The Supreme Court of South Carolina

In the Matter of Lori Solinger, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on September 20, 2005, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk, S. C. Supreme Court, received February 25, 2010, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

March 19, 2010

The Supreme Court of South Carolina

In the Matter of Jillian Ann Conrad, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 13, 2006, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated January 26, 2010, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

March 19, 2010

The Supreme Court of South Carolina

In the Matter of Dennis C. Gilchrist, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 1, 1977, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of Court, Supreme Court of South Carolina, dated February 26, 2010, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

March 19, 2010

The Supreme Court of South Carolina

In the Matter of Michael L. Cantrell, Jr., Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 13, 2007, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated February 23, 2010, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

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

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Michael L. Cantrell, Jr. shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

March 19, 2010

The Supreme Court of South Carolina

In the Matter of Eileen Schoen Githens, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 15, 1993, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Bar, dated January 11, 2010, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

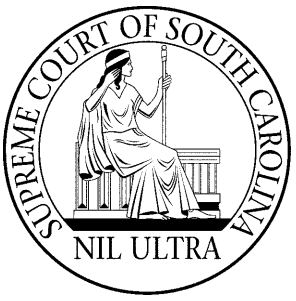
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

March 19, 2010



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

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ADVANCE SHEET NO. 11
March 22, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Quail Hill, LLC, Respondent,

v.

County of Richland, South Carolina, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
Roger M. Young, Circuit Court Judge

Opinion No. 26788
Heard January 7, 2010 – Filed March 22, 2010

AFFIRMED IN PART AND REVERSED IN PART

Andrew F. Lindemann, William H. Davidson, II, Michael B. Wren, of Davidson & Lindemann, of Columbia, for Petitioner.

Charles E. Carpenter, Jr., Carmen V. Ganjehsani, Sharon Plyler Besley, of Carpenter Appeals and Trial Support, of Columbia, and Clifford O. Koon, Jr., Paul D. deHolczer, Robert L. Brown, of Moses Koon and Brackett, of Columbia, for Respondent.

JUSTICE BEATTY: In this zoning dispute case, this Court granted Richland County's (County's) petition for a writ of certiorari to review the decision of the Court of Appeals in Quail Hill, LLC v. County of Richland, South Carolina, 379 S.C. 314, 665 S.E.2d 194 (Ct. App. 2008), in which the Court of Appeals affirmed in part and reversed in part the grant of summary judgment in favor of County as to Quail Hill, LLC's (Quail Hill's) claims stemming from the issuance of inaccurate zoning information by County employees. We affirm in part and reverse in part.

FACTUAL/PROCEDURAL HISTORY

In late 2002, Quail Hill sought to acquire a 72.5 acre parcel of property in Richland County to develop a manufactured-home subdivision. To assist in procuring this property, Quail Hill contacted Phillip Aylan Brown, Jr., a licensed real estate broker, and authorized him to act as its agent. In January 2003, Brown met with Carl Gosline, the Richland County Subdivision Coordinator, to determine whether the parcel was suitable for the development of manufactured housing. According to Brown, Gosline told him the parcel was zoned RU (rural) based on information obtained from Gosline's computer. Brown also testified the tax bill from the Tax Assessor's office listed the parcel's zoning as RU. A zoning classification of RU allows the property to be developed as a manufactured-home subdivision.

On March 13, 2003, Quail Hill purchased the property and then surveyed, platted, and prepared it for development. In September 2003, Quail Hill filed an application with the Richland County Planning Commission ("Planning Commission") for site plan approval for the development of the subject property as a twenty-lot, manufactured-housing subdivision. On October 6, 2003, the Richland County Development Services Department issued a report for the Planning Commission in which it recommended approval of Quail Hill's subdivision plan. Subsequently, the Planning Commission voted unanimously to approve Quail Hill's site plan for the property. In turn,

Quail Hill began marketing and selling lots for the subdivision. According to Quail Hill, five lots were then sold, with manufactured homes being installed on two of the lots.

In November 2004, neighboring landowners contacted their County Council representative and asked him to attend a meeting regarding Quail Hill's subdivision. Geonard Price, the County's Zoning Administrator,[1] accompanied the County Council member to the meeting, where the neighbors inquired about zoning restrictions and expressed opposition to Quail Hill's development. Following this meeting, Price consulted the County's Official Zoning Map[2] and found the subject property was zoned RS-1, a residential classification that prohibits manufactured homes.

Based on the RS-1 zoning classification, County staff informed Quail Hill on November 4, 2004, that it was prohibited from developing manufactured housing on the property. On November 17, 2004, Price issued an order requiring Quail Hill to cease development of the subdivision except for those uses permitted under the RS-1 zoning district.

Following this order, Quail Hill representatives met with County staff who revealed that Gosline had erroneously advised Quail Hill the property was zoned RU, and that records from the Planning Development Services Division and the Tax Assessor's office differed from the Official Zoning Map. According to Quail Hill, County staff advised it to apply for a zoning map change. However, after Quail Hill applied for the zoning map change, the Planning Commission's report

[1] Richland County Code sections 26-34, 26-501, and 26-502 authorize the County Zoning Administrator to interpret, administer, and enforce County's zoning ordinances. Richland County, S.C., Code art. 3, § 26-34; art. 11, §§ 26-501, -502 (2005).

[2] Richland County Code section 26-33 provides that the Official Zoning Map is available for inspection by the general public and states that it is the "only official description of the location of zoning district boundaries, and persons having recourse to this ordinance for any purpose are hereby so notified." Richland County, S.C., Code art. 3, § 26-33 (2005).

recommended the change be denied. Ultimately, County Council denied Quail Hill's request.

Quail Hill did not appeal County Council's finding, but instead filed suit against County. In its Complaint, Quail Hill requested an injunction and asserted causes of action against County for equitable estoppel, negligent misrepresentation, negligence, and inverse condemnation. Additionally, Quail Hill sought an order requiring County to change zoning of the subject property from RS-1 to RU. Alternatively, Quail Hill sought actual damages and attorney's fees and costs.

After filing an Answer to Quail Hill's allegations, County moved for summary judgment as to all causes of action. In opposition to this motion, Quail Hill introduced a printout of the website for the Richland County Development Services Division, where Gosline worked. The website stated in part:

> Since 1997 the department has performed the planning, zoning and land use management staff functions of county government. The department provides principal staff support to the Planning Commission, and Board of Zoning Appeals. Subdivisions, site plans, map amendments, variances, special exceptions and sign permit applications are filed at the Development Services Counter. The Development Services counter is the key point of public contact for the planning and zoning functions of the County. It is the primary information resource of property owners and land use professionals who often need to know "What can and can not [sic] be done with a piece of property."

The site also contained a section of "Frequently Asked Questions." Amongst these questions was the following: "How do I find out how my property is zoned?" The answer states:

> A request for zoning verification of any parcel within the unincorporated area of Richland County can be obtained from: Richland County Planning Development . . . . Please include the current Tax Parcel Number, Street Address, if available, size of tract, or any information that will assist us in locating the correct parcel.

Another question on the site is: "Who should I talk to about Zoning Issues?" The answer lists the Development Services Manager and the Zoning Administrator, and provides a brief explanation that the "staff can informally respond to any concerns or requirements that must be complied with and also inform you of anything that may impact your project."

At the conclusion of the hearing on the summary judgment motion, the circuit court judge ruled in favor of County as to all of Quail Hill's causes of action.[3] In a subsequent written order, the circuit court judge explained his ruling.

In terms of equitable estoppel, the judge prefaced his discussion with the fact that the "Richland County Zoning Ordinances provide that the official zoning map of Richland County constitutes the only official description of the location of zoning district boundaries, and that the zoning administrator is the only representative on behalf of Richland County that can interpret the official zoning map." The judge further noted that zoning ordinances and state law authorize County Council as the only entity that can adopt or amend zoning designations in the County. Additionally, the judge found that neither Gosline nor the Tax Assessor's office had the authority to interpret, alter, or amend the zoning classifications of property, and any such act would clearly be outside the scope of their authority.

As a result, the judge concluded that "equitable estoppel cannot be applied to frustrate Richland County's attempts to enforce its zoning

[3] The Court of Appeals affirmed the grant of summary judgment as to Quail Hill's claim of inverse condemnation. Quail Hill does not challenge that portion of the opinion.

ordinances." The judge further found Quail Hill had the means to acquire knowledge of the zoning designation of the property because the Official Zoning Map and County ordinances are public record; thus, Quail Hill could not claim to have been misled.

As to Quail Hill's causes of action for negligence and negligent misrepresentation, the trial judge found it was well settled that the South Carolina Tort Claims Act (the Act)[4] governs all tort claims against governmental entities and that the Act is the exclusive civil remedy available in an action against a governmental entity or its employees. Based on the Act, the judge concluded that a governmental entity is liable for its torts in the same manner and to the same extent as a private individual under like circumstances.

In view of these rules, the judge concluded that County could be liable for negligence and negligent misrepresentation in enforcing and administering zoning "only if a private person can also be held liable for breach of that same duty under South Carolina law." The judge found the duty of care regarding zoning is a uniquely governmental function with no analogous private counterpart.

The judge further held that sections 15-78-40 and 15-78-50(b) of the Act, by their express language, "do not allow for tort liability in this action." Based on this reasoning, the judge concluded that to allow Quail Hill to recover would hold County liable for the negligence of its employees where a private person could not be held liable under state law. Accordingly, the judge found County's sovereign immunity had not been waived.

As an additional basis for granting summary judgment, the judge found that County would be immune from liability under section 15-78-60(4) of the Act "for any compliance, enforcement or failure to enforce" the applicable zoning ordinances. Based on the language of the statute, the judge concluded that County was entitled to absolute sovereign immunity for its compliance or enforcement of its zoning

[4] S.C. Code Ann. §§ 15-78-10 to -220 (2005 & Supp. 2009).

ordinances, which included the designations on the Official Zoning Map. The judge also found County could not be liable for failing to adopt or enforce an RU zoning classification on the property.

Finally, the judge found Quail Hill's claims for negligence and negligent misrepresentation failed because Quail Hill "with the exercise of reasonable diligence could have acquired knowledge as to the zoning of the subject property from the public record and cannot claim to have been misled."

Quail Hill appealed the circuit court judge's order to the Court of Appeals. In a divided opinion, the Court of Appeals affirmed in part[5] and reversed in part the decision of the circuit court judge. Quail Hill, LLC v. County of Richland, South Carolina, 379 S.C. 314, 665 S.E.2d 194 (Ct. App. 2008).

With respect to Quail Hill's causes of action for negligence and negligent misrepresentation, the majority of the Court of Appeals concluded that the circuit court judge erred in granting summary judgment. Id. at 323, 665 S.E.2d at 199. Although the majority acknowledged there is federal authority to support the circuit court judge's resolution of this issue,[6] it noted that the Court of Appeals' decision relied on by the circuit court judge had recently been

[5] Initially, the Court of Appeals rejected Quail Hill's challenges regarding the validity of County's zoning ordinances and the circuit court judge's grant of summary judgment as to Quail Hill's claim for inverse condemnation. Because Quail Hill has not appealed these findings, we have not included the Court of Appeals' analysis regarding these issues.

[6] Specifically, the Court of Appeals referenced the case relied upon by the circuit court judge. United States v. Olson, 546 U.S. 43, 43 (2005) (interpreting Federal Tort Claims Act and holding United States waives sovereign immunity under circumstances where local law would make a "private person" liable in tort, not where local law would make state or municipal entity liable even where uniquely governmental functions are at issue).

reversed.[7] Thus, the majority found there was no South Carolina precedent to support the circuit court's determination that "it is necessary to have a private analogue in order for liability to exist against a governmental entity under the South Carolina Tort Claims Act." Id. at 323, 665 S.E.2d at 198. The Court of Appeals declined, "at this premature stage of the litigation," to hold that Quail Hill could not pursue its claims for negligence and negligent misrepresentation based on the provisions of the South Carolina Tort Claims Act. Id.

