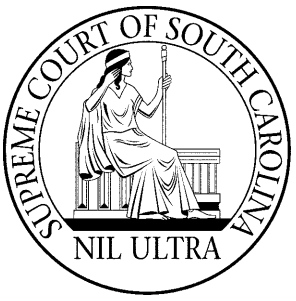

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 12

March 18, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James Mellen, **Appellant / Respondent,**

v.

David Patrick Lane, **Respondent / Appellant.**

Appeal from Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 4354
Submitted March 1, 2008 – Filed March 11, 2008

AFFIRMED

Donald H. Howe, of Charleston, for Appellant / Respondent.

Deborah Harrison Sheffield, of Columbia, and Hugh W. Buyck, of Charleston, for Respondent-Appellant.

ANDERSON, J.: After being injured in a brawl outside of a bar, James Mellen brought a civil action for assault and battery against David Patrick Lane. The Master-in-Equity found Lane liable for Mellen's injuries, awarding Mellen $200,000 in actual damages, but declining to award punitive damages. Lane contends the Master erred in determining his actions

were the proximate cause of Mellen's injuries. Mellen maintains the Master erred by denying punitive damages. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

In the early morning hours of September 23, 2001, Mellen sustained a fractured skull when he was struck in the head with a bottle during a melee outside Big John's, a bar located in Charleston, South Carolina. At the time of the incident, Mellen was twenty-one years old, and attending the College of Charleston.

After leaving work around 10 p.m., on September 22, 2001, Mellen and his friend Josh Tarokh joined a group of friends who were already at a bar. The group consisted of Stephanie Vrla, Mellen's girlfriend; Vrla's roommates, Melissa and Jennifer; Jennifer's boyfriend; and James Traybert. Mellen and his friends relocated to Big John's between 11:30 p.m. and 12:30 a.m. Upon arriving at Big John's, Mellen observed a group of men, including Lane:

> I noticed that there was a group of gentlemen at the bar, kind of loud, obnoxious, kind of drunk guys you don't want to get in their way.
>
> . . .
>
> [Y]ou know, they were kind of - - they were definitely having a good time. One of the gentlemen was passing shots around, it seems like to whatever girls would walk by him.

Mellen stated he did not interact with the men inside Big John's, other than "[a]t one point, [he] took the shot off the table and [he] placed it back on the bar." At approximately 1:30 a.m., Big John's issued their "last call" for drinks and Mellen and his friend began to leave. Mellen described the altercation and the events leading up to it:

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

> We all kind of gathered up inside the bar after they called last call. And we walked out the front door onto East Bay Street. And after that we walked around the corner to Pinckney Street and started walking down Pinckney Street.
>
> . . .
>
> [Lane] was standing in the doorway, and I was walking with Stephanie by my side. Her friend Melissa and Jennifer, they were in front of us. Mr. Lane was standing in the doorway. And I noticed him, he was kind of hassling Melissa and Jennifer, kind of, you know, hey, come back in, that kind of thing. And so it kind of put me on guard right off the bat.
>
> . . .
>
> Well, we came up, and they kept on walking, Melissa and Jennifer. And when we got up there, Mr. Lane reached across my body and started grabbing my girlfriend. I caught his arm, and I asked him, you know, pretty politely, I said: "Leave it alone. We're leaving." And at that point he started saying numerous expletives to me.
>
> . . .
>
> I turned back to him, you know, said some certain things to him, and then turned to walk away. And I remember being pushed very hard in the back. And that's all I remember after that. And I woke up and I was in the hospital.

