The Supreme Court of South Carolina

In the Matter of Harry C. DePew, Respondent.

ORDER

By opinion of this same date, respondent was suspended from the practice of law in this state for nine months. In the Matter of DePew, Op. No. 26440 (S.C. Sup. Ct. filed February 25, 2008). The Office of Disciplinary Counsel has requested the appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that Elizabeth B. Partlow, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Ms. Partlow shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Ms. Partlow may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to

effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Elizabeth B. Partlow, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Elizabeth B. Partlow, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Ms. Partlow's office.

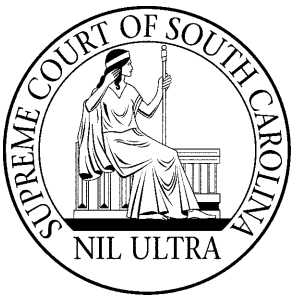
Ms. Partlow's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

FOR THE COURT

Columbia, South Carolina
February 25, 2008



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 8

February 26, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2008-UP-090-The State v. John Massey
(York, Judge John C. Hayes, III)
2008-UP-091-The State v. Derrek Young
(Spartanburg, Judge J. Derham Cole)

2008-UP-092-The State v. Brian Keith Nesbitt
(Spartanburg, Judge J. Mark Hayes, II)

2008-UP-093-The State v. James Edward Sargent
(Clarendon, Judge J. Derham Cole)

2008-UP-094-The State v. Marcus McClintock
(Spartanburg, Judge Gordon G. Cooper)

2008-UP-095-The State v. Latorey Green
(Sumter, Judge Thomas W. Cooper, Jr.)

2008-UP-096-The State v. Daniel Cook
(Aiken, Judge James R. Barber)

2008-UP-097-The State v. Bobby Wayne Allison
(Spartanburg, Judge John C. Few)

2008-UP-098-The State v. Robbie Collins
(Lee, Judge Clifton Newman)

2008-UP-099-Jennifer Lynn Christmas and Jay Christmas v. Dale Eugene Enos, Jr. and A Rainbow of Carpets, Inc.
(Berkeley, Judge Kenneth G. Goode)

2008-UP-100-The State v. Kendrick Rice
(Georgetown, Judge Paula H. Thomas)

2008-UP-101-The State v. Ronnie Mills
(Florence, Judge Michael G. Nettles)

2008-UP-102-The State v. Frank Moore
(Greenville, Judge John C. Few)

2008-UP-103-The State v. Darrell Eugene Roberts
(Spartanburg, Judge Kenneth G. Goode)

2008-UP-104-The State v. Damon L. Jackson

(Richland, Judge Reginald I. Lloyd)

2008-UP-105-The State v. Phillip Keith Odom
(York, Judge Lee S. Alford)

2008-UP-106-The State v. Terry A. Clayton
(Spartanburg, Judge Marc H. Westbrook)

2008-UP-107-The State v. Ayree Henderson
(Richland, Judge Alison Renee Lee)

2008-UP-108-The State v. Leon Barnes
(Lexington, Judge William P. Keesley)

2008-UP-109-The State v. Alvin Earle Ballard, Jr.
(Spartanburg, Judge Doyet A. Early, III)

2008-UP-110-The State v. Benjamin Fulton
(Williamsburg, Judge Paula H. Thomas)

2008-UP-111-The State v. Luis Enrique Vargas Avila
(York, Judge Lee S. Alford)

2008-UP-112-The State v. Marty Hannah
(York, Judge Lee S. Alford)

2008-UP-113-The State v. Zora Stocker
(Richland, Judge James W. Johnson, Jr.)

2008-UP-114-The State v. Joseph Thomas
(Spartanburg, Judge Alexander S. Macaulay)

2008-UP-115-The State v. Daniel Shannon
(Lexington, Judge William P. Keesley)

2008-UP-116-Janet Miller v. Ferrellgas, L.P. Inc. and Kenneth W. Ellis
(Beaufort, Judge R. Markley Dennis, Jr.)

2008-UP-117-The State v. Clarence O. Rice, Jr.
(Anderson, Judge Alexander S. Macaulay)

2008-UP-118-The State v. Tyhia Mattress
(Anderson, Judge J. Cordell Maddox, Jr.)

2008-UP-119-The State v. Gregory Freeman
(Aiken, Judge Doyet A. Early, III)

2008-UP-120-The State v. William Chadwick Davis
(Union, Judge Alexander S. Macaulay)

PETITIONS FOR REHEARING

4316-Lynch v. Toys "R" Us, Inc.	Pending
4318-State v. David Swafford	Pending
4320-The State v. Donald Paige	Pending
4333-State v. Dantonio	Pending
4334-Silver v. Aabstract Pools	Pending
4338-Friends of McLeod v. City of Charleston	Pending
4339-Thompson v. Cisson Construction	Pending
4340-Simpson v. Simpson	Pending
4341-William Simpson v. Becky Simpson	Pending
2007-UP-467-State v. N. Perry	Pending
2007-UP-494-National Bank of SC v. Renaissance	Pending
2007-UP-544-State v. Christopher Pride	Pending
2007-UP-549-Frierson v. InTown Suites	Pending
2007-UP-556-RV Resort & Yacht v. BillyBob's Marine	Pending
2008-UP-004-Ex parte: Auto Owners	Pending
2008-UP-018-Wachovia Bank v. Beckham	Pending
2008-UP-043-Eadon v. White	Pending

2008-UP-048-State v. Edward Cross (#1) Pending

2008-UP-060-BP Staff, Inc. v. Capital City Ins Pending

2008-UP-073-Mosley v. MeadWestvaco Pending

2008-UP-081-State v. Robert Hill Pending

2008-UP-082-White Hat v. Town of Hilton Head Pending

2008-UP-084-First Bank v. Wright Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4128 – Shealy v. Doe Pending

4143 – State v. K. Navy Pending

4159--State v. T. Curry Pending

4195—D. Rhoad v. State Pending

4198--Vestry v. Orkin Exterminating Pending

4209-Moore v. Weinberg Pending

4211-State v. C. Govan Pending

4213-State v. D. Edwards Pending

4220-Jamison v. Ford Motor Pending

4224-Gissel v. Hart Pending

4233-State v. W. Fairey Pending

4235-Collins Holding v. DeFibaugh Pending

4237-State v. Rebecca Lee-Grigg Pending

4238-Hopper v. Terry Hunt Const. Pending

4239-State v. Dicapua Pending

4240-BAGE v. Southeastern Roofing	Pending
4242-State v. T. Kinard	Pending
4243-Williamson v. Middleton	Pending
4244-State v. O. Gentile	Pending
4245-Sheppard v. Justin Enterprises	Pending
4247-State v. Larry Moore	Pending
4251-State v. Braxton Bell	Pending
4256-Shuler v. Tri-County Electric	Pending
4258-Plott v. Justin Ent. et al.	Pending
4259-State v. J. Avery	Pending
4261-State v. J. Edwards	Pending
4262-Town of Iva v. Holley	Pending
4264-Law Firm of Paul L. Erickson v. Boykin	Pending
4265-Osterneck v. Osterneck	Pending
4267-State v. Terry Davis	Pending
4270-State v. J. Ward	Pending
4271-Mid-South Mngt. v. Sherwood Dev.	Pending
4272-Hilton Head Plantation v. Donald	Pending
4274-Bradley v. Doe	Pending
4275-Neal v. Brown and SCDHEC	Pending
4276-McCrosson v. Tanenbaum	Pending

4277-In the matter of Kenneth J. White	Pending
4279-Linda Mc Co. Inc. v. Shore	Pending
4284-Nash v. Tindall	Pending
4285-State v. Danny Whitten	Pending
4286-R. Brown v. D. Brown	Pending
4289-Floyd v. Morgan	Pending
4291-Robbins v. Walgreens	Pending
4292-SCE&G v. Hartough	Pending
4295-Nationwide Ins. Co. v. James Smith	Pending
4296-Mikell v. County of Charleston	Pending
4306-Walton v. Mazda of Rock Hill	Pending
4309-Brazell v. Windsor	Pending
4310-State v. John Boyd Frazier	Pending
4315-Todd v. Joyner	Pending
4319-State v. Anthony Woods (2)	Pending
2006-UP-222-State v. T. Lilly	Pending
2006-UP-304-Bethards v. Parex	Pending
2006-UP-315-Thomas Construction v. Rocketship Prop.	Pending
2006-UP-320-McConnell v. John Burry	Pending
2006-UP-350-State v. M. Harrison	Pending
2006-UP-413-Rhodes v. Eadon	Pending
2007-UP-052-State v. S. Frazier	Pending

2007-UP-054-Galbreath-Jenkins v. Jenkins	Pending
2007-UP-061-J. H. Seale & Son v. Munn	Pending
2007-UP-064-Amerson v. Ervin (Newsome)	Pending
2007-UP-066-Computer Products Inc. v. JEM Rest.	Pending
2007-UP-091-Sundown Operating v. Intedge	Pending
2007-UP-125-State v. M. Walker	Pending
2007-UP-128-BB&T v. Kerns	Pending
2007-UP-147-Simpson v. Simpson	Pending
2007-UP-151-Lamar Florida v. Li'l Cricket	Pending
2007-UP-172-Austin v. Town of Hilton Head	Pending
2007-UP-177-State v. H. Ellison	Pending
2007-UP-183-State v. Hernandez, Guerrero, Arjona	Pending
2007-UP-187-Salters v. Palmetto Health	Pending
2007-UP-199-CompTrust AGC v. Whitaker's	Pending
2007-UP-202-L. Young v. E. Lock	Pending
2007-UP-226-R. Butler v. SC Dept. of Education	Pending
2007-UP-243-E. Jones v. SCDSS	Pending
2007-UP-249-J. Tedder v. Dixie Lawn Service	Pending
2007-UP-252-Buffington v. T.O.E. Enterprises	Pending
2007-UP-255-Marvin v. Pritchett	Pending
2007-UP-266-State v. Dator	Pending