Additionally, the Court of Appeals viewed Quail Hill's claims for negligence and negligent misrepresentation as arising from County's actions in mistakenly advising Quail Hill regarding the applicable zoning restriction on the subject property, not as emanating from the adoption or the enforcement of County's zoning ordinances. Based on this reasoning, the Court of Appeals held the circuit court judge erred in finding section 15-78-60(4) of the Act, which grants a municipal entity sovereign immunity for the adoption or enforcement of an ordinance, barred Quail Hill's claims. Id. at 323, 665 S.E.2d at 199.

In terms of Quail Hill's equitable estoppel claim, the Court of Appeals found the circuit court judge erred in granting summary judgment to County. In reaching this conclusion, the Court of Appeals cited and analyzed the three elements of estoppel.

Initially, the Court of Appeals addressed whether Quail Hill lacked the knowledge to discover the correct zoning classification of the property. Id. at 324-25, 665 S.E.2d at 199. The Court of Appeals held the circuit court judge's finding as to whether Price, the Zoning Administrator, was the only person who could interpret the official zoning map "ignores the clear import of the County's website which

[7] Sloan Constr. Co. v. Southco Grassing, Inc., 368 S.C. 523, 629 S.E.2d 372 (Ct. App. 2006), rev'd, 377 S.C. 108, 659 S.E.2d 158 (2008) (concluding Court of Appeals erred in finding subcontractor's claims for negligence and breach of contract under Suppliers' Payment Protection Act (SPPA) did not give rise to a private right of action against the South Carolina Department of Transportation pursuant to statutory bond requirements; noting the Act was not relevant to the government's liability for failure to comply with a duty under the SPPA).

directs the public to the Development Services Counter as 'the primary information resource of property owners and land use professionals'" to determine "'[w]hat can and can not [sic] be done with a piece of property.'" Id. The court also referenced the "Frequently Asked Questions" portion of the website that advised the public to check the zoning of a parcel prior to its development by consulting with the Department of Development Services, and suggested that it is advisable to meet with the Planning Staff to discuss any upcoming projects. The court further emphasized that nowhere on the website did it state that the Official Zoning Map must be consulted to determine a property's correct zoning designation. Id.

Based on this reasoning, the court concluded a genuine issue of material fact existed as to whether Quail Hill possessed the knowledge or the means to acquire the knowledge concerning the true zoning of this property. Id. at 325, 665 S.E.2d at 199. The court also instructed that both parties would have the opportunity to develop evidence on the issue of whether or not the Official Zoning Map in Richland County is the exclusive means for acquiring zoning information. Id. at 325, 665 S.E.2d at 199-200.

In terms of justifiable reliance, the court noted that Quail Hill purchased the parcel, then surveyed, platted and prepared it for development based on information conveyed by County's staff. Id. at 326, 665 S.E.2d at 200. In view of this evidence, the court held a genuine issue of material fact existed as to whether Quail Hill's reliance on the representations of County officers and staff, acting within their proper scope of authority, was justified. Id.

ISSUES

We granted County's petition for a writ of certiorari to review the following issues:

1. Did the Court of Appeals err in failing to apply prior precedent from the Supreme Court and in concluding that the

government cannot be estopped for mistaken statements of law?

2. Did the Court of Appeals err in failing to apply long-standing principles in this state limiting the use of equitable estoppel to thwart the police power where an unauthorized person provides erroneous information?

3. Did the Court of Appeals err in reversing summary judgment on the negligence and negligent misrepresentation causes of action where those claims are premised entirely on misstatements of law upon which Quail Hill had no justifiable right to rely?

4. Did the Court of Appeals err in declining to rule on County's sovereign immunity defense based upon the application of sections 15-78-40 and 15-78-50(b) of the Act and also in failing to affirm summary judgment on the basis of sovereign immunity?

DISCUSSION

I. Standard of Review

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment "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 a judgment as a matter of law." Rule 56(c), SCRCP.

"In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Pye v. Estate of Fox, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56, SCRCP.

Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." Id. at 378, 534 S.E.2d at 692.

II. Equitable Estoppel

County generally argues the Court of Appeals erred in finding there existed any genuine questions of material fact with respect to Quail Hill's cause of action for equitable estoppel. In support of this argument, County raises two claims.

First, relying on this Court's decision in Greenville County v. Kenwood Enterprises, Inc., 353 S.C. 157, 577 S.E.2d 428 (2003), overruled on other grounds by Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005), and the Court of Appeals' decision in Morgan v. South Carolina Budget and Control Board, 377 S.C. 313, 659 S.E.2d 263 (Ct. App. 2008), County avers that administrative officers of a governmental entity cannot estop that entity through mistaken statements of law. Because the zoning designation of a particular piece of property is established by ordinance and governed by the Official Zoning Map, it constitutes a matter of law. In turn, a zoning designation may be changed only through legislative action by the Richland County Council. Thus, any misrepresentation by a County official is a mistaken statement of law that cannot subject the governmental entity to estoppel. Furthermore, given Quail Hill could have consulted the Official Zoning Map and related ordinances, but failed to do so, it cannot establish estoppel.

Secondly, County asserts equitable estoppel does not apply given the incorrect zoning information was provided by Gosline and the Tax Assessor's Office, neither of which were authorized to provide zoning information. Because the County Zoning Administrator was the only authorized person to provide this information, County contends Quail Hill was not justified in its reliance on information furnished by unauthorized staff members. Additionally, given Quail Hill could have

with reasonable diligence acquired the correct zoning of the property by consulting the Official Zoning Map or contacting the Zoning Administrator, it cannot assert estoppel against County.

"As a general rule, estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy." Kenwood Enters., 353 S.C. at 171, 577 S.E.2d at 435. This Court has explained:

> No estoppel can grow out of dealings with public officers of limited authority, and the doctrine of equitable estoppel cannot ordinarily be invoked to defeat a municipality in the prosecution of its public affairs because of an error or mistake of . . . one of its officers or agents . . . .
> . . . .
> A governmental body is not immune from the application of the doctrine of estoppel *where its officers or agents act within the proper scope of their authority* . . . The public cannot be estopped, however, by the unauthorized or erroneous conduct **or** statements of its officers or agents which have been relied on by a third party to his detriment.

DeStefano v. City of Charleston, 304 S.C. 250, 257-58, 403 S.E.2d 648, 653 (1991) (citations omitted)(emphasis added). Furthermore, "'administrative officers of the state cannot estop the state through mistaken statements of law.'" Kenwood Enters., 353 S.C. at 172, 577 S.E.2d at 436 (quoting Kelso & Irwin, P.A., v. State Ins. Fund, 997 P.2d 591, 599 (Idaho 2000)). Specifically, "[e]stoppel will not lie against a government entity where a government employee gives erroneous information in contradiction of statute. Simply stated, equity follows the law." Morgan, 377 S.C. at 319, 659 S.E.2d at 267 (citations omitted).

If estoppel is applicable against a government agency, a relying party must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in

position. Grant v. City of Folly Beach, 346 S.C. 74, 80, 551 S.E.2d 229, 232 (2001).

For reasons that will be discussed, we believe the Court of Appeals erred in reversing the circuit court's grant of summary judgment to County as to Quail Hill's claim of equitable estoppel.

Initially, to estop County from enforcing the RS-1 zoning classification would be in direct contravention of the general rule that a governmental entity may not be estopped by the unauthorized or erroneous conduct or statements of its officers or agents. Here, neither Gosline nor the Tax Assessor's office was authorized to interpret or alter the zoning classification designated on the Official Zoning Map. Notably, Gosline did not work for the Zoning Administrator, and his zoning information was "fed" through the Tax Assessor's office and not that of the Zoning Administrator. Pursuant to the Richland County ordinances, the only authorized County employee was the Zoning Administrator.[8] There is no evidence that Quail Hill consulted the Zoning Administrator prior to its purchase and subsequent development of the property at issue. Because the erroneous zoning information relied on by Quail Hill was conveyed by unauthorized individuals, the doctrine of equitable estoppel may not, as a matter of law, be invoked against County.

Furthermore, we disagree with the Court of Appeals' finding that the statements on the Richland County website created a genuine issue of material fact. Although the website language states that the Development Services counter is the "primary information resource of property owners and land use professionals," there is no evidence that Quail Hill relied on these statements. More importantly, the statements cannot supersede what is authorized by the Richland County ordinances. Significantly, the website states that Planning Staff can "*informally* respond to any concerns or requirements that must be complied with and also inform you of anything that may impact your

[8] Richland County, S.C., Code art. 3, § 26-34; art. 11, § 26-502 (2005).

project." (Emphasis added). The site also directs interested persons to the online Richland County zoning code.

A decision to affirm the circuit court judge's grant of summary judgment to County on this claim is consistent with our state's jurisprudence regarding the applicability of the doctrine of equitable estoppel to a government entity. See DeStefano, 304 S.C. at 257-58, 403 S.E.2d at 653 (finding City was not estopped from refusing to issue building permits even though Deputy City Engineer and Zoning Administrator made errors which led to the recording of citizen's plat); McCrowey v. Zoning Bd. of Adjustment of the City of Rock Hill, 360 S.C. 301, 306, 599 S.E.2d 617, 620 (Ct. App. 2004) (holding doctrine of equitable estoppel was not applicable to City where Zoning Administrator erroneously issued a certificate of zoning compliance given Zoning Administrator "did not have the authority to alter or waive the zoning ordinance in question" and "equitable estoppel could not be applied to frustrate the attempts by [City] to enforce its zoning code as written"); see also Am. Legion Post 15 v. Horry County, 381 S.C. 576, 674 S.E.2d 181 (Ct. App. 2009) (concluding County was not estopped from raising statute of limitations against non-profit corporations seeking refunds of fees where corporations paid fees based on County employee's conduct that was in contradiction of a statute); Morgan, 377 S.C. at 319-22, 659 S.E.2d at 267-68 (holding Retirement Systems was not estopped from calculating the cost of plaintiff's service credit using his current, career-high salary even though Retirement Systems' misinformation and delays prevented plaintiff from completing his purchase before his salary increase given eligibility to purchase service credit is purely statutory and, thus, Retirement Systems lacked authority to contradict the statute).

More importantly, we agree with County's argument that the RU zoning classification was a mistaken statement of law and, thus, could not be used to estop County from enforcing it. Cf. Kenwood Enters., 353 S.C. at 173, 577 S.E.2d at 436 (concluding County was not estopped from enforcing zoning ordinance where County official's representations regarding the constitutionality of the subject ordinance was an "erroneous statement of the law"); see Meyer v. Santema, 559

N.W.2d 251, 255 (S.D. 1997) (recognizing that misrepresentations regarding interpretation and implementation of a zoning ordinance constitute misrepresentations of matters of law).

Alternatively, even if the doctrine of estoppel were applicable to County in the instant case, we find Quail Hill failed to establish the requisite elements.

Admittedly, Quail Hill experienced a prejudicial change of position due to the erroneous zoning information. However, Quail Hill had the "means of knowledge" to determine the correct zoning classification and could not justifiably rely solely on information provided by staff members. There is no evidence that Brown, an experienced real estate broker,[9] ever examined the publicly-accessible zoning map or consulted with anyone other than Gosline to determine the zoning classification. See Grant, 346 S.C. at 82, 551 S.E.2d at 233 (holding City, which had issued erroneous building permits, was not estopped from enforcing zoning ordinance where building owner could have easily ascertained flood limitations on his building by reviewing the zoning/flood ordinance); cf. Abbeville Arms v. City of Abbeville, 273 S.C. 491, 257 S.E.2d 716 (1979) (holding City was estopped from denying building permit on basis of corrected zoning after discovering the zoning map had been made up defectively given developer checked the zoning ordinance, including the Official Zoning Map, and received written confirmation from the City Zoning Administrator).

