen's Ins. Co. of Newark, N.J., 206 S.C. 213, 216, 33 S.E.2d 498, 499 (1945) (noting that if there is a meeting of the minds with regard to the essential elements of a contract, it is immaterial whether the contract is written or oral).

Having a contract is a prerequisite to proving breach of contract accompanied by a fraudulent act. To prove this cause of action, a plaintiff must show: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 53-54, 336 S.E.2d 502, 503-04 (Ct. App. 1985). "Fraudulent intent is normally proved by circumstances surrounding the breach." Id. "The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character." Id. at 54, 336 S.E.2d at 504.

Viewing the evidence in the light most favorable to Armstrong, we find there was evidence that a contract was formed and, thus, both contract causes of action were properly submitted to the jury. Collins maintained that the parties never had a meeting of the minds and that the only offer he ever made Armstrong was for ten percent of Collins Entertainment. However, Armstrong and Youmans both testified that Collins offered to create a new

entity unencumbered by the SouthTrust debt and that Armstrong would be a ten percent owner. Armstrong further testified that he accepted Collins' offer and procured the exclusive distribution agreements in reliance on the agreement. The consideration for Collins was his agreement to capitalize the new business entity. Armstrong's consideration was his agreement to continue working for Collins Entertainment while developing the new Skillpins product on his own time, despite his desire to go into business for himself.

Because the evidence conflicted, a jury question existed as to whether a contract was formed. Thus, the trial court properly denied the motion for a directed verdict and sent the two contract causes of action to the jury.

D. Unenforceability of Contract

Collins argues the trial court erred in failing to grant him a directed verdict as to all of Armstrong's causes of action because the alleged agreement was unenforceable. He argues that he did not have the legal ability to enter into the alleged contract with Armstrong because any such agreement would unlawfully deprive SouthTrust Bank of its interest in its collateral. We disagree.

Generally, courts will not enforce contracts that are illegal or violate public policy. See White v. J.M. Brown Amusement Co., Inc., 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004) ("The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions."); see also Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002) (holding that illegal contracts are void and unenforceable, such that actions for its breach may not be maintained). However, we find this issue is not preserved for appellate review.

In arguing for a directed verdict as to the three fraud causes of action, Collins' counsel argued that Armstrong had no right to rely because "the

question of whether this could, in fact, be done was a serious question" in light of the bank obligations. Although counsel argued that Armstrong had no right to rely because he should have inquired about the bank obligations, Collins' counsel did not argue, as he does in his appellate brief, that the contract was illegal and unenforceable because it violated SouthTrust Bank's security agreement. Because this argument was not presented to the trial court in support of Collins' motion for a directed verdict, the court was never given the opportunity to rule upon whether the agreement was unenforceable. Accordingly, the matter is not preserved and we decline to address it. Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (holding that matters not raised to or ruled upon by the trial court are not preserved for appellate review).

E. Failure to Prove Damages

Collins contends the trial court should have granted his motion for a directed verdict as to all causes of action because Armstrong failed to prove damages. He argues that because Armstrong benefited from starting his own corporation after leaving Collins Entertainment, Armstrong cannot show that he sustained any damages from a breach of the alleged agreement. We disagree.

Initially, we note Collins only moved for a directed verdict for failure to prove damages as to the claims for fraud, constructive fraud, and negligent misrepresentation, arguing that Armstrong failed to prove Skillpins was profitable and that Armstrong would have suffered no change in salary. Thus, the argument Collins raises on appeal regarding the benefit to Armstrong from any alleged breach was never presented to the trial court. Further, Collins never raised any argument before the trial court with regard to damages as to the breach of contract and breach of contract with fraudulent intent causes of action. Accordingly, Collins' current argument on appeal is not preserved for appellate review. Staubes, 339 S.C. at 412, 529 S.E.2d at 546; Gurganious v. City of Beaufort, 317 S.C. 481, 488, 454 S.E.2d 912, 916 (Ct. App. 1995) (holding that a party may not argue one ground at trial and an alternate ground on appeal).