2007-UP-272-Mortgage Electronic v. Suite	Pending
2007-UP-316-Williams v. Gould	Pending
2007-UP-318-State v. Shawn Wiles	Pending
2007-UP-329-Estate of Watson v. Babb	Pending
2007-UP-331-Washington v. Wright Const.	Pending
2007-UP-340-O'Neal v. Pearson	Pending
2007-UP-341-Auto Owners v. Pittman	Pending
2007-UP-350-Alford v. Tamsberg	Pending
2007-UP-351-Eldridge v. SC Dep't of Transportation	Pending
2007-UP-354-Brunson v. Brunson	Pending
2007-UP-358-Ayers v. Freeman	Pending
2007-UP-384-Miller v. Unity Group, Inc.	Pending
2007-UP-412-Hall v. State	Pending
2007-UP-460-Dawkins v. Dawkins	Pending
2007-UP-493-Babb v. Noble	Pending
2007-UP-498-Gore v. Beneficial Mortgage	Pending
2007-UP-513-Vaughn v. SCDHEC	Pending
2007-UP-528-McSwain v. Little Pee Dee	Pending
2007-UP-529-Adoptive Father v. Birth Father	Pending
2007-UP-530-Garrett v. Lister	Pending
2007-UP-531-Franklin Ventures v. Jaber	Pending

The Supreme Court of South Carolina

In the Matter of Marvin Lee Robertson, Jr., Respondent.

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR. The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to being placed on interim suspension and to an attorney being appointed to protect the interests of his clients.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that Robert C. Byrd., Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Byrd shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's

clients. Mr. Byrd may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Robert C. Byrd, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Robert C. Byrd, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Byrd's office.

Mr. Byrd's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Jean H. Toal C.J.

FOR THE COURT

Columbia, South Carolina
February 22, 2008

The Supreme Court of South Carolina

In the Matter of Saint George
and Cottageville Municipal
Court Judge Michael Evans, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension pursuant to Rule 17(b) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

IT IS ORDERED that respondent is suspended from any and all judicial duties pending further order of this Court. Neither the Town of Saint George nor the Town of Cottageville is under an obligation to pay respondent his salary during the suspension. See In the Matter of Ferguson, 304 S.C. 216, 403 S.E.2d 628 (1991).

Respondent is hereby enjoined from any access to any monies, bank accounts, or records related to any court of this State. The Chief Magistrates for Colleton and Dorchester Counties are directed to immediately take possession of all books, records, funds, property and documents relating to respondent's judicial office in their respective counties.

IT IS FURTHER ORDERED that respondent is prohibited from entering the premises of the Saint George or Cottageville Municipal Court unless escorted by a law enforcement officer after authorization for any such entry by the Chief Magistrate of the county in which the court is located. Finally, respondent is prohibited from having access to, destroying, or canceling any public records, and he shall immediately release any public records in his possession to either the Chief Magistrate of Colleton County or the Chief Magistrate of Dorchester County, depending on whether the records pertain to Cottageville or Saint George.

This Order, when served on any bank or other financial institution maintaining any judicial accounts of respondent, shall serve as notice to the institution that respondent is enjoined from making withdrawals from the accounts.

Any petition for reconsideration, as provided by Rule 17(d), RJDE, must be served and filed within fifteen (15) days of the date of this order.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina
February 22, 2008

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Nathaniel Kennedy Ferguson, Jr., Appellant.

Appeal From Laurens County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 4342
Submitted January 2, 2008 – Filed February 20, 2008

AFFIRMED

Deputy Chief Attorney for Capital Appeals Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Deputy Attorney General Melody

J. Brown, all of Columbia; and Solicitor Jerry W. Peace, of Greenwood, for Respondent.

HEARN, C.J.: Nathaniel Ferguson, Jr., appeals his convictions for murder and possession of a firearm during the commission of a violent crime, alleging the trial court erred by denying his motion for a mistrial. We affirm.

FACTS

On the afternoon of May 13, 2004, Ferguson shot and killed Virginia Ann Wilson (Victim) following a dispute concerning repairs to water leaking inside Victim's home. Victim's daughter, Kimberly Wilson (Girlfriend), is Ferguson's former girlfriend of ten years. Girlfriend and Ferguson have two daughters together and for the year preceding Victim's death, Girlfriend, Ferguson, their two daughters, and Ferguson's two children from a previous relationship had lived together in Girlfriend's mobile home. Three weeks before Victim's death, Girlfriend and her two children moved next door into Victim's mobile home, while Ferguson and his children from the prior relationship remained in the first mobile home

A common well and water line served the adjacent homes. Immediately before the shooting, Girlfriend's father, George Earl, had attempted to repair a water leak inside Victim's home and had turned off the water supply serving both homes.[1] During the repair, Earl asked someone to go out to the utility pole behind Victim's home to switch the water back on. Victim volunteered, but before she went outside, she placed a loaded gun in the waistband of her pants. While outside, Ferguson approached Victim to ask about the disruption to the water supply in his home.

The subsequent events, which culminated in Victim's death, are disputed. Ferguson contends he shot Victim in self-defense after she pointed

[1] Detective Bolt testified Ferguson gave a statement to police the day after the shooting that Victim and Girlfriend disconnected the water line in order to annoy him.

and fired her gun at him. Ferguson stated he ran toward Victim "in a zigzag pattern firing my gun." However, Girlfriend testified Ferguson appeared agitated earlier that day. She stated Ferguson began cursing at Victim before retrieving his gun from the car. Girlfriend said she tried to get Victim to go back inside her house while Ferguson was retrieving his gun, but when Victim refused, Girlfriend went into Victim's home and called 911 for help. Girlfriend testified Ferguson started shooting his gun at Victim as he walked toward Victim's yard. Witness Gary Bryson testified he was driving by the Victim's residence when he heard a shot and saw Ferguson and Victim in the yard. Bryson saw the Victim fall to the ground as Ferguson approached her with a gun in his hand.

During the second day of trial, in response to a question about Ferguson's behavior at the time of the shooting, Girlfriend responded that Ferguson allegedly told her she "was next." Defense counsel asked the court to strike Girlfriend's response as unresponsive to the question asked. Ferguson's counsel requested a mistrial, contending the court should strike Girlfriend's answer because the State did not notify the defense, in writing and during discovery, about Ferguson's alleged statement. The court sustained Ferguson's objection, ruling Girlfriend's answer to the solicitor's question was unresponsive. However, the court denied Ferguson's motion for a mistrial, finding a curative instruction to the jury would overcome any potential prejudice to Ferguson.

Ultimately, a jury found Ferguson guilty of murder and possession of a firearm during the commission of a violent crime. This appeal followed.

STANDARD OF REVIEW

"The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law." State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007). "This Court favors the exercise of wide discretion of the trial court in determining the merits of [a mistrial] motion in each individual case." State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999).

LAW/ANALYSIS

Ferguson argues the trial court erred in denying his motion for a mistrial following Girlfriend's testimony that he told her she "was next" to be shot. We disagree.

The "[g]ranting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error." State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007). In Edwards, the appellant argued the trial court erred in denying his motion for a mistrial in his prosecution for criminal sexual misconduct with a minor because the jury improperly heard evidence he hit his wife. Id. We affirmed the trial court, finding (1) the prosecution had not intentionally elicited the statement; (2) the statement was not offered for its truth, but as "state-of-mind" evidence; and (3) any prejudice to Edwards was cured by the court's curative instruction asking the jury to disregard the last statement given by the witness. Id. at 236-37, 644 S.E.2d at 69; See also State v. Patterson, 337 S.C. 215, 227-28, 522 S.E.2d 845, 851 (Ct. App. 1999) (holding the trial court did not err in denying Paterson's motion for mistrial because an extensive curative instruction "cured any possible error and eliminated any conceivable prejudice").

Here, Ferguson's attorney asked Girlfriend on cross-examination about "words [Ferguson] had" with her. On redirect, the solicitor asked Girlfriend to discuss her observations of Ferguson's temperament prior to the shooting; Girlfriend testified Ferguson appeared "agitated." Next, the solicitor asked Girlfriend: "[W]hen you came outside and went to your mother, what was his behavior like then?" Girlfriend responded: "[H]e was just standing there looking down at my [sic] mother at the time. And when I exited the home at the same time the police was [sic] trying to get into the driveway." The solicitor then asked: "Did he ever exhibit that behavior towards you?" Girlfriend responded: "Yes, he exhibited [sic] towards me even when the

police was there and they were ready to arrest him. *He looked at me and told me that I was next*." (emphasis added).

After dismissing the jury, the court heard from both sides on defense counsel's objection to Girlfriend's answer. The solicitor contended the defense opened the door by asking Girlfriend to discuss Ferguson's behavior, and that he had informed the defense about Ferguson's alleged comment a week earlier. He further alleged the testimony was admissible as evidence of Ferguson's state of mind immediately after he shot Victim. The court ultimately sustained Ferguson's objection, and then heard arguments as to whether a curative instruction to the jury would be sufficient to counter potential prejudice to Ferguson. Both sides submitted cases to the court, and eventually it denied Ferguson's motion for a mistrial.