Josh Tarokh was aware of the group of men in Big John's: "They were just [a] loud, obnoxious, drunk crowd." Tarokh, who was walking with Mellen, saw Lane shove Mellen, and asserted Lane "[kept] pursuing [Mellen]," prompting Tarokh to "[swing] at Mr. Lane." Tarokh recalled the incident:

> I just - - immediately after I swung at Mr. Lane, all of his friends at the door, you know, they immediately started coming after me. So I just, you know, them swinging at me, you know, and I just kind of cover my head, ran about 10 yards away. And by the time I turned around, that's when Mr. Mellon [sic] was struck, and everybody just scattered.
>
> . . .
>
> Amh, you know, I had two guys like trying to punch me, and come at me. I saw [Mellen] and Mr. Lane in front of each other, you know. But after that, you know - - and then after everyone ran, I just saw [Mellen] laying on the ground.
>
> . . .
>
> I ran towards [Mellen], and then saw that his head was busted open, blood everywhere. And I chased after Mr. Lane.
>
> . . .
>
> I was going to the parking lot behind Big John's. By then Mr. Lane was, you know, shutting the door of his car, you know. And I was on the phone with the dispatch, you know, and I was screaming at him, telling him to stop.

During cross-examination, Tarokh was asked if Mellen fell as a result of Lane's initial push. He responded "No" and confessed he did not see who actually struck Mellen in the head, causing Mellen's brain injuries.

James Traybert was involved in the brawl, and attested he "thought [he] saw [Mellen] get hit with a bottle." The Master-in-Equity quizzed Traybert, "And somebody wearing a Citadel polo shirt is who slammed [Mellen] with a bottle?" Retorting affirmatively, Traybert identified Lurie Poston as the bottle wielder.

David Lane professed he planned to tailgate prior to and attend the Citadel football game on September 22, 2001. He began consuming alcohol at approximately 2 p.m., while tailgating, and continued drinking throughout the day. Lane and his comrades left the game and went to Big John's at about 10 p.m., staying there until the bar closed. Lane depicted his involvement in the skirmish:

> Well, I turned, turned away, and then I was pushed from behind. There were three people in front of me, two guys and a girl, and I was shoved from behind. And then I hit into the person in front of me, and he went to go - - he went almost down. I grabbed him by the back of the shirt to pick him back up.
>
> . . .
>
> Then the individual with the shirt turned around, the individual on the left turned around. The individual on the left shoved his finger in my face, told me don't do it. We'll beat the crap out of you, something along those lines. I let out an expletive, and I got hit.

When questioned about causing Mellen's injuries, Lane asseverated: "No. I thought I was preventing an injury." Lane denied reaching for Vrla.

Lane's friend Peter Swiderski accompanied Lane to the Citadel game and Big John's the night Mellen was injured. Swiderski, while declaring he did not see who hit Mellen with a bottle, witnessed the altercation:

> I walked out. We were walking around the corner of Big John's, make a left walking towards the back, and I see David Lane surrounded by about three men. And they were, you know punching at them. I'm like, what's going on here. I'm like this is not good. I took off after them, okay. Peeled the guy that was, if you have A David Lane's back was to me, because I'm coming around the corner. I took the guy that was on his right – hand side, pushed him off to the side. Me and

> him got into a scuffle there, okay? And I looked back and the Plaintiff was on the ground.

Another companion of Lane's that night was Gregory McHone. McHone remembered the row:

> [W]e walked up to [the fight]. It looked like some of our buddies were in the mix, and we just stepped in and started trying to separate people.
>
> And at some point I remember I had my back to the parking lot. And I remember the level of crowd noises increasing, like some particular event had happened. And I turned and to my left rear I saw Mr. Mellon [sic]. Well, I didn't know it was him, at the time, but I saw a gentleman laying on the ground.

McHone checked on Mellen, but Mellen did not answer: "I asked him if he was okay, and he didn't respond to me."