III. Negligence/Negligent Misrepresentation

For several reasons, County contends the Court of Appeals erred in reversing the grant of summary judgment as to Quail Hill's claims for negligence and negligent misrepresentation. We agree with each of County's arguments.

As a threshold matter, County claims the negligence claim should be treated solely as a cause of action for negligent misrepresentation

[9] Significantly, Quail Hill's pleadings characterize Brown as "experienced in the development of manufactured home subdivisions."

because the crux of Quail Hill's complaint is that County furnished erroneous information regarding the subject property's zoning.

Next, County asserts the Court of Appeals failed to address the fact that Quail Hill did not present any evidence to support its negligent misrepresentation claim. Specifically, County contends Quail Hill could not have justifiably relied on a mistaken representation regarding the proper zoning classification. County avers that a misrepresentation as to the correct zoning status is not actionable given the zoning of the property was a legal issue, not a factual issue, and claims for negligent misrepresentation cannot be based on mistaken statements of law. Finally, County contends Quail Hill could have discovered the proper zoning classification had it exercised reasonable diligence.

We agree with County that Quail Hill's claims of negligence and negligent misrepresentation should be treated as solely one for negligent misrepresentation. Notably, the circuit court judge and the Court of Appeals did not address these two claims in seriatim, but instead merely ruled on the negligent misrepresentation cause of action. Although pled separately, we find Quail Hill's claim for negligence is essentially subsumed in the negligent misrepresentation cause of action.

To prove a claim for the common law tort of negligent misrepresentation, Quail Hill was required to establish the following elements:

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

West v. Gladney, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000).

"There is no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence." AMA Mgt. Corp. v. Strasburger, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992). "[W]hile issues of reliance are ordinarily resolved by the finder of fact, 'there can be no reasonable reliance on a misstatement if the plaintiff knows the truth of the matter.'" McLaughlin v. Williams, 379 S.C. 451, 457-58, 665 S.E.2d 667, 671 (Ct. App. 2008) (quoting Gruber v. Santee Frozen Foods, Inc., 309 S.C. 13, 20, 419 S.E.2d 795, 800 (Ct. App. 1992)). "Thus, if the undisputed evidence clearly shows the party asserting reliance has knowledge of the truth of the matter, there is no genuine issue of material fact." Id. at 458, 665 S.E.2d at 671. A determination of justifiable reliance involves the evaluation of the totality of the circumstances, which includes the positions and relations of the parties. West, 341 S.C. at 134, 533 S.E.2d at 337.

Turning to the facts of the instant case, we disagree with the Court of Appeals that there exists a genuine issue of material fact with respect to Quail Hill's claim for negligent misrepresentation. We find this claim is controlled by the question of whether Quail Hill could have justifiably relied on the representations of County staff. As previously stated, Quail Hill could have reviewed the Official Zoning Map to ascertain the correct zoning classification. Moreover, given the fact that Brown, as the agent of Quail Hill, was an experienced real estate broker, it would be difficult to conclude that his reliance solely on the statements of Gosline and the Tax Assessor's records was reasonable.

Furthermore, there is authority to support County's contention that misrepresentations as to matters of law are not actionable. See, e.g., Meyer v. Santema, 559 N.W.2d 251, 255 (S.D. 1997) (affirming grant of summary judgment to City as to purchasers' cause of action for negligent misrepresentation stemming from erroneous representations regarding zoning given the misrepresentation involved a matter of law

and "county officials may not be held liable in damages when they negligently misrepresent the legal requirements of their zoning ordinance to members of the public who rely on that misrepresentation").

In view of our conclusion that Quail Hill's negligence/negligent misrepresentation claim fails as a matter law, we need not address County's remaining argument regarding immunity under the Tort Claims Act.

CONCLUSION

Because there is no challenge to the Court of Appeals' decision affirming the grant of summary judgment regarding Quail Hill's claim of inverse condemnation and the validity of the County's zoning ordinances, we affirm those portions of the opinion. We reverse, however, the Court of Appeals' decision regarding Quail Hill's claims of equitable estoppel, negligence, and negligent misrepresentation.

AFFIRMED IN PART AND REVERSED IN PART.

TOAL, C.J., KITTREDGE, J., and Acting Justice James E. Moore, concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sea Cove Development, LLC, Appellant,

v.

Harbourside Community Bank and Harbourside Mortgage Company, Respondents.

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

Opinion No. 26789
Heard February 4, 2010 – Filed March 22, 2010

AFFIRMED

W.H. Bundy, Jr. and M. Brent McDonald, both of Smith, Bundy, Bybee & Barnett, of Mt. Pleasant, for Appellant.

Ehrick K. Haight, Jr. and Philip J. Rios, both of Minor Haight & Arundell, of Hilton Head, for Respondents.

JUSTICE BEATTY: Sea Cove Development, LLC (Sea Cove) brought this action for breach of contract and promissory estoppel against

Harbourside Community Bank and Harbourside Mortgage Company (Harbourside) after its loan application was denied.[1] The circuit court granted summary judgment to Harbourside, finding Sea Cove's claims were barred by S.C. Code Ann. § 37-10-107 (2002), commonly referred to as the lender statute of frauds, which prohibits certain legal and equitable actions arising out of the loan of money where there is no writing evidencing the parties' alleged agreement. Sea Cove appeals, challenging the constitutionality of section 37-10-107 and its application here. We affirm.

I. FACTS

The facts, in the light most favorable to Sea Cove, are as follows.[2] Sea Cove is a limited liability company formed by Robert J. Lohman and Grant P. Evans in December 2003. On or about February 17, 2006, Sea Cove entered into a contract to purchase property at 21 Jacana Street on Hilton Head Island for $1.45 million. Sea Cove intended to replace the existing home on the property with a beach house that it hoped to sell for over $3 million. The closing date for the purchase was set for May 17, 2006.

Loan Application Process

In February 2006, Sea Cove (with Lohman and Evans acting as personal guarantors) applied for a $2.4 million, twelve-month, speculative construction loan from Harbourside to finance the purchase of the property and the anticipated construction. Harbourside was already the lender for Sea Cove on another project on Hilton Head Island. Harbourside was aware of the proposed closing date for the property.

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[1] References in the record indicate Harbourside Community Bank was formerly known as Harbourside Mortgage Company.

[2] On appeal from an order granting summary judgment, the evidence and all reasonable inferences should be viewed in the light most favorable to the non-moving party. Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 673 S.E.2d 801 (2009).

By identical letters dated February 24, 2006, Harbourside wrote separately to Lohman and to Evans, advising them that they were "conditionally qualified for the mortgage loan" and that "[t]his prequalification will expire on May 15, 2005 [sic] and your interest rate will float until closing documents are prepared or you contact your Loan Officer to lock your interest rate by executing a Rate Lock Agreement."

Harbourside further advised that the prequalification was subject to (1) receipt of all necessary documentation verifying the information upon which the conditional qualification was based, (2) a satisfactory appraisal, and (3) clear title. Harbourside noted that additional information could be required before final approval. The letters were signed by Ed Brown, who identified himself as Harbourside's president.

A loan processor with Harbourside, Kristen Toho, subsequently sent Lohman a "Conventional Loan Pre-Approval Needs List" on March 7, 2006, which listed specific items that needed to be submitted or verified, such as documents verifying income. The notice included the following statement: "These Verification Requirements are needed to complete the full approval process for this loan. Any delays in returning the requested documents in their entirety may delay your loan closing." Lohman sent the requested information to Harbourside the same day.

On March 12, 2006, Evans signed a one-page "Application Disclosure" provided by Harbourside, which informed him of an "appraisal and credit report fee" and noted: "Any responses to the applicant's inquiries DO NOT constitute a commitment to make a mortgage nor do they constitute guarantee of any terms of the mortgage loan."

According to Evans, on the day before the scheduled closing date for purchase of the property, he contacted Harbourside to determine the status of the loan and was informed that the loan application had been denied. Approximately a week later, Lohman and Evans each received a separate "Statement of Credit Denial, Termination, or Change" from Harbourside dated May 22, 2006, which stated the loan was being denied for the following

reasons: (1) "[i]ncome insufficient for amount of credit requested," and (2) "[e]xcessive obligations in relation to income."

Sandy Harp, formerly the Quality Control and Loan Compliance Manager for Harbourside, confirmed in her affidavit that the loan application was denied due to insufficient income and unfavorable debt to income ratios; further, she stated the loan also would have been denied based on an unsatisfactory appraisal value for the property (consisting of the site plus construction), which was found to be $2.5 million, some $700,000 less than Sea Cove's projected value of $3.2 million.

Sea Cove's Complaint

Sea Cove filed this action for breach of contract and promissory estoppel against Harbourside on November 8, 2007 as a result of Harbourside's denial of the loan application. Sea Cove asserted that it had a loan agreement with Harbourside and that it had forfeited its deposits and incurred expenses based on assurances from Harbourside personnel that the loan had been approved.

Harbourside denied the allegations and moved for summary judgment on three grounds: (1) Sea Cove's claims are barred by section 37-10-107 because there is no required writing evidencing a promise, undertaking, accepted offer, commitment, or agreement between the parties; (2) there is no genuine issue of material fact supporting Sea Cove's claim of a loan commitment by Harbourside; and (3) there is no genuine issue of material fact by which Sea Cove can establish that Harbourside's authority to approve the loan could come from anyone or anything other than the organization's loan committee.

By order filed October 9, 2008, the circuit court granted summary judgment to Harbourside based solely on the first ground, finding as a matter of law that Sea Cove's claims were barred by the provisions of section 37-10-107. The circuit court specifically stated there was no need for it to look beyond the first ground in granting the motion. Sea Cove filed a Rule 59(e),

SCRCP motion to alter or amend the judgment, which the circuit court denied. Sea Cove appeals.

II. STANDARD OF REVIEW

Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted "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 a judgment as a matter of law." Rule 56(c), SCRCP. "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 114, 687 S.E.2d 29, 32 (2009) (citing Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000)).

III. LAW/ANALYSIS

A. Constitutionality of Section 37-10-107

Sea Cove first asserts the circuit court erred in concluding section 37-10-107 is constitutional, arguing the statute violates Article III, section 17 of the South Carolina Constitution.

Article III, section 17 (entitled "One subject") provides that "[e]very Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." S.C. Const. Art. III, § 17. The objectives of Article III, section 17 are "(1) to apprise the members of the General Assembly of the contents of an act by reading the title; (2) to prevent legislative 'log-rolling'; and (3) to inform the people of the State of the matters with which the General Assembly concerns itself." Am. Petroleum Inst. v. South Carolina Dep't of Revenue, 382 S.C. 572, 576, 677 S.E.2d 16, 18 (2009).[3]

[3] "Log rolling" is a term used for the legislative practice of including several propositions in one measure so that the legislature will pass all of them, even though the propositions

"The mandate of the Constitution is complied with if the title states the general subject of [the] legislation, and the provisions in the body of the act are germane thereto as means to accomplish the objects expressed in the title." Poulnot v. Cantwell, 129 S.C. 171, 177, 123 S.E. 651, 653 (1924) (citation omitted).

"Article III, § 17 does not preclude the legislature from dealing with several branches of one general subject in a single act." Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 102 (1996). "It is complied with if the title of an act expresses a general subject and the body provides the means to facilitate accomplishment of the general purpose." Id. at 87, 470 S.E.2d at 102.

Article III, section 17 is to be liberally construed so as to uphold an act if practicable, and doubtful or close cases are to be resolved in favor of upholding the act's validity. Giannini v. South Carolina Dep't of Transp., 378 S.C. 573, 585, 664 S.E.2d 450, 456 (2008). However, it should not be construed so liberally as to foster the abuses that its provisions are designed to prevent. Maner v. Maner, 278 S.C. 377, 382, 296 S.E.2d 533, 536 (1982).