When the jury returned to the courtroom, the court issued the following curative instruction:

> [S]ometimes when matters of law come up I am required to send you out of the courtroom because I may have to hear some testimony or hear some arguments that you don't need to hear so that I can make a ruling on those matters of law. . . . [B]efore th[e] break there was a question that was asked by the solicitor that was objected to by the defense attorney. And I have sustained that objection on the grounds that the response that the witness gave to that question was not responsive, was not responding to the question that she was asked. And I have made that ruling on the record and I would instruct you folks right now to forget about, ignore and disabuse from your mind the response that was given by the witness to the question that was asked prior to the break. It should not play any part in your fact finding function as a jury in this case. And so we're going to continue with the testimony at this time with those instructions to you . . . .

We find the trial court properly exercised its discretion in deciding to give a curative instruction rather than granting Ferguson's motion for a mistrial.[2] We additionally find the court cured any potential prejudice to Ferguson with its instruction to disregard Girlfriend's response to the question posed by the solicitor. Here, as in Edwards, the trial court's curative instruction was simple, and the court refrained from reiterating or emphasizing the unresponsive answer. Accordingly, we find the instruction cured any potential prejudice, and we hold the trial court properly exercised its discretion in denying Ferguson's motion for a mistrial.

CONCLUSION

For the foregoing reasons, Ferguson's convictions for murder and possession of a firearm during the commission of a violent crime are

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[2] We note that Ferguson made neither an overt contemporaneous objection as to the sufficiency of the curative instruction, nor a renewed motion for a mistrial after the court gave the jury the curative instruction. See State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) (finding the issue is not preserved for review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial). Rather, the following colloquy between the court and the attorneys ensued:

> Court: [A]ny exceptions to [the curative] instruction from the state?
> Solicitor: No, your Honor.
> Court: Mr. Price? (Ferguson's Counsel)
> Ferguson's Counsel: No, sir.
> Court: *Other than what you had already put on the record.*
> Ferguson's Counsel: *That is correct.*

Because the additional statements between the court and Ferguson could be interpreted to satisfy the requirement of a contemporaneous objection, we have deemed the issue preserved for appellate review.

AFFIRMED.[3]

KITTREDGE, J., and THOMAS, J., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael James Franks, Appellant.

Appeal From Pickens County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 4343
Submitted December 1, 2007 – Filed February 20, 2008

AFFIRMED

Chief Attorney Joseph L. Savitz, III, of Columbia; for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

THOMAS, J.: Michael James Franks appeals his conviction for distribution of marijuana, contending the trial court erred in refusing to instruct the jury on the lesser-included offense of simple possession. We affirm.[1]

FACTS

On April 28, 2004, Agent Neysa Diana Caron of the Pickens County Sheriff's Department, accompanied by a confidential informant, went to a trailer at 36 Indian Creek Drive in Pickens County for the purpose of arranging an undercover buy. When they reached the address, Caron noticed a woman at the window of the trailer facing their vehicle. After the informant spoke with the woman, who was later identified as Heather Alley, Caron exited the vehicle, and someone admitted her and the informant into the trailer. Once inside the trailer, Caron and the informant went to a back bedroom, where they encountered Franks and Alley.

Franks, who was standing by a set of dresser drawers in the room, removed several bags of marijuana from a drawer and told Caron and the informant that the bags were "each ounce bags." Alley advised Caron and the informant that she had two quarter-ounce bags and inquired what they wanted. When Caron answered she would buy a half ounce, Alley took the two bags, weighed them with hand-held scales, and asked Franks to "weigh these and make sure it's right." After Alley tossed the bags to Franks, he weighed them, said "they are fine" and tossed them back to Alley. When Alley gave Caron the marijuana, Caron asked the price, whereupon Franks answered it would be $60.00. Caron then took $60.00 and paid it to Alley, who counted the money and laid it on a bed in the room.

Caron further testified that, when the informant asked about the possibility of buying a larger amount, it was Franks who answered the question. Alley then wrote down both her own name and Franks's name, as

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

well as their telephone numbers, on a piece of paper, which she gave to Caron.

Franks and Alley were arrested some time after the sale[2] and charged with distribution of marijuana. After a jury trial on September 21, 2005, both were found guilty as charged.

STANDARD OF REVIEW

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. Id.

"A trial judge is required to charge a jury on a lesser included offense if there is evidence from which it could be inferred that a defendant committed the lesser offense rather than the greater." State v. Drafts, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986). Nevertheless, "due process requires that a lesser included offense instruction be given only where the evidence warrants such an instruction." Hopper v. Evans, 456 U.S. 605, 611 (1982). "The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty of only the lesser offense." State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006).

LAW/ANALYSIS

Franks argues on appeal the trial court erred in denying his request to instruct the jury that it could find him guilty of the lesser-included offense of simple possession of marijuana. He contends the trial court's agreement to charge mere presence to the jury supports an inference that, although Franks

[2] Caron explained that arrests are sometimes delayed for either additional investigation or protection of confidential informants.

and Alley jointly possessed the marijuana, only Alley was the distributor. We disagree.

The South Carolina Supreme Court has distinguished possession from mere presence, explaining that "proof of possession requires more than proof of mere presence, and . . . the State must show defendant had dominion and control over the thing allegedly possessed or had the right to exercise dominion and control over it." State v. Tabory, 260 S.C. 355, 364-65, 196 S.E.2d 111, 113 (1973).

The evidence in the present case supporting the inference that Franks had dominion and control over the bags of marijuana that Caron purchased was as follows: (1) Franks weighed the bags to be certain of the quantity that was being sold to Caron; (2) Franks tossed the bags back to Alley, who then immediately handed them to Caron; and (3) Franks himself told Caron how much she would have to pay for the drugs. These acts, though probative of Franks's dominion and control of the marijuana Caron purchased, were also an integral part of the transaction that led to his arrest. We cannot conceive of any way they would support a finding that Franks committed only the offense of possession of marijuana and did not participate in its distribution.

AFFIRMED.

HEARN, C.J., and KITTREDGE, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Green Tree Servicing, LLC as successor in interest to Conseco Finance Servicing Corp. as interest to Green Tree Financial Servicing Corporation,
Plaintiff,

v.

Reniata L. Williams a/k/a Reniata Garvin Williams; Scott L. Williams, BB&T Bankcard Corporation; The South Carolina Department of Motor Vehicles, Defendants,

and

Green Tree Servicing, LLC as successor in interest to Conseco Finance Servicing Corp. as interest to Green Tree Financial Servicing Corporation, Respondents,

v.

Lueveania Garvin, Appellant.

Appeal From Hampton County
Walter H. Sanders, Jr., Circuit Court Judge

Opinion No. 4344
Submitted January 2, 2008 – Filed February 20, 2009

REVERSED AND REMANDED

Lueveania Garvin, for Appellant.

Pearce W. Fleming, D. Randolph Whitt, and Martha S. Phillips, all of Columbia, for Respondents.

HUFF, J.: Lueveania Garvin appeals the order of the special referee holding her interest in certain property was subject and junior to Green Tree's mortgages and that she was not entitled to damages for trespass. We reverse and remand.[1]

FACTUAL/PROCEDURAL BACKGROUND

In September of 1995, Garvin deeded .23 acres of property to her granddaughter, Reniata Williams. The deed provided the property was to be used for residential purposes and further provided:

> In the event Reni[a]ta L. Garvin Williams shall fail to use said property for residential purposes for a consecutive period of sixty (60) days or more, the aforementioned property shall revert back to Grantor or Grantor's heirs and assigns, in fee simple.

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

Thus, the interest Garvin transferred to Williams was a fee simple determinable while she retained a possibility of reverter.

Williams subsequently obtained two notes secured by mortgages on the property. Garvin was not a party to these mortgages. Williams had a mobile home placed on the property. The mobile home encroached onto Garvin's property by six feet.

On June 1, 2004, Williams wrote to Garvin that she no longer resided on the property and in recognition of the condition in the deed, she wished to return the property to Garvin.

Green Tree then brought this action for foreclosure of the mortgages in August of 2004. In an order filed December 30, 2004, the special referee ordered foreclosure of the mortgages. Garvin was not named a party to the action at this time. In April of 2005 Garvin wrote to Green Tree stating she would charge it $25.00 a day storage fee effective June 1, 2004 for the mobile home on her property. She explained $10.00 a day was for the part of the mobile home on the far end of her yard previously deeded to Williams and $15.00 a day was for the part of the mobile home that extended into her front yard.

Green Tree subsequently filed a petition for a rule to show cause requesting the court order Garvin to show cause why she should not be bound by the previous order and determine whether Garvin's interest was junior to Green Tree's mortgages. The court issued the rule as requested. Garvin answered asseverating Green Tree executed the mortgages with knowledge of the possibility of reverter. She also asserted a claim for trespass.

After a hearing on the matter, the special referee held Garvin had no estate in the property until the possibility of reverter was triggered, which was after Green Tree had perfected its mortgage. Thus, the referee held Garvin's interest in the property was subject and junior to Green Tree's mortgage that was already in place when she acquired an estate in the property. In addition, the referee held that as Garvin had submitted no evidence of any diminution in the market value of her property due to the

mobile home's presence on her property, she was not entitled to damages for trespass. However, the referee did order Green Tree to remove the trailer from Garvin's property. This appeal followed.

LAW/ANALYSIS

1. Mortgages

Garvin argues the special referee erred in holding her interest in the property was subject to and junior to Green Tree's mortgages. We agree.