Lurie Poston is the individual Traybert identified as hitting Mellen with the bottle. He advanced he and his companions did purchase shots at Big John's but denied they were overly rambunctious: "Well, you know, we did buy some shots, but we weren't rowdy. You know, we were respectful." When asked if he saw what injured Mellen, Poston stated: "My impression was he fell. I never saw him get hit." Acknowledging Traybert's allegations, Poston offered:

> And you know, Mr. Traybert just said he saw me bending over the guy, hit him with a bottle. That's - - I never did that. I was not even there when that happened. I came after Mr. Mellon [sic] was already down on the ground. And it was my attempt to help him. But his girl friend was so hysterical, you know, that I said, well, maybe we better just back off and let them handle it.

Originally, Mellen sued Lane, McHone, Swiderski and Poston. Prior to trial, all defendants were dismissed by consent except Lane. The case was referred by consent to the Master-in-Equity for trial.

The Master-in-Equity for Charleston County heard this action and issued an order awarding Mellen $100,000 in actual damages. The Master found the testimony and evidence offered by Mellen more credible than that offered by Lane. In his order, he named several factors contributing to his credibility determination: (1) "Lane (and his witnesses) had admittedly been drinking for approximately twelve hours prior to the brawl;" (2) Lane's testimony at trial was inconsistent with statements he gave to police shortly after the incident; (3) Lane's and his friends' flight from the scene was behavior consistent with wrongdoing (noting McHone was the only person in Lane's party to check on Mellen's condition before leaving the scene); (4) "[Mellen] and his two eyewitnesses, both by their demeanor, lesser amount of drinking and substance of their testimony, [were] more credible witnesses;" and (5) Lane's testimony regarding the push from behind was not believable. The Master-in-Equity's factual finding of proximate cause provides:

> I find that the shove of Mellen by Lane was the proximate cause of Mellen's injury. The shove by Lane was certainly the direct cause, i.e., "but for" the shove by Lane there would have been no incident which erupted into a general melee in the course of which Mellen was injured. I also find it foreseeable that the original assault could have caused Mellen's injuries. The assault occurred at closing time at a bar. Defendant and his friend had been drinking on and off for around twelve hours – a long day of drinking by anyone's standards – including the ordering of "shots" by Defendant Lane and his friends. I find that the Defendant made a rude remark, accompanied by touching Plaintiff Mellen's girlfriend, as they walked passed the Defendant. As Plaintiff turned to leave, the Defendant forcefully pushed him from behind into the street.

The Master held a hearing on punitive damages and issued an order inculcating:

> Upon review and weighing of the [Gamble] factors as set forth above I find that while Defendant's conduct in initiating the action which led to Plaintiff's injury and his apparent attempt to conceal his involvement in that activity is reprehensible, I find that it is not of a sufficient level of proof by the clear and convincing standard to form the basis for an award of punitive damages under the specific facts of this case.

A final order increased Mellen's actual damage award to $200,000 and denied punitive damages.

ISSUES

1. Did the Master-in-Equity err in failing to find the intervening act of a third party broke the chain of causation and insulated Lane from liability for Mellen's injuries?

2. Did the Master-in-Equity err in awarding $200,000 in actual damages?

3. Did the Master-in-Equity err in denying punitive damages?

STANDARD OF REVIEW

An appellate court's "scope of review for a case heard by a Master-in-Equity who enters a final judgment is the same as that for review of a case heard by a circuit court without a jury. Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1990) (citing Wigfall v. Fobbs, 295 S.C. 59, 60-61, 367 S.E.2d 156, 157 (1988)). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Assocs. V. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

"An action in tort for damages is an action at law." Longshore v. Saber Sec. Servs., Inc., 365 S.C. 554, 560, 619 S.E.2d 5, 9 (Ct. App. 2005) (citing Culler v. Blue Ridge Elec. Coop. Inc., 309 S.C. 243, 246, 422 S.E.2d 91, 93

(1992)). In an action at law decided by a Master-in-Equity, "this Court will correct any error of law." Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach, 337 S.C. 380, 388, 523 S.E.2d 193, 197 (Ct. App. 1999). "We must affirm the Master's factual findings unless there is no evidence reasonably supporting them." Id.; Twelfth RMA Partners, L.P. v. Nat'l Safe Corp., 335 S.C. 635, 639, 518 S.E.2d 44, 46 (Ct. App. 1999).