In this case, Sea Cove contended section 37-10-107 violates Article III, section 17 because, although the statute is in the Consumer Protection Code, it has no relation to protecting consumers and is really a statute of frauds provision that protects banks.

Section 37-10-107 precludes certain actions regarding loans for money where there is no writing evidencing the alleged promise or agreement. It provides in relevant part:

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might not have passed if they had been submitted separately. Id. at 577, 677 S.E.2d at 18 (citing Black's Law Dictionary 849 (7th ed. 1999)).

(1) No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:

(a) to lend or borrow money;

(b) to defer or forbear in the repayment of money; or

(c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.

(2) Failure to comply with subsection (1) precludes an action or defense based on any of the following legal or equitable theories:

(a) an implied agreement based on course of dealing or performance or on a fiduciary relationship;

(b) promissory or equitable estoppel;

(c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or

(d) negligent misrepresentation.

S.C. Code Ann. § 37-10-107 (2002) (emphasis added). Subsection (3) of the statute further provides for certain exclusions, stating the statute does not apply to, among other things, personal loans and lines of consumer credit:

(3) Subsections (1) and (2) do not apply to:

(a) a loan of money used primarily for personal, family, or household purposes;

(b) an agreement or change in the terms of an agreement relating to a line of consumer credit, lender credit card, or similar arrangement;

(c) an overdraft on a demand deposit or other bank account; or

(d) promissory notes, real estate mortgages, security agreements, guaranty and surety agreements, and letters of credit.

Id. § 37-10-107(3).

The circuit court found section 37-10-107 is not constitutionally defective, explaining the statute protects consumers seeking personal loans as well as small commercial borrowers because they are exempted from its provisions:

> The writing requirement of the statute applies in situations involving larger commercial loans and subsection (3) clearly excludes loans for personal, family or household use. Subsection (1) (c) even protects commercial borrowers of less than $50,000.00 as it protects consumers. The topic or body of this statute has a legitimate and direct association with the title 'Consumer Protection' and the provisions are germane to one subject. Additionally, the contents comport with the liberally construed purposes, rules of construction and underlying policies of the South Carolina Consumer Protection Code. See S.C. Code Ann. § 37-1-102.

On appeal, Sea Cove argues the exclusion of consumer loans from the statute is not related to the subject of consumer law and therefore the statute should not be located in the Consumer Protection Code. Sea Cove asserts the present case involves a business and a bank so there are no consumers, and if it or other business owners "wished to apprise themselves of the legal rights or equitable rights they were relinquishing by doing business with a bank in the state of South Carolina, they could not look to the S.C. Code section on Banks or Banking or the S.C. Code section on the statute of frauds." Therefore, the statute is unconstitutional as violative of Article III, section 17.

In contrast, Harbourside maintains the "statute has a legitimate and direct association with the Consumer Protection Code and the provisions are closely akin to one subject." Harbourside notes "[t]he words 'consumer credit' are even used in subsection (3) of the statute" and "the statute is closely related to the subject of consumer protection in credit transactions."

As noted above, Article III, section 17 is to be liberally construed so as to uphold a challenged provision if at all possible, and the constitutional requirement "is complied with if the title of an act expresses a general subject and the body provides the means to facilitate accomplishment of the general purpose." Keyserling, 322 S.C. at 87, 470 S.E.2d at 102.

Moreover, "Article III, section 17 requires that an act must relate to but one subject, with topics in the body of the act being kindred in nature and having a legitimate and natural association with the subject of the title and that the title of an act convey reasonable notice of the subject matter to the legislature and the public." Westvaco Corp. v. South Carolina Dep't of Revenue, 321 S.C. 59, 64, 467 S.E.2d 739, 741 (1995).

Section 37-10-107 is entitled, "Certain legal or equitable actions prohibited." This gives reasonable notice of the subject matter of the act—the prohibition of certain causes of action, and the text of the statute goes on to specify the instances where a writing is required to litigate an action regarding a loan of money. Although Sea Cove raises a valid concern about

the placement of the statute in the Consumer Protection Code, we agree with the circuit court's reasoning that the statute touches upon consumer issues and, applying a liberal construction, it should be upheld.

The statute protects consumers because it excludes from its ambit personal and household loans, as well as small commercial borrowers with loans of less than $50,000. In addition, subsection (3) of the statute further references "consumer credit" in the portion stating the statute does not apply to "an agreement or change in the terms of an agreement relating to a line of consumer credit, lender credit card, or similar arrangement[.]" S.C. Code Ann. § 37-10-107(3)(b). Thus, consumers are properly made aware of this provision by its inclusion in the Consumer Protection Code.

Many states have now enacted such lender liability limitation provisions, either as amendments to their existing statutes of frauds or as a new statute barring the enforcement of oral lending agreements in the absence of a signed writing. See John L. Culhane, Jr., Lender Liability Limitation Amendments to State Statutes of Frauds, 45 Bus. Law. 1779 (1990) (discussing the implementation of lender statutes of frauds). The language in South Carolina's statute is based directly on the Model Lender Liability Limitation Statute prepared by the Joint Task Force of the Committees on Consumer and Commercial Financial Services. See id. at 1792 (reviewing the provisions of the model statute).

South Carolina's statute, section 37-10-107, is essentially a statute of frauds. Although the legislature did not choose to make this provision an amendment to an existing statute of frauds, this so-called lender statute of frauds is within an area, the Consumer Protection Code, that is calculated to apprise those who are seeking loans of the effects of the writing requirement, and its inclusion in this area is not aberrational. It touches upon consumer issues as it protects consumers seeking personal loans as well as small commercial borrowers by exempting these classes of borrowers from having to meet the statutory requirement. Further, the title gives reasonable notice of its contents, and any reasonable doubts as to its constitutionality should be resolved in favor of upholding the provision. Accordingly, we affirm the

circuit court's determination on this point and hold that Sea Cove has not clearly established that section 37-10-107 violates Article III, section 17. See Westvaco Corp., 321 S.C. at 62-63, 467 S.E.2d at 741 (stating "[a] legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the constitution").

B. Application of Section 37-10-107

Sea Cove next asserts that, even if section 37-10-107 is deemed constitutional, the circuit court erred in applying it here to preclude its claims. Sea Cove maintains Harbourside's February 24, 2006 letters, which advised Sea Cove's members that they were "prequalified" for a loan, contain all of the material terms of the loan agreement and they were signed by Harbourside's president; therefore, the letters should be deemed to comply with the writing requirement of section 37-10-107 or should, "[a]t the very least," create a jury question on this issue.

Harbourside argues that none of the documents or writings submitted to the circuit court in this matter, including the February 24, 2006 letters, "contain any indication of a promise . . . or agreement between the parties as required by the legislature under S.C. Code Ann. § 37-10-107"; therefore, the circuit court's order granting summary judgment was proper.

Section 37-10-107 provides in relevant part that no person may maintain an action for failure to perform an alleged promise or agreement to loan money in excess of $50,000 unless the party bringing the action "has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing." S.C. Code Ann. § 37-10-107(1)(c).

The circuit court found Sea Cove's claims were subject to the writing requirement of section 37-10-107 because its members sought a loan from Harbourside for an amount in excess of $50,000. The circuit court observed

that, except for the constitutionality challenge made by Sea Cove, the applicability of section 37-10-107 to the alleged agreement was not an issue before the court.

The circuit court observed that none of the documents, writings, and exhibits submitted to the court "contain any indication of a promise, undertaking, accepted offer, commitment or agreement between the parties as contemplated by the legislature within § 37-10-107." The circuit court also found that any alleged oral assurances could not be used to alter the requirement for a writing. The circuit court concluded that there were no genuine issues of material fact regarding Sea Cove's causes of action for breach of contract and promissory estoppel, even when the evidence and its inferences were viewed in the light most favorable to Sea Cove.

Specifically as to the February 24, 2006 prequalification letter, the circuit court found "[t]he letter . . . relied upon by [Sea Cove] clearly states that [Sea Cove] is 'conditionally qualified' for the loan and mortgage. It further provides that 'this prequalification' is 'subject to' verification and validation of previously supplied information, along with an appraisal and site work. It also expresses that 'additional information' may be needed for final approval." (Citing letter of Brown to Evans dated February 24, 2006). The circuit court noted that "[t]he documents[4] clearly establish that [Sea Cove's] right to receive the loan's proceeds had not vested" and that "this is not the requisite foundation as contemplated by the legislature."

We agree with the circuit court that the February 24, 2006 letters indicated that the loan was not guaranteed and, further, none of the documents submitted to the circuit court show that Sea Cove had obtained Harbourside's final approval for the loan. For example, in the February 24,

[4] The circuit court also referred in passing to Lohman's affidavit, stating it "does not show that the requirements of a written agreement under S.C. Code Ann. § 37-101-107 were met for invoking judicial involvement over the two alleged causes of action." To the extent Sea Cove's brief can be read to challenge this finding, we find no error and agree with the circuit court that none of the documents submitted by Sea Cove satisfy the requirement for a writing under the statute.

2006 letters, Harbourside specifically stated the loan was "subject to" additional verification and had not yet been finally approved:

> This prequalification, which is based on the information you have provided to us, is **subject to** receipt of all necessary documentation to verify and validate the information upon which this conditional qualification was based, satisfactory appraisal, and clear title. There may be additional information needed for final approval, and you will be contacted by your Loan Officer or Loan Processor.

We hold Sea Cove has not shown that the documents satisfy the writing requirement of section 37-10-107 or that they create a genuine issue of material fact in this regard.

IV. CONCLUSION

Although it is unfortunate for Sea Cove that its loan application was denied, it was Sea Cove's responsibility to secure final approval for the loan before attempting to proceed with a closing date on the property. The fact that the seller or any other party might have imposed deadlines for closing upon Sea Cove created no legal obligation on the part of Harbourside to accelerate the time it needed for completing the loan evaluation process. Sea Cove has not shown that section 37-10-107 is unconstitutional, nor has it presented a genuine issue of material fact that would indicate application of the statute was inappropriate in this case. Accordingly, we affirm the circuit court's order granting summary judgment to Harbourside.

AFFIRMED.[5]

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[5] To the extent Sea Cove additionally asserts the circuit court erred in failing to find section 37-10-107 does not apply to an action for breach of contract and in failing to find genuine issues of material fact existed regarding whether an agreement to loan money was reached between the parties and whether Harbourside's president and loan officers had the authority to enter into a loan agreement, we find these issues are not properly before us because they were not preserved. The circuit court ruled solely on Harbourside's first ground for summary judgment, the application of section 37-10-107

TOAL, C.J., KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

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and the lack of any writings evidencing a promise or agreement to make a loan and, having affirmed, we agree with the circuit court that its ruling on this ground is dispositive of the matter. See, e.g., Johnson v. Sonoco Prods. Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider."); South Carolina Dep't of Soc. Servs. v. Lisa C., 380 S.C. 406, 414-15, 669 S.E.2d 647, 652 (Ct. App. 2008) (stating a contemporaneous objection is required to preserve an issue for appellate review); cf. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James L. Foti, Respondent.

Opinion No. 26790
Submitted January 25, 2010 – Filed March 22, 2010

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and William C. Campbell, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

James L. Foti, Pro Se, of North Charleston.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a confidential admonition or a public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent failed to complete and report the required Continuing Legal Education hours for the 2008 reporting year. He was administratively suspended by the Commission on Continuing Legal Education on April 2, 2009. See Rule 419(c), SCACR. On or about April 9, 2009, a CLE report was filed with the Commission on respondent's behalf. Respondent resumed the practice of law on April 14, 2009. However, on April 29, 2009, respondent read an email notice from the Commission, which had been sent some days earlier, informing him that he had not completed the required number of CLE hours. Respondent did not complete and submit the required number of CLE hours until April 29, 2009. Respondent conducted at least twenty-two real estate closings from April 14, 2009 through April 29, 2009, while he was administratively suspended from the practice of law. Respondent was reinstated on April 30, 2009.