A fee simple determinable is a grant that can be cut short when a given term expires. Scott v. Brunson, 351 S.C. 313, 316, 569 S.E.2d 385, 387 (Ct. App. 2002). "It is an estate in fee 'with a qualification annexed to it by which it is provided that it must determine whenever that qualification is at an end'" S.C. Dep't of Parks, Recreation, & Tourism v. Brookgreen Gardens, 309 S.C. 388, 392, 424 S.E.2d 465, 467 (1992) (quoting Purvis v. McElveen, 234 S.C. 94, 98, 106 S.E.2d 913, 915 (1959)). The wording of the grant allows for defeasance of the grantee upon the terms, covenants and conditions of the grant. Brookgreen Gardens, 309 S.C. at 392, 424 S.E.2d at 467. A possibility of reverter is the future interest that accompanies a fee simple determinable. Id. In the case of a possibility of reverter, the possessory estate vests immediately and automatically upon the happening of the event whereby the determinable or conditional fee is terminated. Batesburg-Leesville Sch. Dist. No. 3 v. Tarrant, 293 S.C. 442, 446, 361 S.E.2d 343, 346 (Ct. App. 1987).

Although the grantee of a fee simple determinable may transfer or assign the estate, the determinable quality of the estate follows the transfer or assignation. 28 Am.Jur. 2nd Estates § 30 (2000). The determinable fee may be mortgaged, subject to the qualification. 27 S.C. Jur. Mortgages § 19(e) (1996). The creator of the estate would have to join in the mortgage to subject the entire fee interest to the lien. Id.

The deed granting Williams the fee simple determinable estate was duly recorded and was referred to in the mortgage. Green Tree was on notice

of the nature of the estate. See S.C. Code Ann. § 30-9-30 (2007) (stating recording of instrument is notice to all persons, sufficient to put them upon inquiry of the purport of the filed instrument and the property affected by the instrument); Binkley v. Rabon Creek Watershed Conservation Dist., 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) (stating notice of a deed is notice of its whole contents). Garvin never joined in the mortgages and the mortgages were subject to the determinable quality of the estate. When the determinable fee was terminated, Green Tree's interest in the property terminated. Therefore, the special referee erred in holding Garvin's interest in the property was subject to Green Tree's mortgages.

2. Trespass

Garvin argues the special referee erred in holding her claim for trespass failed as she had not established a diminution in the market value of the property due to placement of the mobile home on her property. We agree.

If a plaintiff establishes a willful trespass, the damages from invasion of the plaintiff's legal rights will be presumed sufficient to sustain the action even though such damages may be only nominal and not capable of measurement. Hinson v. A. T. Sistare Construction Co., 236 S.C. 125, 113 S.E.2d 341, 344 (1960). Thus, Garvin did not need to establish a diminution in value to her property to maintain her claim for trespass. We reverse the order of the special referee and remand the trespass claim for further proceedings.

CONCLUSION

We reverse the special referee's holding that Garvin's interest in the property was subject and junior to Green Tree's mortgages. We further reverse the special referee's ruling on Garvin's trespass claim and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED

PIEPER, J., and CURETON, AJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Clifford A. Atkins, Appellant,

v.

Horace Mann Insurance Company Respondent.

Appeal From Barnwell County
Doyet A. Early,III, Circuit Court Judge

Opinion No. 4345
Heard December 12, 2007 – Filed February 21, 2008

AFFIRMED

E.T. Moore, Jr. and Angela W. Abstance, both of Barnwell, for Appellant.

Karl Brehmer and L. Darby Plexico, III, both of Columbia, for Respondent.

HEARN, C.J.: Clifford Atkins appeals the circuit court's order finding Horace Mann Insurance Company (Horace Mann) made him a commercially reasonable offer of underinsured motorist (UIM) coverage, and that the underlying policy should not be reformed to include UIM coverage up to liability limits. Atkins contends Horace Mann failed to meet its burden of proving that a meaningful offer of UIM coverage was made. We affirm.

FACTS

On or about December 27, 2000, Atkins purchased a 1993 Lexus. The circuit court's order is contradictory as to the manner in which Atkins' Lexus became covered by Horace Mann. The order initially states "the plaintiff purchased a policy of Insurance covering the [new] Lexus." However, the next paragraph states Atkins made a request "to add the Lexus to his existing Horace Mann policy . . . " After making this request, Kevin Hunt, a new agent for Horace Mann, sent Atkins a form entitled "Automobile coverage selection/ rejection form." Atkins' name, date, policy number, and the make and model of his new Lexus were already filled in at the top of the form. Just below this information, in a section titled "Uninsured and Underinsured Motor Vehicle Coverage Offers," the form instructed Atkins to "please check the limits you want for each coverage and sign and date your choice. You must sign your name five times on this form." Immediately below this instruction, the form indicated that Atkins' existing policy liability limits were $100,000/ $300,000/ $50,000.

Under the heading entitled "Underinsured Motor Vehicle Bodily Injury Coverage," seven choices of coverage were listed, ranging from $15,000/$30,000 to $500,000/$1,000,000. A check mark on the form indicates Atkins chose UIM coverage in the amount of $25,000/$50,000. This selection was below his policy liability limits, but is the same amount of UIM coverage he had on his other cars insured with Horace Mann. Atkins admits he signed his name on the signature line under the UIM section; however, Atkins contends he does not recall writing the date beside the signature line or putting a check mark for the levels of UIM coverage that were selected. Atkins

also admits that he signed his name under the acknowledgment paragraph, indicating he had read the explanations and offers of UM and UIM coverage.

On October 22, 2003, Atkins was involved in an automobile accident with Terry Gillyard, and suffered bodily injuries and other damages. Gillyard's insurance company tendered its liability limits to Atkins, but Atkins sought additional compensation from Horace Mann because his damages exceeded Gillyard's coverage limits. Thereafter, Atkins filed a declaratory judgment action requesting to have his policy with Horace Mann reformed to provide him with UIM coverage equal to the limits of his liability insurance coverage.

The circuit court found Horace Mann was not entitled to the conclusive presumption of a meaningful offer pursuant to S.C. Code Ann. § 38-77-350(B) (Supp. 2007). This finding has not been appealed and therefore is not before us for review. See Dreher v. Dreher, 370 S.C. 75, 78 n.1, 634 S.E.2d 646, 647 n.1 (2006) ("[A]n unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal [.]") (citing In re Morrison, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996)). The circuit court ultimately ruled in favor of Horace Mann, concluding Horace Mann had carried its burden of proving that it had made a meaningful offer of UIM coverage to Atkins pursuant to S.C. Code Ann. § 38-77-160 (2002) and § 38-77-350 (Supp. 2007), and the Wannamaker Test.[1] Atkins appeals this ruling, asserting the circuit court erred in holding that Horace Mann

[1] To determine whether an insurer has complied with its duty to offer optional coverages and thus make a meaningful offer of UIM coverage, the court must consider the following factors: (1) the insurer's notification process must be commercially reasonable, whether oral or in writing; (2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms; (3) the insurer must intelligibly advise the insured of the nature of the option coverage: and (4) the insured must be told that optional coverages are available for an additional premium. State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987).

carried its burden of proving it made a meaningful offer to Atkins. We disagree.

STANDARD OF REVIEW

A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue. Hardy v. Aiken, 369 S.C. 160, 164, 631 S.E.2d 539, 541 (2006). In this case, the underlying issue involves determination of coverage under an insurance policy, and therefore, is an action at law. Auto-Owners Ins. Co., v. Hamin, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006) (cert. granted 2007). In an action at law, tried without a jury, the trial judge's factual findings will not be disturbed on appeal unless a review of the record reveals there is no evidence which reasonably supports the judge's findings. State Farm Mut. Auto. Ins. Co. v. Calcutt, 340 S.C. 231, 237, 530 S.E.2d 896, 899 (Ct. App. 2000).

LAW/ ANALYSIS

We initially note that the addition of Atkins' Lexus to his Horace Mann policy appears to be a "'change' to an existing policy as contemplated by S.C. Code Ann. § 38-77-350(C) (Supp. 2007), and thus a new offer of UIM coverage is not mandated." Smith v. South Carolina Ins. Co., 350 S.C. 82, 88-89, 564 S.E.2d 358, 362 (Ct. App. 2002). In Smith, this court held that "[a]n insurer is not required to make a new offer of UIM coverage when an insured adds an additional vehicle to an existing automobile insurance policy." Id. at 89, 564 S.E.2d at 362. However, since Horace Mann made an offer of UIM coverage to Atkins, this offer must be a meaningful offer pursuant to the statute and Wannamaker. Wannamaker at 521, 354 S.E.2d at 556. We find Horace Mann made a valid offer and therefore affirm.

Section 38-77-160 of the South Carolina Code (2002) provides automobile insurers must "offer at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage." To comply with this statutory obligation, the insurer's offer

of UIM coverage must be "meaningful." Tucker v. Allstate Ins. Co., 337 S.C. 128, 130, 522 S.E.2d 819, 820 (Ct. App. 1999). The insurer bears the burden of establishing that it made a meaningful offer. Butler v. Unisun Ins. Co., 323 S.C. 402, 405, 475 S.E.2d 758, 759 (1996). If the insurer fails to comply with its statutory duty to make a meaningful offer to the insured, the policy will be reformed by operation of law to include UIM coverage up to the limits of liability insurance carried by the insured. Id., at 404, 475 S.E.2d at 760.

Atkins maintains Horace Mann's offer failed the Wannamaker test in two respects. First, Atkins asserts the offer was not made in a commercially reasonable manner because Hunt never spoke with him directly, instead mailing him a selection/rejection form. We disagree. The use of mail is a reasonable method of communicating with the insured about an important business transaction. Dewart v. State Farm Mut. Auto. Ins. Co., 296 S.C. 150, 153-54, 370, S.E.2d 914, 917 (Ct. App. 1988). Moreover, Atkins had an ongoing relationship with Horace Mann when he purchased the Lexus. He chose to call Hunt to insure his Lexus instead of going by the agent's office, and it was apparently acceptable to him to read the automobile coverage selection/rejection form, sign every blank, and return it to the agent via the mail. Therefore, we find that the Horace Mann's notification process was commercially reasonable.