Assuming the issue is preserved for our review, we find there was sufficient evidence of damages to submit the case to the jury. In order for damages to be recoverable, the evidence should be sufficient to "enable the court or jury to determine the amount thereof with reasonable certainty or accuracy." Whisenant v. James Island Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981). "While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required." Id.

Armstrong presented evidence of damages in the form of the loss of his salary and the loss of ten percent of Skillpins' profits. Evidence was presented that Armstrong was to receive a guaranteed yearly salary of $150,000, which he lost as a result of the breach. At the time of the agreement, Armstrong expected to work approximately fourteen more years before retiring. However, Armstrong retired shortly after starting his own corporation for health reasons. Thus, Armstrong presented a range of damages from lost salary of $150,000 for one year of work up to $2.1 million over fourteen years.

Armstrong also presented evidence that Collins' actions deprived him of the agreed-upon ten percent of the expected profits from Skillpins. Armstrong and Collins planned to have 2,400 Skillpins machines in operation after two years. The machines were eventually placed in the name of Collins Entertainment. Skillpins machines accounted for about two-thirds of the corporation's revenue after their first full year of operation. The 2001 gross profit from about 400 machines amounted to nearly $2.7 million, with a net profit of approximately $650,000. Ten percent of the 2001 net profit would have amounted to $65,000. Armstrong testified that when all 2,400 machines were in operation, the expected yearly gross profit would have been $16 million, and the net profit, around twenty percent of that, would have been $3.2 million. Armstrong expected to share in ten percent of the net, or $320,000 per year, once the corporation installed all 2,400 machines. Thus, Armstrong presented evidence of lost profits ranging from $65,000 per year up to $320,000 per year.

Viewing the evidence in the light most favorable to Armstrong, evidence was presented regarding damages from Collins' actions. Accordingly, we find the trial court properly denied Collins' motion for a directed verdict regarding lack of proof of damages. Further, the jury's verdict of $1.8 million was declared a general verdict by the trial court and was well within the range of damages shown by Armstrong. Because the verdict was a general verdict, we cannot now speculate as to how the jury allocated damages. See Gold Kist , Inc. v. Citizens S. Nat'l Bank of S.C., 286 S.C. 272, 282, 333 S.E.2d 67, 73 (Ct. App. 1985) ("The appellate courts of this State exercise every reasonable presumption in favor of the validity of a general verdict.").

II. Amendment and Request for Continuance

Collins asserts the trial court erred in allowing Armstrong to amend his complaint to add causes of actions for breach of contract and breach of contract accompanied by fraudulent act and in refusing to grant a continuance or adjournment.

A. Amendment of the Complaint

Collins argues the trial court erred in allowing Armstrong to conduct the lawsuit based on the alleged fraudulent failure of Collins to create a contract and then amend the complaint on the theory that there was a contract. We disagree.

Initially, we note that Collins misconstrues Armstrong's complaint. Rule 8, SCRCP allows inconsistent causes of action; however, we find nothing in the complaint that alleges Collins failed to create a contract. To the contrary, paragraph 3 of the complaint avers "Plaintiff and Defendant agreed to the formation of a corporation . . . ." Paragraph 6 states "The Plaintiff carried out his obligations;" and paragraph 8 avers ". . . **the Plaintiff had performed under the contract** . . ." (emphasis added). Thus, contrary to Collins' allegation that Armstrong alleged no contract was formed in the complaint, Armstrong clearly alleges that the parties already had a contract.

If a party seeks to amend his pleadings greater than thirty days after a responsive pleading has been filed, he may only do so by leave of the court or with express consent of the other parties. Rule 15(a), SCRCP. Leave to amend the pleadings "shall be freely given when justice so requires and does not prejudice any other party." Id. Amendments may also be made to conform the pleadings to the evidence when issues not pled are tried by express or implied consent of the parties. Rule 15(b), SCRCP. However, implied consent will not be found if all the parties did not recognize it as an issue at trial, even if evidence in the record exists to support the amendment. Dunbar v. Carlson, 341 S.C. 261, 268, 533 S.E.2d 913, 917 (Ct. App. 2000).