We note that in 2006 and 2008, respondent was placed on administrative suspension pursuant to Rule 419, SCACR, for failing to comply with CLE requirements.

Law

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 5.5(a) ("A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so."); Rule 8.4(a)(it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); and Rule 8.4(d)(it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent further admits his misconduct constitutes grounds for discipline under Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. Respondent shall, within thirty days of the date of this order, pay $5.71, which represents the costs incurred by the Office of Disciplinary Counsel and the Commission on Lawyer Conduct in the investigation and prosecution of this matter.

PUBLIC REPRIMAND.

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

The Supreme Court of South Carolina

In re: Amendments to the South Carolina Appellate Court Rules

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O R D E R

The Office of Commission Counsel has proposed several amendments to the Rules for Lawyer Disciplinary Enforcement and the Rules for Judicial Disciplinary Enforcement. First, Commission Counsel seeks amendments to Rule 14(c), RLDE, Rule 413, SCACR, and Rule 14(c), RJDE, Rule 502, SCACR, to provide a default method for service of formal charges where an attorney or judge cannot be located. Provided the lawyer or judge is served by registered or certified mail at his or her last known address and at the address the lawyer or judge provided to the South Carolina Bar in accordance with Rule 410(e), SCACR, if those addresses differ, we agree this method of service is proper. We also remind the Bench and Bar that, pursuant to Rule 410(e), all members are required to provide the South Carolina Bar with any change of address within ten days of such change.

Second, Commission Counsel seeks amendments to Rule 26(d), RLDE, Rule 413, SCACR, and Rule 26(d), RJDE, Rule 502, SCACR, to extend the time a hearing panel has to forward formal charges to the Court

from thirty to sixty days. Commission Counsel states this amendment is necessary so that parties have an opportunity to provide a hearing panel with proposed findings and/or legal memoranda to aid the panel in making a decision.

Finally, Commission Counsel seeks an amendment to Rule 31(b)(1), RLDE, Rule 413, SCACR. This amendment permits the Chair or Vice Chair of the Commission on Lawyer Conduct to issue orders compelling suspended or disbarred lawyers to cooperate with attorneys appointed to protect clients' interests. Currently, only an investigative panel has the power to issue such orders; however, investigative panels only meet once per month. The failure to promptly act in some cases could result in harm to clients.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend the South Carolina Appellate Court Rules as set forth in the attachment to this Order. The amendments are effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

March 22, 2010

Amendments to the Rules for Lawyer Disciplinary Enforcement and the Rules for Judicial Disciplinary Enforcement

RLDE (Rule 413, SCACR):

RULE 14
TIME, SERVICE AND FILING

. . .

(c) Service. Service upon the lawyer of formal charges in any disciplinary or incapacity proceedings shall be made by personal service upon the lawyer or the lawyer's counsel by any person authorized by the chair of the Commission, or by registered or certified mail, return receipt requested, to the lawyer's last known address. If service cannot be so made, service shall be deemed complete when deposited in the U.S. Mail, provided the formal charges were sent by registered or certified mail, return receipt requested, to the address the lawyer provided to the South Carolina Bar pursuant to Rule 410(e), SCACR, and to the lawyer's last known address, if those addresses differ. Service of all other documents shall be made in the manner provided by Rule 262(b), SCACR.

RULE 26
HEARING

. . .

(d) Submission of the Report. Within 60 days after the filing of the transcript, the hearing panel shall file with the Supreme Court the record of the proceeding and a report setting forth a written summary, proposed findings of fact, conclusions of law, any minority opinions, and recommendations for dismissal, letter of caution, sanction(s), or transfer to lawyer incapacity inactive status. The hearing panel shall at the same time serve the report upon the respondent and disciplinary counsel.

RULE 31
APPOINTMENT OF ATTORNEY TO PROTECT CLIENTS' INTERESTS WHEN LAWYER IS TRANSFERRED TO INCAPACITY INACTIVE STATUS, SUSPENDED, DISBARRED, DISAPPEARS OR DIES

. . .

(b) Duties of Appointed Attorney. The appointed attorney shall:

(1) Take custody of the lawyer's files and trust or escrow accounts. The chair or vice chair may issue such orders as may be necessary to assist the appointed attorney in obtaining custody over such files and accounts, to include orders compelling the lawyer or a third party to take specific action regarding the files and accounts. The willful failure to comply with such an order may be punished as a contempt of the Supreme Court. A party who wishes to challenge such an order must immediately seek review of the order by petition to the Supreme Court.

RJDE (Rule 502, SCACR):

RULE 14
TIME, SERVICE AND FILING

. . .

(c) Service. Service upon the judge of formal charges in any disciplinary or incapacity proceedings shall be made by personal service upon the judge or the judge's counsel by any person authorized by the chair of the Commission, or by registered or certified mail, return receipt requested, to the judge's last known address. If service cannot be so made, service shall be deemed complete when deposited in the U.S. Mail, provided the formal charges were sent by registered or certified mail, return receipt requested, to the address the judge provided to the South Carolina Bar pursuant to Rule 410(e), SCACR, and to the judge's last known address, if those addresses differ. Service of all other documents shall be made in the manner provided by Rule 262(b), SCACR.

RULE 26
HEARING

. . .

(d) Submission of the Report. Within 60 days after the filing of the transcript, the hearing panel shall file with the Supreme Court the record of the proceeding and a report setting forth a written summary, proposed findings of fact, conclusions of law, any minority opinions, and recommendations for dismissal, letter of caution, sanction(s), transfer to judicial incapacity inactive status, or removal or retirement based on incapacity. The hearing panel shall at the same time serve the report upon the respondent and disciplinary counsel.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Michelle J. Hairston, Appellant,

v.

Kathleen McMillan,
Individually and as Personal
Representative of the Estate of
Normall O. Hudson, Deceased, Respondent.

In Re: Estate of Normall O.
Hudson, Deceased.

Appeal From Horry County
Albert E. Wheless, Special Referee

Opinion No. 4657
Heard February 2, 2010 – Filed March 15, 2010

AFFIRMED

James Thomas Young and John C. Thomas, both of Conway, for Appellant.

Jeffrey E. Johnson and Jarrod M. McPherson, both of Conway, for Respondent.

KONDUROS, J.: Michelle Hairston challenged the validity of her uncle's February 2006 will (the Will) on the grounds he was without testamentary capacity to execute the Will and the Will was the product of undue influence. The special referee found the Will to be valid. Hairston appealed. We affirm.

FACTS

Normall O. Hudson (Decedent) was released from the hospital into home hospice care on Friday, February 24, 2006. At that time, his niece, Michelle Hairston, and her father, Olin Parker, were in town to check on Decedent's condition. Decedent's companion, Kathleen McMillan, and her daughter, Nancy McMillan (Cookie), a health-care worker, were with him. McMillan and Cookie were primarily responsible, along with hospice, for Decedent's care. Hairston and Parker left town on Friday to return home. On Sunday, Cookie telephoned Kathleen Dingle, an attorney, regarding changes to Decedent's will. Dingle testified she spoke to Decedent on the phone, and he indicated he wanted to change his will, making McMillan the sole beneficiary; it had been on his mind.

Dingle went to Decedent's home on Monday and her office assistant accompanied her to serve as witness. Dingle testified Decedent recognized her and was glad to see her. She further testified she asked Cookie and McMillan to leave while they discussed the will, and they went to the garage. According to the notes she dictated at that time, Dingle stated:

> I went through with [Decedent] what his old will said, and he told me he wanted to change it after we

> went through the provisions of it. He told me he wanted to leave everything to Kathleen McMillan. He said it was his decision and his decision only. . . . He knew his address. He knew how long his wife, Lucy[,] had been deceased. He knew who his family members were. He was able to tell me who Olin and Michelle are. . . . I was comfortable with the fact that he knew what he was doing and that he wanted to do it.

The Will effectively revoked Decedent's 2001 will, which left everything to his nieces and nephews. Dingle also prepared that will.

Deposition testimony of Decedent's sister-in-law, Patsy Hudson, revealed she visited him on Sunday. She indicated he seemed lucid, had eaten a small breakfast, and read and understood the newspaper, particularly commenting on the death of actor Don Knotts.

McMillan testified Decedent seemed improved in the few days prior to his death. She admitted to giving him a glass of wine at his request on Friday.[1] She stated she was unaware of Decedent's desire to change his will and he requested Cookie call the attorney. She theorized he may have wanted to leave her assets to help her avoid going into a nursing home as they had discussed their mutual desires to avoid that in the past.

Cookie testified Decedent seemed to improve after his release from the hospital, eating a bit and having conversations. She also testified she did not administer some of the medications issued to him because they were to be administered on an as-needed basis and he did not need them until Monday night. Decedent died on Tuesday.

Dr. William Joel Meggs testified on behalf of Hairston as an expert in toxicology and internal medicine. He reviewed Decedent's medical records

[1] According to Hairston, Decedent frequently drank wine and having wine in the house was not unusual.

from his hospitalization and return home and opined that in his medical opinion, Decedent would not have had the capacity to make a will on February 27, 2006. His opinion was based on the maladies from which Decedent was suffering, which included renal failure, congestive heart failure, cirrhosis of the liver, atherosclerotic heart disease, and cerebral edema. Dr. Meggs further indicated the medicine prescribed for Decedent would have left him susceptible to undue influence, but no records were provided on how that medicine was administered upon his return home. Dr. Meggs also considered Decedent's mental status assessments. On February 24, he was confused with some speech and oriented to person, but not place or time. On February 27, when the will was executed, a social worker reported Decedent was confused when he attempted to provide a life history.[2] The following day of his death, his status was unresponsive.

Hairston testified she was not allowed to talk to Decedent on the telephone from the time she left him on Friday until his death. She also reported McMillan told her upon Decedent's death that she did not need to come; Decedent had left her [McMillan] everything and she was not needed. Hairston filed a petition contesting the Will. The special referee found the Will to be valid, and this appeal followed.

LAW/ANALYSIS

An action to contest a will is an action at law, and in such cases reviewing courts will not disturb the probate court's findings of fact unless a review of the record discloses no evidence to support them. In re Estate of Anderson, 381 S.C. 568, 573, 674 S.E.2d 176, 179 (Ct. App. 2009); Golini v. Bolton, 326 S.C. 333, 338-39, 482 S.E.2d 784, 787 (Ct. App. 1997).

[2] This report also states this was the first day Decedent had exhibited confusion and McMillan and Cookie were attentive and caring.

I. Testamentary Capacity

Hairston contends the special referee erred in finding the Will valid in light of Dr. Meggs's testimony Decedent would not have possessed testamentary capacity at the time of the Will's execution. We disagree.

"[T]he party alleging incompetence bears the burden of proving incapacity at the time of the transaction by a preponderance of the evidence." In re Thames, 344 S.C. 564, 572, 544 S.E.2d 854, 858 (Ct. App. 2001). The test of whether a testator had the capacity to make a will is whether he knew (1) his estate, (2) the objects of his affections, and (3) to whom he wished to give his property. In re Estate of Weeks, 329 S.C. 251, 263, 495 S.E.2d 454, 461 (Ct. App. 1997). "[T]he legal test for determining whether or not a person has sufficient mental capacity to dispose of his property by will does not include the proviso that he must have a reasonable basis on which to found his like or dislike of the natural objects of his bounty." Id. "Further, the capacity to know or understand, rather than the actual knowledge or understanding, is sufficient." Id.

The degree of capacity necessary to execute a will is less than that needed to execute a contract. Id. at 264, 495 S.E.2d at 461. "[E]ven an insane person may execute a will if it is done during a sane interval . . . ." Id. In order to invalidate a will, a testator's insanity should be established at the time of execution, unless the insanity is of a permanent or chronic nature. Gaddy v. Douglass, 359 S.C. 329, 345, 597 S.E.2d 12, 21 (Ct. App. 2004).