> The trial judge has considerable discretion regarding the amount of damages, both actual or punitive. Because of this discretion, our review on appeal is limited to the correction of errors of law. Our task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award.

Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 310-311, 594 S.E.2d 867, 873 (Ct. App. 2004) (internal citations omitted).

LAW/ANALYSIS

Lane insists the Master erred in determining his actions were the direct, efficient, and proximate cause of Mellen's injuries, and he should not be held liable for the actual damages incurred as a result. We disagree.

1. Assault and Battery

a. Assault Defined

An "assault" is an attempt or offer, with force or violence, to inflict bodily harm on another or engage in some offensive conduct. In re McGee, 278 S.C. 506, 507, 299 S.E.2d 334, 334 (1983); Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 230, 317 S.E.2d 748, 754-755 (Ct. App. 1984) ("[A]n assault occurs when a person has been placed in reasonable fear of bodily harm by the conduct of the defendant."). The elements of assault are: (1) conduct of the defendant which places the plaintiff, (2) in reasonable fear of bodily harm. Herring v. Lawrence Warehouse Co., 222 S.C. 226, 241,

72 S.E.2d 453, 458 (1952); Jones by Robinson v. Winn-Dixie Greenville, Inc., 318 S.C. 171, 175, 456 S.E.2d 429, 432 (Ct. App. 1995).

The conduct must be of such nature and made under such circumstances as to affect the mind of a person of ordinary reason and firmness, so as to influence his conduct; or it must appear the person against whom the threat is made was peculiarly susceptible to fear, and the person making the threat knew and took advantage of the fact he could not stand as much as an ordinary person. Brooker v. Silverthorne, 111 S.C. 553, 559, 99 S.E. 350, 351 (1919) (citing Grimes v. Gates, 47 Vt. 594, 19 Am. Rep. 129 (1874)). See In re McGee, 278 S.C. at 508, 299 S.E.2d at 335; Herring, 222 S.C. at 241, 72 S.E.2d at 458.

b. Battery Defined

"A battery is the actual infliction of any unlawful, unauthorized violence on the person of another, irrespective of its degree; it is unnecessary that the contact be by a blow, as any forcible contact is sufficient." Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 230, 317 S.E.2d 748, 754 (Ct. App. 1984) (citing Herring v. Lawrence Warehouse Co., 222 S.C. 226, 241, 72 S.E.2d 453, 458 (1952)); Jones by Robinson v. Winn-Dixie Greenville Inc., 318 S.C. 171, 175, 456 S.E.2d 429, 432 (Ct. App. 1995).

> Generally speaking, a *battery* is the unlawful touching or striking of another by the aggressor himself or by any substance put in motion by him, done with the intention of bringing about a harmful or offensive contact which is not legally consented to by the other, and not otherwise privileged. It is sometimes defined as any injury done to the person of another in a rude, insolent, or revengeful way.

Smith v. Smith, 194 S.C. 247, 259, 9 S.E.2d 584, 589 (1940) (internal citations omitted).

Physical injury is not an element of battery. While there must be a touching, any forcible contact, irrespective of its degree, will suffice. See

Herring, 222 S.C. at 241, 72 S.E.2d at 458; Gathers, 282 S.C. at 230, 317 S.E.2d at 754.

c. Intent is Not an Essential Element of Assault and Battery

> There is a well recognized distinction between criminal assault and a civil action for an assault and battery. In civil actions, the intent, while pertinent and relevant, is not an essential element. The rule, supported by the weight of authority, is that the defendant's intention does not enter into the case, for, if reasonable fear of bodily harm has been caused by the conduct of the defendant, this is an assault.