Next, Atkins contends that Horace Mann failed to intelligibly advise him of the nature of underinsured motorist coverage. Again, we disagree. Atkins purchased exactly the same UIM coverage for his Lexus that he had previously purchased on all his other vehicles insured by Horace Mann. In addition, Atkins properly signed the form in the five required locations, including the lines accepting UIM coverage at limits of 25/50 and under the paragraph acknowledging he had read the form in its entirety. The form clearly explains the nature of UIM coverage: various options of UIM coverage limits are set out, every appropriate selection is made, each signature block is signed, and the form adequately explains where the insured is to seek out additional information if he or she has questions. Moreover, Atkins is a high

school teacher, former principal, and coach of thirty-five years with a Master's degree and over thirty hours towards a PhD.

Atkins relies heavily on Floyd v. Nationwide Mut. Ins. Co. to claim Horace Mann did not intelligibly advise him of the nature of underinsured coverage. Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 626 S.E.2d 6 (2005). However, the holding in Floyd was limited to the issue of whether Nationwide was entitled to the conclusive presumption of a meaningful offer of UIM coverage pursuant to S.C. Code Ann. § 38-77-350(B) (Supp. 2007). Id. As mentioned above, that issue it not before us for review, and therefore Floyd is not controlling. Accordingly, we find that Horace Mann intelligibly advised Atkins of the nature of underinsured coverage.[2]

CONCLUSION

Based on the foregoing, the circuit court's order is

AFFIRMED.

KITTREDGE, J., and THOMAS, J., concur.

[2] We note that Atkins does not challenge factors (2) and (4) of the Wannamaker test; nevertheless, we address those briefly. The selection/rejection form adequately specified the limits of optional coverage, and the form also adequately explained that optional coverages were available for an additional premium. Butler at 405, 475 S.E.2d at 759.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Roger M. Singleton, Jr., **Appellant,**

v.

George D. Sherer and Julie Underwood, **Respondents.**

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

Op. 4346
Heard February 12, 2008 – Filed February 25, 2008

AFFIRMED

Darra James Coleman and Charles S. Gwynne, both of Columbia, for Appellant.

S. Jahue Moore, of West Columbia, for Respondent.

ANDERSON, J.: In this personal injury action for injuries sustained from a raccoon bite, Roger Singleton appeals the trial court's grant of summary judgment in favor of Julie Underwood and George Sherer. Singleton challenges each of the trial court's rulings, arguing: (1) he was an

invitee, not a licensee, while on Underwood's property the day of the incident; (2) issues of material fact existed regarding negligence on Underwood's behalf; (3) the proximate cause of his injury was the negligence of Underwood; (4) the doctrine of assumption of risk does not bar recovery; and (5) the raccoon was a domestic animal rather than a wild animal. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

A raccoon bit Roger Singleton while he was on George Sherer and Julie Underwood's jointly owned property.[1] Approximately a year before this incident, Singleton rescued the raccoon from the yard of a home where he was delivering furniture "but wanted someone else to take care of it." Subsequently, Underwood agreed to take the raccoon. According to Singleton, he was familiar with the raccoon from the time it was removed from the wild and placed in Underwood's care. Indeed, Singleton "would come to [Underwood's] home from time to time and was often around the [raccoon]. He would play with the raccoon and he liked it." Singleton testified the raccoon was neither vicious nor dangerous and had never bitten anyone prior to the incident.

The night before the incident, the raccoon escaped from his outdoor pen and reappeared the next morning in a "disheveled" state. After letting the raccoon into the house, Underwood attempted to calm the animal by picking him up and feeding him. However, when her dog entered the room, the raccoon bit Underwood's arm severing an artery and median nerve. Underwood was taken by ambulance to the emergency room accompanied by her children.

At her deposition, Underwood was asked if she called anyone in her family for help. From the hospital, she first called her husband but he was out of town. She called her father, Duke Singleton (Duke), to tell him she had been bitten. She explained:

[1] Appellant, Roger Singleton, is the brother of Respondent, Julie Underwood, and former brother-in-law of Respondent, George Sherer.

A: And, so then I called my father and told him that he had bitten me…. I was very surprised at his behavior because he had never done anything like that before, so I didn't know, you know, what was going on and he was in the house and to please go to my house and open the door so he could get out.

Q: Okay

A: I was really worried because my two cats and my dog were in the house and I just didn't know what his behavior would be and I didn't want them to get hurt.

…

Q: Were you in the hospital when you called your dad?

A: Yes.

Q: All right. At any point, did you instruct that he was not to call your brother…

A: No.

Q: …for assistance? Okay. At any point, did you tell either your dad or Roger that they were not have any contact with [the raccoon]?

A: If so I do not…I did not talk to Roger, so I didn't tell him anything. I'm pretty sure I told my dad, don't go inside or try to catch him because I didn't know what he would do, but I'm…it's really hard to remember exactly. My dad would probably remember better than me.

Q: Okay. Prior to September 24th of 2001, did you pretty much have an open door policy with your dad and your brother? Any by open door policy, I mean, that they could come in to your

house or show up at your house without calling for prior permission?

A: Yes, we all do in our family.

…

Q: And that's the way it is with all of you that you just… you're welcomed…

A: Yes.

Q: …and your home and they're welcomed at your home, right?

A: Yes.

Q: To the best of your knowledge, would there have been any reason for Roger to believe that he was not authorized to go into your home?

A: No.

Q: Okay. Did you have any objection to Roger actually going into your home…

A: No.

After learning his daughter was bitten and in the hospital, Duke called and informed Singleton of the incident and suggested he go to Underwood's home "to see what he could do." However, Duke advised Singleton to wait until he could arrive "with a net and some sacks" and specifically instructed Singleton not to capture the raccoon by himself. When Singleton arrived at Underwood's home, no one was home, and his father had not yet arrived. Despite his father's warning, Singleton entered the home and proceeded into the room where the raccoon was located. Singleton confronted the raccoon and attempted to "soothe the animal with his voice." During Singleton's

attempt to calm the raccoon, "the animal attacked him and bit him on the hand." Shortly thereafter, Duke arrived and Singleton made another effort to capture the raccoon with the burlap sack his father provided. While Singleton was successful in capturing the raccoon, "the raccoon bit Singleton a second time through the bag."

At his deposition, Singleton explained his arrival at Underwood's house:

> Q: Did [Underwood and Sherer] know you were going into their house?
>
> A: I don't know.
>
> Q: Did they ask you to go into their house?
>
> A: The phone call that I had was from my father. I never spoke with them.
>
> Q: All right, so the answer is…
>
> A: I would walk into their house on a regular basis without knocking.
>
> Q: I understand. I just wanted to make sure that we understand on this particular day they, either of them, asked you to come to their house?
>
> A: I didn't speak directly to either one of them.
>
> …
>
> Q: The person who had asked you to go was your father?
>
> A: Correct.

Q: Now, you say you had a practice of walking into their house uninvited?

A: Absolutely.

Subsequently, Singleton filed a complaint against Sherer and Underwood for the injuries he sustained from the raccoon bite while on their jointly owned property. The trial court granted summary judgment in favor of Sherer and Underwood, reasoning (1) Singleton's status on the property at the time of the incident was "at best" a social guest or licensee and the duty owed to a licensee is much less than the duty owed to an invitee; (2) Singleton failed to prove any negligence on the part of Underwood because there was no evidence the raccoon was vicious prior to the day of the incident; (3) the acts and conduct of Singleton were the proximate cause of his injury; and (4) the true cause of Singleton's injury was his voluntarily exposure to a known risk. Singleton filed a motion to alter or amend judgment, challenging both the trial court's ruling regarding his "licensee" status and the trial court's application of the assumption of risk defense. Singleton's motion was denied.

STANDARD OF REVIEW

"In reviewing the grant of summary judgment, [an appellate court] applies the same standard that governs the trial court under Rule 56, SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005); Young v. South Carolina Dep't of Disabilities & Special Needs, 374 S.C. 360, 649 S.E.2d 488 (2007); Henderson v. Allied Signal, Inc., 373 S.C. 179, 644 S.E.2d 724 (2007); Eagle Container Co., LLC v. County of Newberry, 366 S.C. 611, 622 S.E.2d 733 (Ct. App. 2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004). In determining whether any triable issue of fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 642 S.E.2d 751 (2007); Medical Univ. of South

Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Moore v. Weinberg, 373 S.C. 209, 216, 644 S.E.2d 740, 743 (Ct. App. 2007); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005). If triable issues exist, those issues must go to the jury. Mulherin-Howell v. Cobb, 362 S.C. 588, 608 S.E.2d 587 (Ct. App. 2005).

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Hanssen v. Scalise Builders of South Carolina, 374 S.C. 352, 650 S.E.2d 68 (2007); Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485 (2005); BPS, Inc. v. Worthy, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party. RWE NUKEM Corp. v. ENSR Corp., 373 S.C. 190, 644 S.E.2d 730 (2007); Connor Holdings, L.L.C. v. Cousins, 373 S.C. 81, 644 S.E.2d 58 (2007); Willis v. Wu, 362 S.C. 146, 607 S.E.2d 63 (2004); see also Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003) (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005); Montgomery v. CSX Transp., Inc., 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Montgomery v. CSX Transp., Inc., Op. No. 26411 (S.C. Sup. Ct. filed Jan. 7, 2007) (Shearouse Adv. Sh. No. 1 at 11); Baugus v. Wessinger, 303 S.C. 412, 401 S.E.2d 169 (1991); Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). When reasonable minds cannot differ on plain, palpable, and indisputable facts, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). The party seeking summary judgment has the burden of

clearly establishing the absence of a genuine issue of material fact. Bradley v. Doe, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007); McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). The nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rife, 363 S.C. at 214, 609 S.E.2d at 568.