"A person may execute a valid will, even if he or she is not competent to transact ordinary, everyday affairs." Speegle v. Oswald, 774 So. 2d 595, 597 (Ala. Civ. App. 2000). "Ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity, though it seems to be quite generally but mistakenly supposed, outside the ranks of the legal profession, that a capacity to transact important business is the criterion of fitness to make a valid will." In re Nelson's Estate, 38 Cal. Rptr. 459, 466-67 (Cal. Ct. App. 1964).

Dr. Meggs testified Decedent was not competent at the time of executing the Will. However, he was not able to examine Decedent personally, but relied on medical records showing Decedent was experiencing some confusion and had been prescribed pain medication. In contrast, Dingle testified at the time of the execution of the Will, Decedent understood the extent of his estate, the potential beneficiaries of his estate, and what he was doing in changing his will. He also recognized Dingle and was able to converse with her in a lucid fashion. Furthermore, the deposition of Hudson reveals Decedent was lucid on Sunday, the date he first spoke with Dingle, ate a small breakfast and read the newspaper. Based on our standard of review, and bearing in mind the somewhat limited requirements for testamentary capacity, evidence in the record supports the special referee's finding Decedent was competent to execute the Will.

II. Undue Influence

Hairston next argues the special referee erred in finding the Will valid because she presented evidence McMillan and Cookie exerted undue influence on Decedent to make the Will. We disagree.

"The mere existence of influence is not enough to void a will as all influences are not unlawful. For influence to vitiate a will, it must destroy free agency and amount to force and coercion." Hembree v. Estate of Hembree, 311 S.C. 192, 196, 428 S.E.2d 3, 5 (Ct. App. 1993). "Circumstances must unmistakably and convincingly point to the substitution of another's will for that of the testator." Id. Evidence of undue influence may include threats, force, restricted visitation, or an existing fiduciary relationship at the time of or before the will's execution." Id. "A contestant must show that the influence was brought directly to bear upon the testamentary act." Mock v. Dowling, 266 S.C. 274, 277, 222 S.E.2d 773, 774 (1976). "General influence is not enough." Id.

The existence of a fiduciary relationship between a testator and beneficiary raises a presumption of undue influence. Howard v. Nasser, 364

S.C. 279, 288, 613 S.E.2d 64, 68-69 (Ct. App. 2005). If evidence of such a relationship is presented, the proponents of the will must offer rebuttal evidence. Id. "We emphasize that although the proponents of the will must present evidence in rebuttal, they do not have to affirmatively disprove the existence of undue influence. Instead, the contestants of the will still retain the ultimate burden of proof to invalidate the will." Id.

In the instant case, the record shows McMillan and Hairston both held powers of attorney for Decedent. This establishes a fiduciary relationship between McMillan and Decedent and raises the presumption of undue influence. However, other evidence in the record supports the special referee's finding no undue influence occurred. Decedent apparently expressed no concern for being left in the care of McMillan and Cookie, and he was happy to be home from the hospital. While he did not speak to Hairston in the days leading up to his death, he was seen by hospice workers, neighbors, and other relatives with whom he could have shared any concerns. At the time of the execution of the Will, Dingle asked McMillan and her daughter to be out of the house, providing Decedent a chance to confide in Dingle if he did not wish to change the Will. Furthermore, Dingle testified Decedent told her on the phone changing his will had been on his mind. Accordingly, we find McMillan presented evidence to rebut the presumption of undue influence.

Furthermore, Hairston presented no evidence of threats or force wielded against Decedent. Although Decedent did not speak to Hairston in the days immediately preceding his death, his visitation and communication were apparently not restricted overall. Additionally, Hairston contends Cookie and McMillan exerted control over Decedent's food and medicine and intimates they could have withheld it, giving them control over him. However, the record contains evidence to the contrary. Cookie, McMillan, and Patsy Hudson testified to Decedent eating better and more in the last days of his life. The prescriptions for Decedent were written for his comfort as needed, which supports Cookie's testimony regarding how she administered the medications. Consequently, evidence in the record supports the special referee's finding of no undue influence.

III. Viewing of Evidence

Finally, Hairston argues the special referee failed to view the evidence in the light most favorable to her as the contestant to the Will. We disagree.

While we acknowledge the special referee should have viewed the evidence in this fashion, Hairston's only argument is that the order did not contain a statement indicating the evidence was so considered. Calhoun v. Calhoun, 277 S.C. 527, 530, 290 S.E.2d 415, 417 (1982) (finding whether the contestants of a will met the required burden of proof must be determined by viewing evidence in the light most favorable to the contestants). Nothing in the record suggests the special referee did not view the evidence properly and the lack of an affirmative statement to that effect is not enough to warrant a reversal in light of the evidence in the record.

CONCLUSION

Based on the record before us, we cannot conclude the special referee erred in finding the Will valid. Accordingly, the decision of the special referee is

AFFIRMED.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Tyrone A. Ravenell, Appellant.

Appeal From Horry County
Clifton Newman, Circuit Court Judge
James E. Lockemy, Circuit Court Judge

Opinion No. 4658
Submitted March 1, 2010 – Filed March 17, 2010

AFFIRMED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Salley W. Elliott, Office of the Attorney General, of Columbia; Solicitor J. Gregory Hembree, of Conway, for Respondent.

HUFF, J.: Appellant Tyrone A. Ravenell was tried in absentia and convicted of armed robbery and burglary in the first degree. Subsequently, Ravenell appeared and his sealed sentence was opened, at which time Ravenell objected to the trial judge's imposition of a consecutive, twenty year sentence on each charge and moved the sentencing judge to reduce the sentence. The sentencing judge modified the sentence to run concurrently. Ravenell appeals, asserting the trial judge erred in (1) proceeding to trial in Ravenell's absence and (2) failing to quash the jury when it consisted of only one person of a minority race and only two people of a minority race were included in the jury pool pulled for the trial. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

On January 13, 1998, Ravenell was present when his case was called to trial. On that day, a jury was drawn. Thereafter, Ravenell challenged the "composition of the jury," noting that "out of twenty-eight jurors called to the Bar, only two minorities were in that group," and therefore it was "a misrepresentative cross-section of [the] community." Ravenell conceded that the jurors were properly drawn at random by computer and according to law and statute but challenged the jury pool and the particular jury drawn, asserting it did not represent the community as a whole racially. The trial judge stated he was taking the matter under advisement. Ravenell then moved for a continuance based on his inability to locate a witness, asserting the witness was vital to his case and he had just learned the witness had moved to Atlanta. The State maintained it had information the witness was actually in Georgetown. The trial judge refused to grant the motion for continuance, noting Ravenell failed to subpoena the witness, but allowed for a delay in the start of the trial until 10:00 a.m. the next day in order to give the defense more time to locate the witness. The judge then took testimony from the clerk of court regarding the pulling of the jury venire. The clerk stated the jurors for this trial were selected at random from a reel obtained from the South Carolina Election Commission, which is then "dump[ed]" into the clerk's computer system. She further testified, as far as the racial makeup of that jury, she did not notice any major differences in it for that week in Horry County as opposed to any other week. Ravenell's counsel declined to

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

question the clerk and put forth no evidence on the matter. The trial judge denied the motion to quash the jury.

The next day, Ravenell failed to appear for trial. Counsel for Ravenell acknowledged the "need to go forward with this trial," whether Ravenell was there or not, and that Ravenell "obviously [had] opted not to be [there]." Nonetheless, counsel requested a continuance until such time as he could locate his client. The trial judge observed Ravenell was present the day before for jury selection. He further noted he had allowed Ravenell to remain on bond for the purpose of assisting in the location of his missing witness, and before doing so, he had admonished Ravenell that if he did not appear the next day, the trial would go forward without him. The trial judge stated he had explained to Ravenell the perils of a trial in his absence. He therefore found Ravenell was given notice the trial would proceed without him and he would be tried in absentia if he failed to appear. The judge thereafter called three bailiffs to the stand, who each testified to calling Ravenell's name three times with no response. The State then indicated to the court that Ravenell had also been noticed by subpoena that his trial was taking place, and he was to appear during that term of court. The trial judge also took notice of the bond signed by Ravenell on February 27, 1997, and made the document a court exhibit along with the subpoenas sent to Ravenell. During this time, the court took testimony from an acquaintance of Ravenell's who happened to have been at the courthouse the previous day and saw Ravenell around 5:00 p.m., after court had adjourned. This witness testified he spoke with Ravenell at that time and Ravenell indicated to him that he planned to attend court the next day.

The matter proceeded to trial in Ravenell's absence and he was thereafter convicted of armed robbery and burglary in the first degree. At the close of the State's case, Ravenell moved for a mistrial based upon the jury composition, which the trial judge denied. In July 2006, Ravenell was apprehended in Florida and returned to South Carolina for sentencing. Shortly thereafter, the sentencing judge opened Ravenell's sealed sentence, wherein the trial judge sentenced him to twenty year consecutive sentences on the two charges. Ravenell moved for a reduction in the sentence. On November 9, 2006, the sentencing judge modified the sentence to run concurrently instead of consecutively. This appeal follows.

ISSUES

I. Whether the trial judge erred in proceeding with trial in Ravenell's absence.

II. Whether the trial judge erred in failing to quash the jury and select a second jury when the jury consisted of only one person of a minority race and only two people of a minority race were in the pool of jurors pulled for the trial.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Banda, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id.

LAW/ANALYSIS

I. Trial in Absentia

On appeal, Ravenell asserts the trial judge erred in proceeding with the trial in his absence. He contends the judge committed error in denying his motion for continuance, and he was prejudiced by this error inasmuch as he was then unable to assist in his own defense. Ravenell argues there is evidence of record from a witness that Ravenell had planned to return to court the second day, and the trial judge "mistakenly thought he had warned Ravenell about the dangers of not being present but the trial record does not reflect this." In support of his argument, Ravenell cites the case of Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006), wherein the supreme court found counsel ineffective in a post-conviction relief (PCR) action for failure to move for a continuance when the defendant was tried in absentia, and determined the trial court would have committed an abuse of discretion had the court refused to grant a continuance under the circumstances of that case.

Ravenell further cites to law that a trial may proceed in a defendant's absence only upon a finding by the court that the defendant voluntarily waived his right to be present, and the court must make findings on the record that the defendant received notice of his right to be present and a warning the trial would proceed in his absence. We find no error.

The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion. State v. McKennedy, 348 S.C. 270, 280, 559 S.E.2d 850, 855 (2002). Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth. Id.

It is well established that, although the Sixth Amendment of the United States Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived, and a defendant may be tried in his absence. State v. Fairey, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct. App. 2007); State v. Goode, 299 S.C. 479, 481, 385 S.E.2d 844, 845 (1989). See also Rule 16, SCRCrimP ("Except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court."). A trial judge must determine a criminal defendant voluntarily waived his right to be present at trial in order to try the defendant in his absence. State v. Patterson, 367 S.C. 219, 229, 625 S.E.2d 239, 244 (Ct. App. 2006) (citing State v. Jackson, 288 S.C. 94, 95, 341 S.E.2d 375, 375 (1986)). The judge must make findings of fact on the record that the defendant (1) received notice of his right to be present and (2) was warned he would be tried in his absence should he fail to attend. Id.