Herring v. Lawrence Warehouse Co., 222 S.C. 226, 241, 72 S.E.2d 453, 458 (1952).

d. Words Alone Will Not Justify Assault or Battery

> [W]e have announced the rule in numerous cases that in the absence of statute, mere words, no matter how abusive, insulting, vexatious or threatening they may be, will not justify an assault or battery, unless accompanied by an actual offer of physical violence.

City of Gaffney v. Putnam, 197 S.C. 237, 242, 15 S.E.2d 130, 131 (1941); Nauful v. Miligan, 258 S.C. 139, 146, 187 S.E.2d 511, 514 (1972).

2. Proximate Cause

"It is apodictic that a plaintiff may only recover for injuries proximately caused by the defendant's [conduct]." Parks v. Characters Night Club, 345 S.C. 484, 491, 548 S.E.2d 605, 609 (Ct. App. 2001); Howard v. Riddle, 266 S.C. 149, 151, 221 S.E.2d 865, 865-866 (1976); Crider v. Infinger Transp. Co., 248 S.C. 10, 16, 148 S.E.2d 732, 734-735 (1966). "Proximate cause is the efficient or direct cause of an injury." McNair v. Rainsford, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998). Proximate cause is the immediate cause. See State v. Clary, 222 S.C. 549, 551, 73 S.E.2d 681, 682

(1952) (approving a jury instruction saying proximate cause "is the immediate cause"). An act is the proximate cause if it is "an efficient cause without which the injury would not have resulted to as great an extent and that any other efficient cause is not attributable to the person injured." S.C. Ins. Co. v. James C. Greene and Co., 290 S.C. 171, 176, 348 S.E.2d 617, 620 (1986) (citing Gray v. Barnes, 244 S.C. 454, 462-463, 137 S.E.2d 594, 598 (1964)).

"Proximate cause requires proof of both causation in fact and legal cause." Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 88, 502 S.E.2d 78, 83 (1998) (citing Oliver v. S.C. Dep't of Highways and Pub. Transp., 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992)); Rush v. Blanchard, 310 S.C. 375, 379, 426 S.E.2d 802, 804 (1993); Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 408, 563 S.E.2d 109, 112 (Ct. App. 2002). Causation in fact is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's action. Bishop, 331 S.C. at 88, 502 S.E.2d at 83 (citing Oliver, 309 S.C. at 316, 422 S.E.2d at 130; Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994)); Rush, 310 S.C. at 379, 426 S.E.2d at 804; Thomas Sand Co., 349 S.C. at 408-409, 563 S.E.2d at 112. "Legal cause is proved by establishing foreseeability." Bishop, 331 S.C. at 88, 502 S.E.2d at 83 (citing Koester, 313 S.C. at 493, 443 S.E.2d at 394); Oliver, 309 S.C. at 316, 422 S.E.2d at 131; Small v. Pioneer Mach., Inc., 329 S.C. 448, 463, 494 S.E.2d 835, 842 (Ct. App. 1997).

"[L]egal cause is ordinarily a question of fact for the jury." Oliver, 309 S.C. at 317, 422 S.E.2d at 131; Hughes, 269 S.C. at 399, 237 S.E.2d at 757 (stating it is generally for the jury to say whether defendant's action was a concurring, proximate cause of the plaintiff's injuries); Thomas Sand Co., 349 S.C. at 409, 563 S.E.2d at 113; Small, 329 S.C. at 464, 494 S.E.2d at 843 ("Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence."). "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon." Rule 52(a), SCRCP. "Once referred, the master or special referee shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter."

Rule 53(c), SCRCP. "Only when the evidence is susceptible to only one inference does it become a matter of law for the court." Oliver, 309 S.C. at 317, 422 S.E.2d at 131; Thomas Sand Co., 349 S.C. at 409, 563 S.E.2d at 113.