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (quoting George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 593 S.E.2d 183 (Ct. App. 2004). Summary judgment is a drastic remedy and should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004); Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004).

LAW/ANALYSIS

I. Singleton's Status / Invitee v. Licensee

Singleton argues the trial court erred in deducing he was a licensee, not an invitee, while on Underwood's property the day of the incident. We disagree.

A licensee is a person who is privileged to enter or remain upon land by virtue of the possessor's consent. Neil v. Byrum, 288 S.C. 472, 473, 343 S.E.2d 615, 616 (1986). When a licensee enters onto the property of another, the primary benefit is to the licensee, not the property owner. Hoover v. Broome, 324 S.C. 531, 535, 479 S.E.2d 62, 65 (Ct. App. 1996); Landry v. Hilton Head Plantation Prop. Owner's Ass'n, 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct. App. 1994). A licensee is a person whose presence is tolerated,

a person not necessarily invited on the premises, but one who is privileged to enter or remain on the premises only by the property owner's express or implied consent. Sims v. Giles, 343 S.C. 708, 720, 541 S.E.2d 857, 864 (Ct. App. 2001). While the most common example of a licensee is the social guest, "[a]n injured person has been held to be a licensee where he entered premises to seek a favor, to make inquiries or ask directions, to do volunteer work, to use recreational facilities without asking specific permission, to recover an item of personal property left on the premises, to obtain some article of value given to the licensee by the occupant, or while chasing his dog." Id.

"[An invitee is a person] who enters onto the property of another by express or implied invitation, his entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land, and there is a mutuality of benefit or a benefit to the owner." Sims, 343 S.C. at 716-17, 541 S.E.2d at 862; see also Parker v. Stevenson Oil Co., 245 S.C. 275, 280, 140 S.E.2d 177, 179 (1965) (noting when an invitee enters onto the property of another, the primary benefit is to the property owner, not the invitee); Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 441, 494 S.E.2d 827, 831 (Ct. App. 1997) ("[A]n invitee is a person who enters onto the property of another at the express or implied invitation of the property owner."). The law recognizes two types of invitees: the public invitee and the business visitor. Sims, 343 S.C. at 717, 541 S.E.2d at 862. "A public invitee is one who is invited to enter or remain on the land as a member of the public for a purpose for which the land is held open to the public." Goode, 329 S.C. at 441, 494 S.E.2d at 831; Sims, 343 S.C. at 717, 541 S.E.2d at 862. In contrast, a business visitor is an invitee whose purpose for entering the property is either directly or indirectly connected with the purpose for which the property owner uses the land. Parker, 245 S.C. at 280, 140 S.E.2d at 179; Sims, 343 S.C. at 717, 541 S.E.2d at 862; Goode, 329 S.C. at 441, 494 S.E.2d at 831; Hoover, 324 S.C. at 535, 479 S.E.2d at 65. "[T]he class of persons qualifying as business visitors is not limited to those coming upon the land for a purpose directly or indirectly connected with the business conducted thereon by the possessor, but includes as well those coming upon the land for a purpose connected with their own business, which itself is

directly or indirectly connected with a purpose for which the possessor uses the land." 62 Am. Jur. 2d Premises Liability § 88 (1990).

Singleton was a licensee while on Underwood's property the day of the incident. By his own admission, Singleton did not enter Underwood's property through an express or implied invitation. Rather, Singleton voluntarily entered the premises in an effort to capture the raccoon regardless of specific instructions to the contrary. Thus, as described in Sims, 343 S.C. at 720, 541 S.E.2d at 864, Singleton was on Underwood's property performing "volunteer work," which is an activity traditionally associated with the licensee status.

II. Duty Owed to Licensees and Invitees

Singleton maintains the trial court erred in asseverating there was no genuine issue of material fact regarding Underwood's contributory negligence. Specifically, Singleton argues Underwood breached her duty to warn of any hidden and latent dangers posed by the raccoon. We disagree.

To establish negligence in a premises liability action, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) defendant's breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. See Hurst v. East Coast Hockey League, Inc., 271 S.C. 33, 37, 637 S.E.2d 560, 562 (2006). The court must determine, as a matter of law, whether the law recognizes a particular duty. Id. "If there is no duty, then the defendant in a negligence action is entitled to summary judgment as a matter of law." Id.; see also Hopson v. Clary, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996) ("If the evidence as a whole is susceptible to only one reasonable inference, no jury issue is created and [summary judgment] is properly granted.").

The nature and scope of duty in a premises liability action, if any, is determined based upon the status or classification of the person injured at the time of his or her injury. Sims v. Giles, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001). South Carolina recognizes four general classifications

of persons present on the property of another: adult trespassers, invitees, licensees, and children. Id. Different standards of care apply depending upon the classification of the person present. Id.; see also Larimore v. Carolina Power & Light, 340 S.C. 438, 444, 531 S.E.2d 535, 538 (Ct. App. 2000) ("The level of care owed is dependent upon the class of the person present."). Thus, Underwood's duty to protect Singleton from conditions on the property largely depends on whether Singleton was a licensee or an invitee at the time of the incident. See Landry v. Hilton Head Plantation Prop. Owners Ass'n, 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct. App. 1994).

A. Licensees

Under South Carolina jurisprudence, "a landowner owes a licensee a duty to use reasonable care to discover the licensee, to conduct activities on the land so as not to harm the licensee, and to warn the licensee of any concealed dangerous conditions or activities." Landry, 317 S.C. at 203, 452 S.E.2d at 621; see Neil v. Byrum, 288 S.C. 472, 473, 343 S.E.2d 615, 616 (1986). The duty owed to a licensee differs from the duty owed to an invitee "in that the [landowner] has no duty to search out and discover dangers or defects in the land or to otherwise make the premises safe for a licensee." 18 S.C. Jur. Negligence § 44 (2007); see Landry, 317 S.C. at 203, 452 S.E.2d at 621. As the South Carolina Supreme Court explained in Neil v. Byrum:

> The [owner or possessor of land] is under no obligation to exercise care to make the premises safe for his reception, and is under no duty toward him except:
>
> (a) To use reasonable care to discover him and avoid injury to him in carrying on activities upon the land.
>
> (b) To use reasonable care to warn him of any concealed dangerous conditions or activities which are known to the possessor, or of any change in the condition of the premises which may be dangerous to

> him, and which he may reasonably be expected to discover.

288 S.C. at 473, 343 S.E.2d at 616 (emphasis in original). "[S]ince a licensee is there for his own benefit, he can be said to accept the premises as they are and demand no greater safety than his host provides himself." F.P Hubbard & R.L. Felix, The South Carolina Law of Torts 111-12 (2d ed. 1997).

In the case sub judice, Underwood owed no duty to Singleton as a licensee because Singleton did not enter Underwood's property through an express or implied invitation. Rather, Singleton voluntarily entered the premises in an effort to capture the raccoon in contrariety to his specific instructions. Under these circumstances, Underwood owed Singleton no duty greater than the duty she owed to herself. See Neil, 288 S.C. at 473, 343 S.E.2d at 616.

B. Invitees

Generally, the owner of property owes an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety and is liable for injuries resulting from the breach of such duty. Larimore v. Carolina Power & Light, 340 S.C. 438, 444, 531 S.E.2d 535, 538 (Ct. App. 2000). Thus, unlike a licensee, an invitee enters the premises with the implied assurance of preparation and reasonable care for his protection and safety while he is there. Landry, 317 S.C. at 203, 452 S.E.2d at 621; Bryant v. City of North Charleston, 304 S.C. 123, 125, 403 S.E.2d 159, 161 (Ct. App. 1991). In addressing premises liability as it relates to an invitee, the South Carolina Supreme Court expressly adopted section 343A of the Restatement (Second) of Torts (1965) in Callander v. Charleston Doughnut Corp., 305 S.C. 123, 126, 406 S.E.2d 361, 362 (1991). Section 343A provides:

> § 343A. Known or Obvious Dangers
>
> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or

> obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
>
> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

Comment e to section 343A further elaborates:

> In the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the conditions and dangers he will encounter if he comes. If he knows the actual conditions, and the activities carried on, and the dangers involved in either, he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining on the land. The possessor of the land may reasonably assume that he will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if he does not succeed in doing so. Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.

Based upon the language of section 343A, Singleton asserts Underwood had a duty to warn him of the dangerous conditions posed by the raccoon regardless of his status as a licensee or invitee at the time of the incident. However, contrary to Singleton's argument, the raccoon did not pose a hidden or latent danger about which Underwood had an affirmative

duty to warn Singleton. As evidenced by the record, Singleton was aware the raccoon had bitten Underwood prior to his arrival at her home. Notwithstanding this knowledge, Singleton entered the home and voluntarily exposed himself to any potential danger posed by the raccoon. Thus, as a matter of law, Underwood had no duty to warn Singleton of the known and obvious danger posed by the raccoon regardless of his status as licensee or invitee. See Restatement (Second) of Torts § 343A.

III. Proximate Cause

Singleton proclaims the trial court erred in declaring there was no genuine issue of material fact as to whether Underwood's actions proximately caused his injuries. We disagree.

> [P]roximate cause is the efficient, or direct, cause – the thing which brings about the injuries complained of. Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided.

Hughes v. Children's Clinic, P.A., 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977). Proximate cause requires proof of both causation in fact and legal cause. Oliver v. South Carolina Dep't of Hwys. & Pub. Transp., 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992). Causation in fact is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's negligence. Id. Legal cause is proved by establishing foreseeability. Id. "Foreseeability is determined by looking to the natural and probable consequences of the act complained of. A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence." Vinson v. Hartley, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (citations omitted).