In order to claim the protection afforded by the rule of law that a criminal defendant may be tried in his absence only upon a trial court's finding that the defendant has received the requisite notice of his right to be present and advisement that the trial would proceed in his absence if he failed to attend, a defendant or his attorney must object at the first opportunity to do so, and failure to so object constitutes waiver of the issue on appeal. State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987). Additionally, notice of the term of court in which a defendant will be tried is sufficient

notice to enable the defendant to make an effective waiver of his right to be present at his trial. Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976); Fairey, 374 S.C. at 100, 646 S.E.2d at 448. Further, a bond form that provides notice that a defendant can be tried in absentia may serve as the requisite warning that he may be tried in his absence should he fail to appear. Fairey, 374 S.C. at 101, 646 S.E.2d at 449. "The deliberate absence of a defendant who knows that he stands accused in a criminal case and that his trial will begin during a specific period of time indicates nothing less than an intention to obstruct the orderly processes of justice." Ellis, 267 S.C. at 261, 227 S.E.2d at 306.

Here, it is arguable that Ravenell has not properly preserved an objection to his trial in absentia. While counsel did move for a continuance until such time as he could locate his client, counsel never specifically objected to a trial in absentia and never asserted to the trial judge that his client did not receive the requisite notice of his right to be present or a warning that the trial would proceed in his absence if he failed to attend. Nor does it appear that Ravenell raised the issue with the sentencing judge following his apprehension and return to court. However, because Ravenell's counsel did move for a continuance, and in light of the fact that the trial judge made findings on the record that Ravenell was given notice the trial would proceed without him and he would be tried in absentia should he fail to appear, we find it proper to address the matter on the merits.

After review of the record, we find Ravenell voluntarily waived his right to be present at trial and therefore was properly tried in absentia. First, Ravenell clearly received notice of his right to be present at trial. The record shows Ravenell was subpoenaed to appear for that particular week of court. Additionally, the trial judge made uncontested findings on the record showing Ravenell had notice of his right to be present for trial by virtue of the judge's warning to Ravenell when he allowed him to stay out on bond. Finally, the very fact that Ravenell was present for the first day of trial when his jury was drawn indicates Ravenell had notice of his right to appear. Second, it is equally clear Ravenell was warned he would be tried in his absence should he fail to appear. The trial judge noted for the record that he specifically informed Ravenell that if he did not appear the next day, the trial would go forward without him. Further, the record shows Ravenell's bond

form provided the requisite notice to him that he could be tried in absentia should he fail to appear. While Ravenell argues on appeal that the trial judge mistakenly thought he had warned Ravenell about the dangers of not being present but the trial record failed to reflect that, we note that counsel did not contest the trial judge's recollection of his discussion with Ravenell but implicitly accepted the judge's rendition of his discussion with Ravenell.

As to Ravenell's reliance on Morris, we believe that case is distinguishable. Morris had been indicted for assault and battery with intent to kill (ABIK), and on the scheduled date of trial appeared at court and signed a sentencing sheet in anticipation of entering a guilty plea to the lesser-included charge of assault and battery of a high and aggravated nature (ABHAN). Morris, 371 S.C. at 280, 639 S.E.2d at 55. Morris subsequently left the courthouse and could not be found when his case was called for the guilty plea. Id. The trial judge determined Morris forfeited his rights by leaving the courthouse and therefore proceeded to trial in Morris's absence. Id. at 281, 639 S.E.2d at 55. Morris was subsequently found guilty of ABIK. Id. At his PCR hearing, Morris maintained that, after he signed the plea sheet, he had asked counsel to obtain a continuance, counsel agreed to try, and after a few minutes in the courtroom, she returned and told him he could leave. Id. Trial counsel denied she told Morris he could leave. Id. The PCR court denied Morris relief. Id. The supreme court reversed, finding trial counsel was deficient in failing to request a continuance. Id. at 282, 639 S.E.2d at 56. In so doing, the court noted the transcript clearly showed trial counsel objected to proceeding with a trial in absentia, but this was "markedly different from counsel making a motion for a continuance so [Morris] could plead guilty to ABHAN as had been agreed upon between [Morris] and the State." Id. The court further found Morris would have been prejudiced by the denial of a continuance because the trial in absentia subjected him to the ABIK conviction as opposed to the ABHAN charge he faced under the guilty plea. Id. at 283, 639 S.E.2d at 56. The court then concluded, given the drastic distinctions between an ABIK and an ABHAN conviction, this was one of the rare cases in which the refusal by the trial judge to grant a continuance would have amounted to an abuse of discretion. Id.

Here, Ravenell's counsel moved for a continuance until such time as he could locate his client for resumption of the trial, not in order for Ravenell to appear for an agreed upon plea of guilty to a lesser included offense. Unlike the situation in Morris, there appears to be a "deliberate absence of a defendant who knows that he stands accused in a criminal case and that his trial will begin during a specific period of time [indicating] nothing less than an intention to obstruct the orderly processes of justice." Ellis, 267 S.C. at 261, 227 S.E.2d at 306. To read Morris to require a trial judge to grant a continuance anytime a defendant intentionally absents himself from trial of which he has notice would subvert the rule and case law specifically allowing a trial in absentia under the proper circumstances, i.e. when the defendant has notice of his right to be present and has been warned that the trial could proceed in his absence upon his failure to appear. Additionally, in the more similar case of State v. Wright, 304 S.C. 529, 532, 405 S.E.2d 825, 827 (1991), our supreme court found no abuse of discretion in the trial judge's denial of counsel's motion for continuance based on the defendant's absence. Specifically, the court held there was no abuse of discretion as the record clearly revealed the defendant was aware of the term of court and knew he would be tried in absentia should he fail to appear. Id. We believe the case at hand is in line with Wright, and the trial judge committed no abuse of discretion in denying Ravenell's motion for continuance.

II. Jury Composition

Ravenell next contends the trial judge erred in failing to quash the jury and select a second jury, asserting the jurors called to the bar was composed of only two minorities out of a total of twenty-eight persons pulled, and the seated jury consisted of only one minority. He argues that he was denied a fair trial by a jury of his peers because the jury was not composed of a representative cross-section of his peers. We disagree.

"Whether there has been systematic racial discrimination by the jury commissioners in the selection of jurors is a question to be determined from the facts in each particular case." State v. Stallings, 253 S.C. 451, 454, 171 S.E.2d 588, 590 (1969). Further, "[d]iscrimination in the selection of a jury must be proved and it cannot be presumed." Id. A criminal defendant attacking his conviction on the ground that the State systematically excluded

members of his race from the jury that convicted him has the burden of proving the existence of purposeful discrimination. Id. at 454-55, 171 S.E.2d at 590.

> In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show that 1) the group excluded is a "distinctive" group in the community; 2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) this underrepresentation is due to a systematic exclusion of the group in the jury selection process.

State v. Patterson, 324 S.C. 5, 21, 482 S.E.2d 760, 767-68 (1997).

Even assuming Ravenell can show the requisite distinctive group in step 1, he has failed to make any showing whatsoever of step 2, that representation of the group in the jury venire was not fair and reasonable in relation to the number of such persons in the community, or step 3, that there was a systematic exclusion of the group in the jury selection process. Accordingly, the trial judge did not err in denying Ravenell's motion challenging the composition of the jury.

For the foregoing reasons, Ravenell's convictions are

AFFIRMED.

THOMAS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Nationwide Mutual Insurance Company, Appellant,

v.

Kelly Rhoden, Ashley Arrieta, and Emerlynn Dickey, Respondents.

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

Opinion No. 4659
Heard November 17, 2009 – Filed March 17, 2010

AFFIRMED IN PART AND REVERSED IN PART

J.R. Murphy and Ashley B. Stratton, both of Columbia, for Appellant.

Dennis James Rhoad, of Moncks Corner, for Respondents.

THOMAS, J: In this declaratory judgment action, Nationwide Mutual Insurance Company appeals the trial court's determination that the respondents, Kelly Rhoden and her daughters, Ashley Arrieta and Emerlynn Dickey, are entitled to underinsured motorist (UIM) coverage under a policy issued to Kelly insuring two "at-home" vehicles. We affirm in part and reverse in part.

FACTS

On October 22, 2004, Kelly, Ashley, and Emerlynn (collectively Respondents) were involved in an automobile accident while in a 1998 Kia owned and driven by Ashley. Ashley insured the Kia under a policy issued by Nationwide, which provided no UIM coverage. Nationwide also insured two at-home vehicles owned by Kelly under a different policy. Kelly's policy provided UIM coverage in the amounts of $15,000 per person and $30,000 per occurrence. The parties stipulated that pursuant to the policy issued to Kelly, Respondents were resident relatives at the time of the accident.

Nationwide brought a declaratory judgment action seeking a declaration that Kelly's policy on the at-home vehicles did not provide Respondents with UIM coverage for injuries sustained in the accident. Kelly's policy contains the following relevant language:

> 3. If a vehicle owned by **you** or a **relative** is involved in an accident where **you** or a **relative** sustains **bodily injury** or **property damage**, this policy shall:
> a) be primary if the involved vehicle is **your auto** described on this policy; or
> b) be excess if the involved vehicle is not **your auto** described on this policy. The amount of coverage applicable under this policy shall be the lesser of the coverage limits under this policy or the coverage limits on the vehicle involved in the accident.

The trial court held Respondents were entitled to UIM under Kelly's policy because UIM is "personal and portable" and all three were either named insureds or resident relatives under the policy. This appeal followed.

ISSUES ON APPEAL[1]

I. Did each Respondent "have" a vehicle involved in the accident, such that the South Carolina Supreme Court's decision in Burgess v. Nationwide Mutual Insurance Co., 373 S.C. 37, 644 S.E.2d 40 (2007), controls the issues in this case?

II. Does Kelly's policy on the at-home vehicles provide UIM coverage for Ashley and Emerlynn when the policy on Ashley's Kia, which was involved in the accident, provided for no UIM?

STANDARD OF REVIEW

The standard of review in an action for declaratory judgment depends on the underlying issues, and "[w]hen . . . the underlying dispute is to determine if coverage exists under an insurance policy, the action is one at law." Goldston v. State Farm Mut. Auto. Ins. Co., 358 S.C. 157, 166, 594 S.E.2d 511, 516 (Ct. App. 2004). "In an action at law, tried without a jury, the appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings." Id. However, " '[w]hen an appeal involves stipulated . . . facts, an appellate court is free to review whether the trial court properly applied the law to those facts.' " In re Estate of Boynton, 355 S.C. 299, 301, 584 S.E.2d 154, 155 (Ct. App. 2003) (quoting WDW Props. v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000)).

LAW/ANALYSIS

Nationwide argues Burgess v. Nationwide Mutual Insurance Co., 373 S.C. 37, 644 S.E.2d 40 (2007), mandates finding Kelly, Ashley, and

[1] For the ease of analysis, we address Nationwide's issues in reverse order.

Emerlynn are not entitled to UIM because they "had" a car in the accident. We agree in part.

"[A]s a general proposition, UIM coverage follows the individual insured rather than the vehicle insured, that is, UIM coverage, like UM, is 'personal and portable.' " Burgess, 373 S.C. at 41, 644 S.E.2d at 42. However, "public policy is not offended by an automobile insurance policy provision which limits the portability of basic 'at-home' UIM coverage when the insured has a vehicle involved in the accident." Id. at 42, 644 S.E.2d at 43.

Nationwide relies on Concrete Services, Inc. v. United States Fidelity & Guaranty Co., 331 S.C. 506, 498 S.E.2d 865 (1998), to argue by virtue of being a resident relative, Class I insured, each respondent had a vehicle in the accident pursuant to Burgess. However, because Burgess makes clear that an individual has a vehicle in the accident when he owns the vehicle, we need not draw analogies to Concrete Services. See Burgess, 373 S.C. at 41-42, 644 S.E.2d at 43 (stating the issue to be: "[Whether] public policy [is] offended by an automobile insurance policy provision that limits basic UIM portability when an insured is involved in an accident while in a vehicle he owns, but does not insure under the policy[]"). Accordingly, because neither Kelly nor Emerlynn owned the 1998 Kia, neither "had" a vehicle involved in the accident. We therefore address the issue of the portability of Ashley's UIM coverage separate and apart from the portability of Kelly's and Emerlynn's UIM coverage.