"Motions to amend pleadings to conform to proof may be made upon motion of any party at any time, even after judgment . . . ." Ball v. Canadian Am. Express Co., 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994). "Amendments to conform to the proof should be liberally allowed when no prejudice to the opposing party will result." Harvey v. Strickland, 350 S.C. 303, 313, 566 S.E.2d 529, 535 (2002); Kelly v. S.C. Farm Bureau Mut. Ins. Co., 316 S.C. 319, 323, 450 S.E.2d 59, 61 (Ct. App. 1994) (holding that amendments are to be freely granted when justice requires and there is no prejudice to any other party).

"A motion to amend is addressed to the sound discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice." Kelly, 316 S.C. at 323, 450 S.E.2d at 61. The prejudice that Rule 15 contemplates is lack of notice that the new issue is to be tried and lack of a full opportunity to introduce testimony to refute it. Soil & Material Eng'rs, Inc. v. Folly Assoc., 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct. App. 1987).

Although Armstrong's counsel believed that facts were alleged in the complaint to support the two contract causes of action, he moved, "out of an abundance of caution," to amend the pleadings to conform to the proof presented at trial pursuant to Rule 15(b), SCRCP. Despite Collins' argument that the contract causes of action were never pled and he was prejudiced by the surprise amendment, the trial court found that the contract causes of action were an integral part of the case.

In determining whether the amendment was proper pursuant to Rule 15(b), SCRCP, we must first address whether the issue of breach of contract was tried by express or implied consent of the parties. In Dunbar v. Carlson, 341 S.C. 261, 533 S.E.2d 913 (Ct. App. 2000), this court analyzed implied consent to try a particular issue. In that case, the plaintiff sued the defendant for dental malpractice, and the defendant cross-examined the plaintiff's daughter regarding the time period during which she warned her mother that the defendant was not giving her adequate care. Based on the daughter's answers, the defendant moved to amend his pleadings to include the affirmative defense that the statute of limitations had run. Although the plaintiff did not object to the daughter's testimony and was not aware of the defendant's intention, the trial court allowed the amendment and immediately granted the defendant's subsequent motion for a directed verdict. This court reversed, holding that there was no implied consent to try the statute of limitations issue where the daughter's testimony was admissible for another purpose and she failed to recognize that the defendant intended to assert the statute of limitations. Dunbar, 341 S.C. at 268, 533 SE.2d at 917.

Although Collins cites Dunbar in support of his argument, we believe the facts in this case are distinguishable. In Dunbar, the plaintiff had concluded her case when a new affirmative defense was raised and directed verdict immediately granted. In the case at bar, Armstrong's unamended complaint alleged "The subject matter of this litigation involves contractual obligations . . . ." The complaint also alleged that the parties had a contract and that Armstrong performed under the contract. Moreover, in his opening statement, Armstrong's counsel stated the case concerned whether or not there was a contract between Collins and Armstrong. He informed the jury that it was their job to determine whether there was a meeting of the minds. Although Armstrong testified he had a verbal agreement with Collins, Collins' counsel cross-examined Armstrong regarding whether the agreement was actually just a promise to do something in the future. Tim Youmans, an attorney who initially worked for Collins Entertainment and later worked for Armstrong in his new enterprise, testified that Collins informed him that Armstrong would get ten percent of a new corporation that would be a

separate entity from Collins Entertainment and the SouthTrust debt. Further, Collins had not begun his defense when the amendment was made.

We find there is sufficient evidence in the record indicating the existence of a contract was an issue at trial. Although Collins' counsel noted early in the trial that the issue of breach of contract had not been pled in the case, he questioned Armstrong and Youmans about the particulars of any alleged agreement and whether it was an actual agreement or merely a promise to do something in the future. Armstrong testified extensively that the parties entered into an oral agreement, he trusted Collins would fulfill his end of the bargain, and he would have ten percent of Skillpins, a corporation free and clear of the SouthTrust debt. Thus, despite counsel's assertions at trial that breach of contract was not an issue, both parties elicited testimony regarding a contract and the issue was tried by implied consent. Because whether a contract existed was such an integral part of this case, we do not find that Collins was taken by surprise as was the plaintiff in Dunbar.