"The touchstone of proximate cause in South Carolina is foreseeability." Koester, 313 S.C. at 493, 443 S.E.2d at 394 (citing Young v. Tide Craft, 270 S.C. 453, 462, 242 S.E.2d 671, 675 (1978)); Small, 329 S.C. at 463, 494 S.E.2d at 842. "Foreseeability is determined by looking to the natural and probable consequences of the act complained of." Id.; Bishop, 331 S.C. at 89, 502 S.E.2d at 83; Oliver, 309 S.C. at 316, 422 S.E.2d at 131; Small, 329 S.C. at 463, 494 S.E.2d at 842.

"The defendant may be held liable for anything which appears to have been a natural and probable consequence of his [actions]." Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990); Greenville Mem'l Auditorium v. Martin, 301 S.C. 242, 245, 391 S.E.2d 546, 548 (1990). "A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's act." Small, 329 S.C. at 463, 494 S.E.2d at 843.

Conduct is the proximate cause of an injury if that injury is within the scope of reasonably foreseeable risks of the conduct. Messier v. Adicks, 251 S.C. 268, 271, 161 S.E.2d 845, 846 (1968). "[W]here the cause of plaintiff's injury may be as reasonably attributed to an act for which defendant is not liable as to one for which he is liable, plaintiff has failed to carry the burden of establishing that his injuries were the proximate result of defendant's [conduct]." Id.

"[I]t is not necessary that the actor must have contemplated or could have anticipated the particular event which occurred." Young, 270 S.C. at 463, 242 S.E.2d at 675-676; Childers v. Gas Lines, Inc., 248 S.C. 316, 325, 149 S.E.2d 761, 765 (1966); Thomas Sand Co., 349 S.C. at 409, 563 S.E.2d at 112-113; Parks, 345 S.C. at 491, 548 S.E.2d at 609. "Foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the alleged [action]." Id. at 491, 548 S.E.2d at 609. The defendant cannot be held liable for unpredictable or unexpected consequences. Young,

270 S.C. at 463, 242 S.E.2d at 676 (citing Stone v. Bethea, 251 S.C. 157, 161-162, 161 S.E.2d 171, 173 (1968)); Crolley v. Hutchins, 300 S.C. 355, 357, 387 S.E.2d 716, 717 (Ct. App. 1989) ("Where the injury complained of is not reasonably foreseeable there is no liability."); Crowley v. Spivey, 285 S.C. 397, 408, 329 S.E.2d 774, 780 (Ct. App. 1985). In determining whether a consequence is natural and probable, the defendant's conduct must be viewed in the light of the attendant circumstances. Young, 270 S.C. at 463, 242 S.E.2d at 676 (citing Stone, 251 S.C. at 161-162, 161 S.E.2d at 173); Crolley, 300 S.C. at 357, 387 S.E.2d at 717.

The act, to be the proximate cause, does not need to be the sole cause of the plaintiff's injury. Bishop, 331 S.C. at 89, 502 S.E.2d at 83 (citing Hughes v. Children's Clinic, P.A., 269 S.C. 389, 399, 237 S.E.2d 753, 757 (1977)); Matthews v. Porter, 239 S.C. 620, 627, 124 S.E.2d 321, 325 (1962); Thomas Sand Co., 349 S.C. at 409, 563 S.E.2d at 113. Liability can be imposed on a defendant if his actions, not necessarily the sole cause, are the proximate concurring cause of the injury. Matthews, 239 S.C. at 627, 124 S.E.2d at 325; Thomas Sand Co., 349 S.C. at 409, 563 S.E.2d at 113.

3. Intervening Cause

> Where there is a contention that an intervening agency interrupts the foreseeable chain of events, there are two consequences to be tested: (1) the injury complained of, and (2) the acts of the intervening agency. If the acts of the intervening agency are a probable consequence of the primary wrongdoer's actions, i.e., "foreseeable", the primary wrongdoer is liable.