A. Portability of Ashley's UIM Coverage

As to Ashley, the Burgess court addressed the exact policy language we are confronted with in this case and held limiting the portability of UIM coverage did not offend public policy when the insured owns a vehicle in the accident. Id. at 42, 644 S.E.2d at 43. This decision recognized the purpose of UIM coverage is to provide insurance coverage when one cannot "otherwise insure himself." Id. "[H]owever, [when] the insured is driving his own vehicle, he has the ability to decide whether to purchase voluntary UIM

coverage." Id. Thus, at no time is an individual more capable of protecting himself than when he owns the involved vehicle.

In this case, because Ashley owned the involved vehicle, Burgess coupled with the recognized purpose of UIM coverage suggests that applying the policy exclusion to limit the portability of her UIM coverage does not offend public policy. Accordingly, the trial court erred in finding Ashley entitled to such coverage.

B. The Portability of Kelly's and Emerlynn's UIM Coverage

As to Kelly and Emerlynn, our supreme court has made clear that although voluntary, UIM is personal and portable, traveling with the individual and not the vehicle. Id. With UIM coverage, the insured is "[e]ssentially[] . . . buying insurance coverage for situations, as where he is a passenger in another's vehicle or . . . where he cannot otherwise insure himself." Id. In this case, we cannot accept Nationwide's argument that a party, such as Kelly or Emerlynn, has any more control or influence over the insurance coverage purchased on a relative's automobile, such as Ashley's, than that of any other individual with whom that person may travel. Here, Kelly purchased UIM coverage for herself and Emerlynn for the precise circumstances in which she could not have otherwise insured herself or Emerlynn, such as when passengers in another's vehicle. This coverage was personal and portable, and we find no support for the proposition that an insurer may limit the portability of that UIM coverage when the auto involved in the accident is owned by a relative. See Isle of Palms Pest Control Co. v. Monticello Ins. Co., 319 S.C. 12, 19, 459 S.E.2d 318, 321 (Ct. App. 1994) (indicating that policy exclusions will not be interpreted to exclude the very risk the parties contemplated). To interpret the exclusion in Kelly's policy to deny UIM coverage to her and Emerlynn when passengers in a vehicle owned and insured by a relative unduly limits the portability of the UIM coverage and likewise offends public policy. Accordingly, we find the evidence supports the trial court's ruling that Kelly and Emerlynn are entitled to UIM coverage.

CONCLUSION

The trial court did not err in finding Kelly and Emerlynn entitled to UIM coverage; however, because public policy is not offended by the application of the exclusion to Ashley, the owner of the involved vehicle, the trial court erred in finding her entitled to UIM. Therefore, the ruling of the trial court is

AFFIRMED IN PART AND REVERSED IN PART.

HEARN, C.J., and KONDUROS J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Ricky Lynn Parris, Appellant.

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 4660
Heard December 10, 2009 – Filed March 17, 2010

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M.

Coombs, Jr., all of Columbia; Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

SHORT, J.: In this criminal case, Ricky Lynn Parris appeals his conviction of reckless homicide. Parris argues the trial court erred by (1) failing to exclude a police officer's testimony about Parris's right to remain silent; (2) allowing testimony regarding prior crimes and prior bad acts; and (3) failing to exclude a police officer's testimony that Parris lacked remorse for the accident. We affirm.

FACTS

On August 19, 2006, Michael Holt received a phone call from his brother that his van had broken down. Holt and his wife arrived at the scene in order to assist his brother and found the van was off the road. Holt backed his truck in front of the van to tow the van. Parris's vehicle struck the driver side door of the truck and then sideswiped the van. As a result of the collision, Holt suffered life-ending injuries.

At the scene of the accident, South Carolina Highway Patrol Officer Ron Manley observed Parris was oblivious to his surroundings, spoke slowly, and was "thick-tongued."[1] Officer Manley concluded Parris was under the influence of prescribed or illicit drugs. These suspicions were later confirmed when Parris tested positive for numerous drugs, including painkillers and antidepressants. These drugs depress the central nervous system by producing drowsiness and sedation.

As a result of the collision and Parris's impairment at the time of the collision, Parris was indicted for causing death by operating a vehicle while under the influence of drugs or alcohol and reckless homicide. The jury convicted Parris of reckless homicide only. Parris also pled guilty to being a

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[1] According to Officer Manley, thick-tongued means an individual is unable to pronounce words and this condition usually results from a medical condition or the influence of drugs.

habitual traffic offender and driving under suspension. The trial court sentenced Parris to ten years' imprisonment for reckless homicide to run consecutive to the sentence of five years' imprisonment on the habitual traffic offender offense. Parris was also sentenced to six months' imprisonment for driving under suspension, to run concurrent with reckless homicide and habitual traffic offender sentences. This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The court is bound by the trial court's factual findings unless they are clearly erroneous. Id. This court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence. Id.

LAW/ANALYSIS

I. Right to Remain Silent

Parris initially argues the trial court erred in failing to exclude Officer Manley's testimony about Parris's right to remain silent. We disagree.

According to Parris, the collision occurred because he swerved to avoid a man getting a ladder from a truck and was blinded by the truck's headlights. During Officer Manley's cross-examination, Parris asked "in all likelihood [was Parris] blinded by the headlights of [Holt's] truck?" Officer Manley replied, "that's for you to . . . have your client up here to testify to."

Parris objected on the grounds that this testimony was "a direct comment and an implication by the State's witness that the defendant has some burden of taking the stand and testifying or proving something." Parris moved for a mistrial on the grounds that his rights to remain silent and have the State to prove the case against him had been violated.

The trial court denied the motion for a mistrial but did give curative instructions. The trial court instructed the jurors they were to only consider matters properly placed into the record. The trial court explained to the jurors that any testimony stricken from the record was to be disregarded in its entirety and could not be discussed or mentioned in any fashion during their deliberations. The trial court then struck from the record Officer Manley's statement. The trial court also stated the State bore the burden of proving the case against Parris and this burden remained with the State throughout the trial. The trial court explained that Parris was presumed innocent and did not have the burden to prove his innocence. Parris failed to object to the sufficiency of the trial court's curative instruction.

On appeal, Parris argues the curative instruction was insufficient. However, this argument is not preserved for our review because Parris accepted the trial court's ruling and did not contemporaneously object to the sufficiency of the curative charge. See State v. Jones, 325 S.C. 310, 316, 479 S.E.2d 517, 520 (Ct. App. 1996) (holding a curative instruction is usually deemed to cure an alleged error; no issue is preserved for appellate review if the complaining party accepts the trial court's ruling and does not contemporaneously object to the sufficiency of the curative charge).

II. Prior Bad Acts

Parris next claims the trial court erred by allowing testimony regarding prior crimes and prior bad acts. We disagree.

Prior to trial, the State sought to present evidence Parris had been indicted on seventeen counts of drug fraud. According to the State, Parris had been to three different doctors and just as many pharmacies in a successful effort to obtain controlled substances often used to treat pain and depression. Additionally, the State sought to introduce evidence of Parris's prior convictions of being a habitual traffic offender and driving under suspension. Parris made a motion in limine to exclude this evidence. The trial court ruled in favor of Parris and concluded evidence relating to how Parris obtained the drugs and Parris's prior convictions was inadmissible.

Officer Manley testified that after Parris left the hospital, he was transported to jail "based on driving violations." Parris objected on the grounds that the trial court had ruled Parris's prior convictions inadmissible. Also, Dr. David Wren, who conducted an autopsy on Holt, testified it was not uncommon to have the combination of drugs that were found in Parris's system because "some people shop around for drugs." Again, Parris objected based on the trial court's evidentiary ruling during the motion in limine.

With respect to Officer Manley's testimony, the trial court stated, "we're not gonna put any evidence of the case about the habitual traffic offender violation and [driving under suspension]. . . . At this point I'm gonna ask the solicitor not to pursue that line of questioning any further." As to Dr. Wren's testimony, the trial court "sustained the objection by the defense . . . and . . . [struck] from the record the . . . statement made by this witness." The trial court also reminded the jurors how they should view evidence stricken from the record.

When the defendant receives the relief requested from the trial court, there is no issue for the appellate court to decide. State v. Sinclair, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981). Furthermore, when a witness gives objectionable testimony and an objection is subsequently sustained, the issue is not preserved for appeal unless the objecting party moves to strike the testimony. State v. Saltz, 346 S.C. 114, 129, 551 S.E.2d 240, 248 (2001) (holding where trial court does not sustain objection, no additional action required to preserve issue for review). On both occasions, Parris got the relief he requested in that the trial court sustained his objections. Thus, there is no issue for this court to decide.[2]

[2] Parris also complains Officer Manley testified he was driving without a driver's license on the night of the collision. Parris did not raise this issue to the trial court, and therefore, it is not preserved for review. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (holding that for an issue to be preserved for review it must have been raised to and ruled upon by the trial court).

III. Lack of Remorse

In his final argument, Parris contends the trial court erred by failing to exclude Officer Manley's testimony that Parris lacked remorse for the accident. We disagree.

The following colloquy took place between the solicitor and Officer Manley.

> Q: And in talking to [Parris] . . . did you notice anything about him?
>
> A: When I first spoke with Mr. Parris, I was having a hard time understanding him because of what we call thick tongued. Basically it, it just kind of means more like their tongue is so thick that they're unable to pronounciate [sic] their words, and that's usually somebody that's either under the influence or had some type [of] medical condition like as a far as blood sugar or something of that nature.
>
> Q: Did . . . you smell any alcohol on him?
>
> A: No, sir, I did not smell any alcohol.
>
> Q: Did you believe him to be under the influence of a substance?
>
> A: Based on my observations . . . based on the way he spoke, which was slow and . . . precise, his actions were real slow, based upon the fact of him being thick tongued, and basically oblivious to his surroundings as far as what had happened there at, not only at the scene, but also at the hospital, which

> was real[ly] more evident at the hospital that yes, it was my conclusion that he was under the influence of some type of prescribed drugs or illicit drugs.
>
> Q: Did he ever show any care for Michael Holt in any way?
>
> A: No sir, he never asked about Mr. Holt whatsoever. You know, me and Trooper Nancy both thought that that was kind of odd that, you know---

Before Officer Manley could finish answering, Parris objected on the grounds that the State was attempting to establish Parris lacked remorse. The trial court sustained the objection in part and overruled it in part. The trial court ruled it was improper for Officer Manley to testify regarding how he felt and whether Parris had a duty to express remorse. The trial court overruled the objection with respect to whether Officer Manley could testify as to the factors he considered in concluding that Parris was under the influence. One of these factors was Parris was oblivious to what was occurring around him. The trial court granted the relief requested because it ruled Officer Manley could not testify about whether Parris expressed any remorse. Because Parris received the relief requested from the trial court, there is no issue for this court to decide. See Sinclair, 275 S.C. at 610, 274 S.E.2d at 412; Saltz, 346 S.C. at 129, 551 S.E.2d at 248.

Additionally, Officer Manley's testimony was not a comment on Parris's lack of remorse. Rather, Officer Manley was testifying as to his factual observations to support his conclusion that Parris was under the influence of an illegal or illicit drug. The testimony was presented for the purpose of illustrating Parris's actions and attitudes after the accident and how Parris's unemotional response was one factor that led Officer Manley to believe Parris was under the influence. We find no reversible error in the trial court's ruling. See State v. Horton, 359 S.C. 555, 571-72, 598 S.E.2d 279, 288 (Ct. App. 2004) (holding that during a prosecution for reckless homicide that a police officer's testimony that the defendant sat in the

officer's car and was unemotional after his vehicle struck and killed victim was admissible and did not constitute a comment on the defendant's lack of remorse because the testimony illustrated the defendant's actions after the accident and showed how the defendant's unemotional responses led the officer to believe the defendant was under the influence).

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.

THOMAS and KONDUROS, JJ., concur.