We next turn to whether Collins was prejudiced by the amendment. In considering potential prejudice, the court should consider whether the opposing party has had the opportunity to prepare for the issue now being formally raised. Soil & Material Eng'rs, Inc. v. Folly Assoc., 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct. App. 1987); see also Pool v. Pool, 329 S.C. 324, 328, 494 S.E.2d 820, 823 (1998) (citing Folly Assoc. for the premise that the prejudice contemplated by Rule 15, SCRCP, is the lack of opportunity to refute any new evidence connected with the amended complaint). Armstrong moved for the amendment after presenting all the evidence in support of his case. Collins objected to the amendment, arguing he was prejudiced because he did not have an opportunity to conduct discovery or to cross-examine Armstrong with the contract causes of action in mind. The trial court granted leave to amend, finding that the existence of a contract was an integral part of this case. The court gave Collins the option of recalling Armstrong for further cross-examination on the contract issue, however. Although Collins failed to recall Armstrong for cross-examination, he presented testimony that: the parties never had a "meeting of the minds;" there was never an agreement that Skillpins would be free from the SouthTrust debt; and Armstrong was only offered the gift of ten percent of Collins Entertainment.

Although Collins argued that he was prejudiced by the amendment because he would have asked different questions on cross-examination and would have presented different evidence, he made no proffer of different questions or evidence, and he was allowed to recall Armstrong if he wanted to do so. We find, based on the facts of this case, that Collins failed to meet his burden of showing prejudice.

Further, we find the trial court's decision to allow the amendment was proper pursuant to Rule 15(a), SCRCP.[4] Although Armstrong's pleadings did not separately delineate causes of action for breach of contract or breach of contract accompanied by a fraudulent act, the facts in the pleadings alleged the following: (1) Armstrong and Collins had a special relationship in which Collins told Armstrong he could trust him; (2) Armstrong developed a business idea, and he and Collins agreed to the formation of a corporation to buy, sell, and distribute coin-operated machines; (3) the agreement between the parties was that Armstrong would receive ten percent of the newly-formed corporation plus a salary of $150,000 per year and that the new corporation would be separate from Collins' other business entities and debts; (4) that Armstrong performed under the contract; and (5) notwithstanding the contract between the parties, Collins pledged the new corporation to the bank to secure debts for his other companies and appropriated Armstrong's idea as his own. These factual allegations were sufficient to support a cause of action for breach of contract and breach of contract accompanied by fraudulent act. Because the allegations were clearly in the pleadings and the issue of the existence of an agreement was addressed at the trial, we find no prejudice to Armstrong in the amendment. Therefore, we find the trial court appropriately allowed the amendment.

In sum, we find the trial court did not abuse its discretion in allowing the amendment. Armstrong's complaint did not allege that Collins failed to create a contract, as Collins asserts. Clearly, the existence of a contract was

[4] This court may affirm the trial court based on any grounds found in the record. Rule 220(c), SCACR; I'on, LLC v. Town of Mount Pleasant, 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000).

an issue at trial, and Collins was not prejudiced by the amendment. Finally, Armstrong's complaint alleges facts that would support the causes of action for breach of contract and breach of contract accompanied by fraudulent act.

B. Continuance

Collins next asserts that even if the trial court properly granted leave to amend, it erred in refusing to continue or adjourn the case to give defense counsel time to prepare. We disagree.

The decision whether to grant leave to amend is within the sound discretion of the trial judge. Soil & Material Eng'rs, Inc. v. Folly Assoc., 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct. App. 1987). However, when a late amendment would cause prejudice to the opposing party, the trial court should either deny the amendment or grant a continuance to allow the time reasonably necessary to prepare for the new issue. Ball, 314 S.C. at 275, 442 S.E.2d at 622. Nevertheless, the decision to grant or deny a continuance is a matter within the trial court's discretion. Graybar Elec. Co. v. Rice, 287 S.C. 518, 520, 339 S.E.2d 883, 884 (Ct. App. 1986).