In the present case, Singleton fails to prove any negligent act or omission attributable to Underwood as the proximate cause of his injury.

First, the record contains no evidence but for Underwood's failure to warn Singleton, he would not have sustained injury. By his own admission, Singleton was aware the raccoon had bitten Underwood prior to his arrival and was warned by his father "not to try and catch the raccoon by himself." Singleton entered Underwood's home and voluntarily exposed himself to the danger posed by the raccoon. The fact Singleton attempted to capture the raccoon in spite of his father's warning refutes any contention he would have proceeded differently and not sustained injury if Underwood warned him.

The record contains no evidence Singleton's injury was foreseeable, as required to establish legal cause. Underwood had no notice the raccoon's attack on Singleton was going to occur. As evidenced by the record, Underwood was hospitalized on the day of the incident and never invited Singleton to enter the property during her absence. Consequently, Underwood had no reason to foresee Singleton would enter her home and attempt to capture the raccoon. Contrary to Singleton's contention, the evidence negates the existence of both causation in fact and legal cause as a matter of law. The trial court did not err in holding there was no genuine issue of material fact as to the proximate cause of Singleton's injuries.

IV. Assumption of Risk

Singleton avers the trial court erred in granting summary judgment against him based upon the doctrine of assumption of risk, arguing (1) assumption of risk is no longer a complete defense to a negligence action since our Supreme Court's adoption of comparative negligence, and (2) whether Singleton assumed the risk was a question of fact the trial court should have submitted to the jury. We disagree.

A. Assumption of Risk in South Carolina's Comparative Negligence System

The threshold issue we must determine is whether assumption of risk serves as a complete bar to recovery under South Carolina's comparative negligence system. In Nelson v. Concrete Supply Co., 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991), the South Carolina Supreme Court adopted a modified version of comparative negligence known as the "less than or equal

to" approach. Under this version, "[f]or all causes of action arising on or after July 1, 1991, a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant." Id. Pellucidly, under Nelson, a plaintiff's contributory negligence does not bar recovery unless such negligence exceeded that of the defendant. Id.

"Assumption of the risk is the deliberate and voluntary choice to assume a known risk." Baxley v. Rosenblum, 303 S.C. 340, 347, 400 S.E.2d 502, 507 (Ct. App. 1991). The doctrine of assumption of the risk embodies the principle plaintiffs may not recover for injuries received when they voluntarily expose themselves to a known and appreciated danger. Lowrimore v. Fast Fare Stores, Inc., 299 S.C. 418, 424, 385 S.E.2d 218, 221 (Ct. App. 1989). South Carolina first adopted assumption of risk within the context of the master-servant relationship, whereby the agreement to become employed included the agreement to assume the risks associated with employment. See Hooper v. Columbia & Greenville R.R. Co., 21 S.C. 541, 547 (1884). While the South Carolina Supreme Court ultimately extended the assumption of risk defense to negligence cases outside the master-servant relationship, the defense is applied less often in its traditional context because of Workers' Compensation laws. See, e.g., Smith v. Edwards, 186 S.C. 186, 191, 195 S.E. 236, 238 (1938) ("[Assumption of risk] applies to any case . . . where the facts proved show that the person against whom the doctrine of assumption of risk is pleaded knew of the danger, appreciated it, and acquiesced therein.").

In Davenport v. Cotton Hope Plantation Horizontal Property Regime, 325 S.C. 507, 513-14, 482 S.E.2d 569, 574 (Ct. App. 1997), this court held assumption of risk had been subsumed by South Carolina's adoption of comparative negligence. Consequently, assumption of risk no longer served as a complete bar to a negligence claim; rather, the defense was simply another factor to consider in comparing the parties' negligence. Id. In later reviewing Davenport, our supreme court analyzed the continuing viability of assumption of risk in South Carolina's comparative negligence system. According to the South Carolina Supreme Court:

> It is contrary to the premise of our comparative fault system to require a plaintiff, who is fifty-percent or less at fault, to bear all of the costs of the injury. In accord with this logic, the defendant's fault in causing an accident is not diminished solely because the plaintiff knowingly assumes a risk. If assumption of risk is retained in its current common law form, a plaintiff would be completely barred from recovery even if his conduct is reasonable or only slightly unreasonable. In our comparative fault system, it would be incongruous to absolve the defendant of all liability based only on whether the plaintiff assumed the risk of injury. Comparative negligence by definition seeks to assess and compare the negligence of both the plaintiff and defendant. This goal would clearly be thwarted by adhering to the common law defense of assumption of risk.

Davenport v. Cotton Hope Plantation Horizontal Property Regime, 333 S.C. 71, 86, 508 S.E.2d 565, 573 (1998). Based upon the foregoing, our supreme court concluded "a plaintiff is not barred from recovery by the doctrine of assumption of risk unless the degree of fault arising therefrom is greater than the negligence of the defendant." Id. at 87, 508 S.E.2d at 573-74.

Applying this analysis to the case sub judice, we agree with Singleton's assertion assumption of risk is no longer a complete bar to recovery under South Carolina's comparative negligence system. This determination is made by the court as a matter of law where the degree of fault arising from the plaintiff's assumption of risk exceeds any negligence on the part of the defendant. See, e.g., Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000) (finding, as a matter of law, plaintiff's own negligence was greater than any potential negligence by defendant, thus precluding his recovery in a negligence action); Estate of Haley v. Brown, 370 S.C. 240, 243, 634 S.E.2d 62, 63 (Ct. App. 2006) (directed verdict proper where the "only reasonable inference that can be drawn from the evidence is that

[plaintiff's] negligence in running into the side of [defendant's] truck outweighed any possible negligence by [defendant] and was the more determinative factor in causing the collision."); Hopson v. Clary, 321 S.C. 312, 316, 468 S.E.2d 305, 308 (Ct. App. 1996) (where plaintiff's negligence was, as a matter of law, greater than defendant's, trial court correctly concluded doctrine of comparative negligence barred claim). We must determine whether Singleton's assumption of risk was, as a matter of law, greater than any negligence attributable to Underwood and the more determinative factor in causing his injuries.

B. Singleton's Assumption of Risk

Davenport edifies: there are four requirements necessary to establish the assumption of risk defense in South Carolina: (1) the plaintiff must have knowledge of the fact constituting a dangerous condition; (2) the plaintiff must know the condition is dangerous; (3) the plaintiff must appreciate the nature and extent of the danger; and (4) the plaintiff must voluntarily expose himself or herself to the danger. 333 S.C. at 78-79, 508 S.E.2d at 569. "The doctrine is predicated on the factual situation of a defendant's acts alone creating the danger and causing the accident, with the plaintiff's act being that of voluntarily exposing himself to such an obvious danger with appreciation thereof which resulted in the injury." Id. Moreover, assumption of risk may be implied from the plaintiff's conduct. Id.

The undisputed facts establish Singleton freely and voluntarily exposed himself to a known danger which he understood and appreciated. By Singleton's own admission, his actions on the day of the incident were "pretty stupid." Any factual issues which might exist as to Sherer and Underwood's contributory negligence cannot alter the inescapable conclusion Singleton's negligence exceeded fifty percent. Under South Carolina jurisprudence, where evidence of the plaintiff's greater negligence is overwhelming, evidence of slight negligence on the part of the defendant is simply not enough for a case to go to the jury. See Hopson v. Clary, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996) (noting where the evidence as a whole is susceptible to only one reasonable inference, no jury issue is

created). The trial court did not err in barring Singleton's claim under the assumption of risk doctrine because Singleton was more than fifty percent at fault in causing his injuries.

V. The Raccoon: A Wild Animal

Singleton maintains the trial court erred by deciding the raccoon was a wild animal rather than a domesticated animal. We disagree.

Initially, we note this issue is not preserved for our review. In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court. See Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 511, 598 S.E.2d 712, 715 (2004); see also In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court."). In the present case, the record contains no indication the trial court ruled on the issue of the raccoon's domestication. While pled and argued, the final order does not address the domestication of the raccoon because Singleton did not assert a cause of action on the basis of liability for injuries caused by a "domesticated animal" pursuant to section 47-5-20(3) of the South Carolina Code (Supp. 2007).

Moreover, Singleton did not file a motion pursuant to Rule 59(e), SCRCP, requesting a ruling on this issue. As noted by our supreme court, "[e]ven after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by section 17-27-80 of the South Carolina Code and Rule 52(a), SCRCP." Pruitt v. State, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992). Singleton's claims regarding domestication of the raccoon are not preserved for our review.

Averring to the merits, the South Carolina Supreme Court set out the common law rule regarding liability for injuries caused by domestic animals

in Mungo v. Bennett, 238 S.C. 79, 81, 119 S.E.2d 522, 523 (1961). According to the Mungo court:

> [A]ll domestic animals, whether horses, mules, cattle, dogs, cats or others, are not presumed to be dangerous to persons, and before recovery of damages may be had against the owner the injured party must prove that the particular animal was of a dangerous, or vicious, nature and that this dangerous propensity was either known, or should have been known to the owner.

Id.; see also S.C. Code § 47-5-20(3) (Supp. 2007) ("[Domesticated animal] means owned or stray cats, dogs, and ferrets or other animals for which there exists a rabies vaccine approved by the department and licensed by the United States Department of Agriculture.").

It should be noted, Mungo is no longer the law regarding liability for injuries arising from dogs. In Hossenlopp By and Through Hossenlop v. Cannon, 285 S.C. 367, 329 S.E.2d 438 (1985), our supreme court adopted the law of California, which did not require knowledge of a vicious propensity before liability attached to a dog owner. Id. at 372, 329 S.E.2d at 441. See also S.C. Code Ann. § 47-3-100 (1987) (imposing strict liability on dog owner for damages arising when person, while lawfully on owner's property, is bitten or otherwise attacked by dog).