Young v. Tide Craft, Inc., 270 S.C. 453, 463, 242 S.E.2d 671, 676 (1978); Matthews v. Porter, 239 S.C. 620, 628, 124 S.E.2d 321, 325 (1962) ("To exculpate a negligent defendant, the intervening cause must be one which breaks the sequence or causal connection between the defendant's negligence and the injury alleged. The superseding act must so intervene as to exclude the negligence of the defendant as one of the proximate causes of the injury."); Lewis v. Seaboard Air Line Ry. Co., 167 S.C. 204, 212, 166 S.E. 134, 137 (1932); Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 180, 463 S.E.2d

636, 640 (Ct. App. 1995) (holding for an intervening act to break the causal link, the intervening act must be unforeseeable; whether the intervening act breaks causal connection is a question of fact for the fact finder which will not be disturbed on appeal unless found to be without evidence which reasonably supports the finding).

> [W]hen the [conduct] appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause.

Locklear v. S.E. Stages, 193 S.C. 309, 318, 8 S.E.2d 321, 325 (1940).

The South Carolina Supreme Court, in State v. Burton, 302 S.C. 494, 496-7, 397 S.E.2d 90, 91, (1990), approved the following jury instruction on proximate cause:

> Now the law recognizes further there may be more than one proximate cause. The acts of two or more persons may combine and concur together as an efficient or proximate cause of the death of a person. The defendant's act may be regarded as the proximate cause if it is a contributing cause of the death of the deceased. The defendant's act need not be the sole cause of the death provided that it be a proximate cause actually and contributing to the death of the deceased. . . . If, however, the death was caused not by the wound or the injury that the deceased had, but was caused merely by the gross, erroneous treatment, that is, where a treatment was so gross, where a treatment was so deliberate, so willful, that it was the cause of death, then the defendant would not be liable. . . The fact that other causes also contribute to the death of the deceased does not relieve the defendant from responsibility.

Id. Burton "was convicted of murder and criminal sexual conduct in the first degree" when his rape victim died as a result of asphyxiation forty-five days after his assault. Id. at 496, 397 S.E.2d at 91. Burton claimed the treating

physician's negligence was an intervening cause in the victim's death and challenged the trial judge's jury instruction for proximate cause. Id. Because "the negligence of an attending physician is reasonably foreseeable" as an intervening cause, Burton's original intentional act remained active and the proximate cause of the victim's death. Id. at 498, 397 S.E.2d at 92.

An intervening act by a third person will not relieve the first wrongdoer of liability if such intervention should have been reasonably foreseen in the attendant circumstances. Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998) ("The intervening negligence of a third person will not excuse the first wrongdoer if such intervention ought to have been foreseen in the exercise of due care. In such case, the original negligence still remains active, and a contributing cause of the injury."); Stone v. Bethea, 251 S.C. 157, 161, 161 S.E.2d 171, 173 (1968) ("The law requires only reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, there is no liability."); Childers v. Gas Lines, Inc., 248 S.C. 316, 325, 149 S.E.2d 761, 765 (1966); Matthews, 239 S.C. at 628, 124 S.E.2d at 324; Locklear, 193 S.C. at 318, 8 S.E.2d at 325; Hill v. York County Sheriff's Dep't, 313 S.C. 303, 309, 437 S.E.2d 179, 182 (Ct. App. 1993) (finding the original conduct is still active and a contributing cause of the injury if the intervention "ought to have been foreseen").