After the trial court denied Collins' motion for a directed verdict, he moved for a continuance or an adjournment of the trial, to "restart it sometime in the future," because he was taken by surprise that the contract causes of action would be a part of the trial. The trial court found the contract issue so completely integral and intertwined with the other issues in the case that a continuance or adjournment was unnecessary in light of the need for judicial economy. However, the court granted Collins the right to recall Armstrong as a witness at any point in the trial. Collins never recalled Armstrong for further cross-examination.

Moreover, Collins had notice of an alleged contract and its breach from the moment he was served with the complaint. He had ample time to conduct discovery and formulate questions on the issue. Considering the theory of his defense – that he only made a promise of a future gift – it is highly unlikely that Collins did not contemplate the contract issue.

As discussed above, Collins presented evidence in his case that there was no agreement. Thus, he failed to show any actual prejudice from the court's decision to allow the amendment. Based on these facts, we find no abuse of discretion in the court's decision to deny the motion for a continuance at such a late date in the trial.

CONCLUSION

We hold that the trial court correctly denied Collins' motion for directed verdict on all six remaining causes of action. We further hold that the damages issue was properly submitted to the jury. Finally, we find no abuse of discretion in allowing the amendment to the pleadings to include the contract causes of action and in denying the request for a continuance or adjournment. Accordingly, the judgment in favor of Armstrong is hereby

AFFIRMED.

HEARN, C.J. and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Russell B. Corbin, Respondent,

v.

Bernard Thomas Carlin, Jr., and James E. Peterson, Defendants,

Of Whom Bernard Thomas Carlin, Jr. is the Appellant.

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 4029
Heard June 17, 2005 – Filed October 3, 2005

AFFIRMED

Mark H. Lund, III, of Bluffton, for Appellant.

John J. Kerr, of Charleston, for Respondent.

BEATTY, J.: This case involves a dispute to title of property. Bernard Thomas Carlin, Jr. appeals the circuit court's order finding Russell B. Corbin held title to the property and voiding the tax sale of the property to Carlin's predecessor. We affirm.

FACTS

The property at issue is a long, narrow strip of land referred to by the parties as Tract B and is located on Yonges Island in Charleston County. Tract B was 1.07 acres, was originally subdivided from a larger piece of property, and was deeded to Thompson Farms. In March 1984, Thompson Farms conveyed Tract B to Henry Lowndes.

In December 1985, Thompson Farms conveyed a 5.99-acre tract of land ("Tract 1") to Russell Corbin. The description of Tract 1 in the deed from Thompson Farms to Corbin described the parcel as including the 1.07 acres of Tract B. At the time of this conveyance, Thompson Farms did not own Tract B. However, two weeks later, in January 1986, Lowndes conveyed Tract B back to Thompson Farms. These exchanges were part of a three-way exchange and sale involving Corbin, Thompson Farms, and Lowndes. In the final part of this exchange, Thompson Farms deeded property known as Tract C to Lowndes that was bounded on the east by Tract B. The description in the deed stated that it was bounded on the east by lands "recently conveyed to Russell Corbin."

The county listed Thompson Farms as the owner of Tract B, even though pursuant to the prior sale, Corbin owned Tract 1 that included Tract B in its 5.99 acres. Corbin paid taxes on the entirety of Tract 1, which included Tract B. Tract B was used by Corbin as an airstrip, and he leased use of the airstrip to Bernard Carlin from 1990 to 1995. However, in 1990, the county mailed tax notices to Thompson Farms for Tract B. Thompson Farms ignored these notices. On July 6, 1992, Charleston County sold Tract B in a tax sale to James E. Peterson for $400. He received the tax deed in August 1993. Peterson later conveyed the property to Carlin in October 1997.

Corbin eventually discovered that Tract B had been sold and then conveyed to Carlin. In August 2001, he brought a declaratory judgment action against Carlin and Carlin's predecessor in title, Peterson. The action sought to quiet title to Tract B and to have the tax sale, deed, and any mortgage on the property declared null and void.[1] Carlin answered, denying the allegations in the complaint and asserting the two-year time limit found in section 12-51-160 of the South Carolina Code barred the action.