As evidenced by his testimony, Singleton was familiar with the raccoon from the time it was removed from the wild and placed in Underwood's care. Singleton professed the raccoon was neither vicious nor dangerous and had never bitten anyone prior to the incident. By Singleton's own admission, the raccoon was not "of a dangerous or vicious nature" which "was either known or should have been known" to Underwood. Mungo, 238 S.C. at 81, 119 S.E.2d at 523.

CONCLUSION

Singleton failed to present any evidence establishing negligence on the part of Underwood. Assumptively concluding that Underwood was guilty of some negligent act, Singleton's own negligence was, as a matter of law, greater than any negligence attributable to Underwood. We rule Singleton's claim was barred under the doctrine of comparative negligence. We hold the acts and conduct of Singleton constituted the sole proximate cause of his injuries. The raccoon was a wild animal rather than a domesticated animal. The decision of the trial court is accordingly

AFFIRMED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Fr. Timothy J. Watters, Appellant,

v.

Terminix Service, Inc., and
John Furlow, Respondents.

Appeal From Charleston County
Mikell R. Scarborough, Special Circuit Court Judge

Opinion No. 4347
Submitted February 1, 2008 – Filed February 25, 2008

AFFIRMED

Gregg E. Meyers, of Charleston, for Appellant.

Clinch H. Belser, Jr. and H. Freeman Belser, both of Columbia; Eugene P. Corrigan, III and Michael J. Ferri, both of Charleston, for Respondents.

KITTREDGE, J.: This case arises from the sale of a moisture-damaged home from John Furlow to Timothy J. Watters in April of 1997. Terminix Service, Inc. provided at closing what is customarily referred to as a "termite letter." In December of 2002, Watters filed an action against Furlow and Terminix claiming defendants failed to disclose the moisture damage. The trial court granted summary judgment to Furlow and Terminix based on the statute of limitations. We affirm.[1]

I.

Watters purchased a home from Furlow in April 1997. As part of the purchase process, Terminix completed a CL-100 Report, also known as a termite letter, and it was presented to Watters at closing. Terminix noted there was evidence of inactive wood destroying fungi, an acceptable moisture level, and previous treatment of the property for termite control. Terminix also suggested a qualified building inspector evaluate the structural integrity of the house. Watters hired American Inspection Service, Inc. to conduct a home inspection, and subsequently he purchased the home.

After the closing, Watters made numerous repairs to the home. Following another inspection, Watters' attorney wrote Terminix a letter on May 15, 1997, indicating an examination of the house disclosed damage not reported at the closing.

In August 1998, Watters hired Russell A. Rosen to evaluate the moisture level. Rosen's inspection revealed the sub-floor plywood was delaminated and a moisture problem existed in the crawl space. Rosen opined that the source of the sub-floor damage was related to installation and ductwork alterations performed by Smoak's Air Conditioning. Watters pursued a claim against Smoak's, which resulted in Smoak's paying a settlement of $72,000.

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

On December 30, 2002, Watters brought the current lawsuit for fraud, negligent misrepresentation, and indemnification alleging Furlow and Terminix failed to disclose the moisture damage. The trial court determined that Watters filed this action outside the statute of limitations and granted summary judgment to Furlow and Terminix.

II.

A cause of action for damage to real property must be brought within three years of when the damage occurred. S.C. Code Ann. § 15-3-530(3) (2005). An exception lies in the discovery rule, which tolls the starting of the statute of limitations until a person discovers or should have known through reasonable diligence that a potential claim might exist. S.C. Code. Ann. § 15-3-535 (2005); Barr v. City of Rock Hill, 330 S.C. 640, 644-45, 500 S.E.2d 157, 160 (Ct. App. 1998).

For purposes of commencement of the statute of limitations, Watters likely received notice of a potential cause of action at closing when he received the Terminix report together with the suggestion by Terminix for an evaluation of the home's structural integrity by a qualified building inspector. Under the summary judgment standard, we give Watters every benefit of the doubt. See Rule 56(c), SCRCP (limiting the issuance of summary judgment to cases where "there is no genuine issue as to any material fact"); Koester v. Carolina Rental Center, Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994) ("In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party.").

Even measured against the exacting summary judgment standard, it seems an insurmountable hurdle for Watters to delay the start of the statute of limitations after his attorney's May 15, 1997 letter to Terminix referencing the moisture damage. At that time, when viewed objectively, one would reasonably conclude that a claim might exist. Nevertheless, under no circumstances could Watters claim he lacked knowledge of his potential cause of action after August 1998 when he received the report of *his* expert.

In August 1998, Watters's expert, Rosen, referenced the damage in a report to Watters. The fact that the expert Rosen identified the wrong source did not further delay the commencement of the statute of limitations as a matter of law. See Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996) (Under the discovery rule, the statute of limitations "runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct."). Watters's assertion of an estoppel theory to further delay the start of the statute of limitations is unavailing, for the August 1998 report of Watters's expert clearly establishes that the delay in filing the action could not properly be attributed to any alleged misconduct by Terminix or Furlow. See Wiggins v. Edwards, 314 S.C. 126, 130, 442 S.E.2d 169, 171 (1994) (stating a defendant may be estopped from claiming the statute of limitations as a defense if the defendant's conduct induced the delay).

III.

We affirm the grant of summary judgment, for the statute of limitations commenced no later than August 1998 and, therefore, bars Watters's claims brought in December 2002.

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joan McKinney, Appellant,

v.

Kimberly Clark Corporation, Respondent.

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 4348
Heard December 11, 2007 – Filed February 25, 2008

AFFIRMED

E. Ross Huff, Jr., Huff Law Firm, for Appellant.

Clarke W. McCants, of Beaufort, for Respondent.

HEARN, C.J.: Joan McKinney appeals the circuit court's determination that she is not entitled to choose her treating physician. We affirm.

FACTS

McKinney worked for Kimberly Clark Corporation for 28 years. In April of 2003, she brought a worker's compensation claim requesting temporary total disability benefits, permanent total disability benefits, payment for medical examinations and payment for treatments to her neck, back, both shoulders/arms, legs, and psyche. McKinney alleged these injuries occurred while she was driving a forklift, and the psychological injuries occurred because she suffered severe depression regarding her pain and lack of mobility.

The single commissioner found McKinney was entitled to medical treatment and that the defendants were responsible for all past, present and continuing medical treatment. The commissioner also ordered Kimberly Clark to pay for causally related medical treatment and ordered it to select a treating physician for McKinney. Thereafter, McKinney requested appellate panel review of the single commissioner's determination that Kimberly Clark should be allowed to select a treating physician. McKinney contended that Toby Warren, a chiropractor, should be designated as the authorized treating physician. During the pendency of this matter, Warren presented to Kimberly Clark a bill for chiropractic services in excess of $48,000.00.

After a hearing before the appellate panel, the single commissioner's decision was affirmed in its entirety. Thereafter, McKinney filed a Petition for Judicial Review of the appellate panel's decision. The circuit court affirmed the decision of the appellate panel, finding that Kimberly Clark must pay for causally related medical treatment and should be allowed to select a treating physician. McKinney appeals.

STANDARD OF REVIEW

The South Carolina Administrative Procedure Act governs judicial review of a decision of an administrative agency. Clark v. Aiken County of Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct.

App. 2005). Section 1-23-380(a)(5) of the South Carolina Code (Supp. 2006) establishes the substantial evidence rule as the standard of review. Under this standard, a reviewing court may reverse or modify an agency decision based on errors of law, but may only reverse or modify an agency's findings of fact if they are clearly erroneous. "The construction of a statute by the agency charged with its administration should be accorded great deference and will not be overruled without a compelling reason." Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 496, 536 S.E.2d 892, 900 (Ct. App. 2000)

LAW/ANALYSIS

McKinney argues the circuit court erred in finding that she is not entitled to select her treating physician after being determined permanently and totally disabled. We disagree.

McKinney relies upon Risinger v. Knight Textiles, 353 S.C. 69, 577 S.E.2d 222 (Ct. App. 2002) for the proposition that she should be allowed, unilaterally, to select a provider to treat her, and that Kimberly Clark should be responsible for payment for such treatment. This reliance is misplaced. In Risinger, the appellate panel designated a treating physician for the claimant in its order. The employer and carrier refused to pay for an additional treatment as recommended by this physician, and sought further to have the claimant evaluated by another physician. We held that the employer and carrier could not refuse to pay for additional treatment under those circumstances.

In the present case, unlike in Risinger, there has never been a designation of a treating physician. While the appellate panel ordered Kimberly Clark to pay for causally related medical expenses pursuant to S.C. Code. Ann. § 42-15-60 (1976), no particular physician was designated by the appellate panel to treat McKinney. Therefore, Risinger does not apply.

McKinney further contends that Risinger stands for the proposition that in a case where the claimant has received permanent

and total benefits, the claimant has an absolute right to pursue medical treatment, of any type and nature, at any location, and that an employer and carrier are responsible for payment of that treatment. We disagree.

McKinney's argument is inconsistent with S.C. Code Ann. § 42-15-60 and § 42-9-10 (1976), which establishes the rights of the employer and the employee with regards to payment for treatments, and ultimately gives great deference to the appellate panel. This statute does not give a unilateral right to claimants to select their treating physician, and such an unencumbered right undermines the authority of the appellate panel, as prescribed by the legislature.

CONCLUSION

Accordingly, the circuit court's order is

AFFIRMED.

KITTREDGE, J., and THOMAS, J., concur.