At trial, Corbin offered the testimony of Curtis Lybrand as a professional land surveyor. He testified regarding the various transactions and the descriptions of the property. He also testified if one researched the three-way deals, it would have placed the individual on notice that Corbin owned Tract B because at least one other deed description referred to the bordering land, Tract B, as belonging to Corbin. He also testified Tract B as described in the tax deed to Peterson did not exist. Finally, he testified the only property which was described as Tract B that he could locate was within Tract 1 and owned by Corbin at the time of the tax sale.

Carlin testified he did no research into what property he purchased from Peterson. He testified in 1999 he purchased property from Lowndes to the west of Tract 1. At the time of the survey, he also assumed Tract B was to the west of Tract 1 and not within its boundaries. When the survey was complete he admitted to being shocked that the tax deed was for property within the land encompassed by Tract 1 and owned by Corbin.

At the end of Corbin's case, Carlin's counsel stated: "I'd like to make a motion to dismiss." The parties then discussed the ramifications of section 12-51-160 and whether the instant action was one to set aside a tax sale so as to fall within the section's purview. The trial court denied the motion.

Carlin then called Peterson to the stand to offer testimony. At the end of his case, Carlin again moved to dismiss the case, simply stating: "And

[1] Corbin also brought an action seeking damages for slander of title, alleging Carlin's deed placed a cloud on his title. The trial court denied Corbin's request for damages, finding no slander of title.

we'll rest the defense. . . . And renew our motion to dismiss." The court made no explicit ruling on the motion, but it directed Corbin's counsel to draft a proposed order ruling in Corbin's favor.

In the final order, the court found Corbin owned Tract B through the doctrine of after-acquired property. The court then concluded the tax notices were in error and the tax sale and deed were null and void. Finally, the court found Corbin the proper owner of Tract B. The order failed to rule on the application of section 12-51-160 to the action.

Carlin filed a motion for reconsideration under Rule 59(e), SCRCP. The motion stated in part: "Grounds therefore will be that the findings, conclusions, holdings, and judgment contained in the referenced Order [the court's final order] are contrary to the record, without evidentiary support, and contrary to the statutory and case law of South Carolina, in such cases made and provided." The motion never specifically asked the court to consider section 12-51-160 as barring the action. The court denied the motion for reconsideration, again without mentioning section 12-51-160. This appeal followed.

STANDARD OF REVIEW

This is an appeal from a decision in a declaratory judgment action. Declaratory judgments are neither legal nor equitable, but the nature of the action is determined by the nature of the underlying issue. Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991); Gordon v. Colonial Ins. Co., 342 S.C. 152, 155, 536 S.E.2d 376, 378 (Ct. App. 2000). "An action to remove a cloud on and quiet title to land is one in equity." Bryan v. Freeman, 253 S.C. 50, 52, 168 S.E.2d 793, 793 (1969). In actions at equity, tried before a judge alone, we are free to find the facts according to our own view of the preponderance of the evidence. Townes Assocs. Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, the decision to grant a declaratory judgment is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. Eargle v. Horry County, 344 S.C. 449, 453, 545 S.E.2d 276, 279 (2001).

LAW/ANALYSIS

Carlin contends the trial court erred in failing to find the action was barred under application of the time limit found in section 12-51-160 of the South Carolina Code.[2] We disagree.

Initially, we note that the trial court found Corbin acquired title through the application of the doctrine of after-acquired property. See Richardson v. Atlantic Coast Lumber Corp., 93 S.C. 254, 258, 75 S.E. 371, 372 (1912) ("The principle is settled beyond controversy in this state that if a grantor conveys land, with the usual covenants of warranty, to which at that time he has no title, but afterwards acquires a title, he is estopped from claiming that he did not have title at the time of the sale; and the after-acquired title inures to the benefit of his grantee."). The trial court's determination that Corbin acquired Tract B through the doctrine of after-acquired property has not been appealed, and it is therefore the law of the case. See Unisun Ins. v. Hawkins, 342 S.C. 537, 544, 537 S.E.2d 559, 563 (Ct. App. 2000) (noting an unappealed ruling is the law of the case which the appellate court must assume was correct). Thus, we must determine the application of the statute to the situation where Corbin had good title to Tract B.

[2] Carlin states the statute controlling the time during which challenges to tax sales may be made is a statute of repose. The statute itself, however, is entitled "Deed as evidence of good title; statute of limitations." S.C. Code Ann. § 12-51-160 (2000). The section appears to operate as a statute of repose, which creates "'a substantive right in those protected to be free from liability after a legislatively-determined period of time.'" Langley v. Pierce, 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993) (quoting First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862, 866 (4th Cir. 1989)). Whether the statute is one of limitations or one of repose, however, is not a question we must address in order to decide the issues on appeal. Therefore, we decline to analyze it. Because the statute is entitled "statute of limitations," we will refer to the statute as one of limitations for the sake of clarity.

Section 12-51-160 provides that the tax sale deed is evidence of good title and that "all proceedings have been regular and that all legal requirements have been complied with." S.C. Code Ann. § 12-51-160 (2000). The section further provides a time limit for recovering land sold pursuant to a tax sale: "No action for the recovery of land sold under the provisions of this chapter or for the recovery of the possession may be maintained unless brought within two years from the date of sale." Id.

To determine the application of this section on the present case, we must apply the rules of statutory construction. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 739 (Ct. App. 2001). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute." City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck (VIN # JM2UF1132N0294812), 330 S.C. 371, 375, 498 S.E.2d 894, 896 (Ct. App. 1998). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998).

If a statute's language is plain, unambiguous, and conveys a clear meaning "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "Our goal in construing statutes is to prevent an interpretation that would lead to a result that is plainly absurd." In re Timothy C.M., 348 S.C. 653, 655-56, 560 S.E.2d 452, 453 (Ct. App. 2002).

We find section 12-51-160 was not intended to bar an action under the circumstances of this case. The legislature intended the statute to create a

time limit during which one who lost title to property through a tax sale, after proper notice, may attempt to regain title. In this case, Corbin never lost title to the property, as the tax sale should never have occurred. We agree with the trial court's finding that Corbin properly paid taxes owed on Tract 1, which included Tract B.[3] There is nothing in the record to indicate he was on notice that Thompson Farms received tax notices for Tract B or that Thompson Farms ignored those notices. Because the taxes for Tract 1, including Tract B, were not delinquent, the county did not have any basis for conducting the tax sale on Tract B.

We find the instant action was not one to set aside a tax sale falling under the provision of section 12-51-160, but instead was an action to quiet title and for Corbin to assert his proper ownership rights to Tract B. It would yield an absurd and unfair result to forbid Corbin to assert his right to ownership of his property when there is no indication he knew or should have known the county was improperly seeking to sell the property in a tax sale. The court properly found Corbin had title to Tract B. It also properly found the county erred in conducting a tax sale. The evidence indicates Corbin paid taxes assessed against Tract 1, which unquestionably included Tract B. Accordingly, the trial court properly refused to find, based upon the circumstances of this case, that the statute of limitations found in section 12-51-160 barred the action.

Considering the particular circumstances of this case, we find no abuse of discretion in the trial court's decision to grant Corbin's declaratory judgment.

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[3] Carlin also alleges that the trial court erred in finding no taxes were delinquent on Tract B. As previously discussed, it is the law of the case that Corbin obtained title to Tract B, as a part of Tract 1, through the doctrine of after-acquired property. Carlin does not challenge evidence that Corbin paid the taxes owed on Tract 1. Because Corbin was not delinquent on taxes owed on property that included Tract B, we find no error with the trial court's determination that no taxes were delinquent on Tract B.

CONCLUSION

Based upon the above, we hold section 12-51-160 did not bar the instant action to quiet title. Accordingly, the decision of the trial court is

AFFIRMED.

HEARN, C.J., and SHORT, JJ., concur.