The test by which the original actor's conduct is insulated as a matter of law is whether the intervening act by a third party was reasonably foreseeable and anticipated, given the attendant circumstances. Bishop, 331 S.C. at 89, 502 S.E.2d at 83; Stone, 251 S.C. at 161, 161 S.E.2d at 173; Matthews, 239 S.C. at 628, 124 S.E.2d at 324 ("The test is to be found in the probable consequences reasonably to be anticipated, and not in the number or exact character of events subsequently arising.") (citing Woody v. S.C. Power Co., 202 S.C. 73, 85, 24 S.E.2d 121, 125 (1943)); Brown v. Nat'l Oil Co., 233 S.C. 345, 352-353, 105 S.E.2d 81, 85 (1958); Locklear, 193 S.C. at 318, 8 S.E.2d at 325; Tobias v. Carolina Power & Light Co., 190 S.C. 181, 186, 2 S.E.2d 686, 688 (1939) ("It is sufficient that in view of all the attendant circumstances, he should have foreseen that his negligence would probably result in injury of some kind to some one."); Hill, 313 S.C. at 309, 437 S.E.2d at 182; Collins & Sons Fine Jewelry, Inc. v. Carolina Safety Sys., Inc., 296

S.C. 219, 228-229, 371 S.E.2d 539, 544-545 (Ct. App. 1988); Crowley v. Spivey, 285 S.C. 397, 407, 329 S.E.2d 774, 781 (Ct. App. 1985).

A third party's intervening act is reasonably foreseeable, and the original actor still liable, if the intervening act is a natural and probable consequence of the original actor's conduct. Oliver v. S.C. Dep't of Highways and Pub. Transp., 309 S.C. 313, 316, 422 S.E.2d 128, 131 (1992); Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990) ("The defendant may be held liable for anything which appears to have been the natural and probable consequence of his negligence."); Childers, 248 S.C. at 325, 149 S.E.2d at 765; Matthews, 239 S.C. at 628, 124 S.E.2d at 324; Brown, 233 S.C. at 352-353, 105 S.E.2d at 84; Pfaehler v. Ten Cent Taxi Co., 198 S.C. 476, 485-486, 18 S.E.2d 331, 335 (1942) ("'Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence; and if they are such as might, with reasonable diligence have been foreseen, the last result, as well as the first, and every intermediate result is to be considered in law as the proximate result of the first wrongful cause.'") (quoting 22 Ruling Case Law 134, 135, 136 (Section 19 and part of Section 20)); Locklear, 193 S.C. at 318, 8 S.E.2d at 325; Tobias, 190 S.C. at 186, 2 S.E.2d at 687-688; Hill, 313 S.C. at 309, 437 S.E.2d at 182.

The original actor need not contemplate the particular intervening act responsible for the injury. Oliver, 309 S.C. at 317, 422 S.E.2d at 131; Bramlette, 302 S.C. at 72, 393 S.E.2d at 916; Childers, 248 S.C. at 325, 149 S.E.2d at 765 ("If the actor's conduct is a substantial factor in the harm to another, the fact that he neither foresaw nor should have foreseen the extent of harm or the manner in which it occurred does not negative his liability."); Matthews, 239 S.C. at 628, 124 S.E.2d at 324 (quoting Brown, 233 S.C. at 352-353, 105 S.E.2d at 84-85); Locklear, 193 S.C. at 318, 8 S.E.2d at 325; Small v. Pioneer Mach., Inc., 329 S.C. 448, 463, 494 S.E.2d 835, 842-843 (Ct. App. 1997) ("While it is not necessary that the actor must have contemplated the particular event that occurred, the actor cannot be charged with that which is unpredictable or could not be expected to happen."); Hill, 313 S.C. at 308, 437 S.E.2d at 182.

"However, even if the intervening acts are not foreseeable, the primary wrongdoer is nevertheless liable if his actions alone 'would have caused the loss in natural course.'" Young, 270 S.C. at 463, 242 S.E.2d at 676 (quoting Benford v. Berkeley Heating Co., 258 S.C. 357, 365, 188 S.E.2d 841, 844 (1972)).

In Hensley v. Heavrin, 277 S.C. 86, 282 S.E.2d 854 (1981), our Supreme Court examined a doctor's liability for proximately causing his patient's injuries. Id. at 87, 282 S.E.2d 855. The doctor incorrectly diagnosed his patient with syphilis. Id. As a result, the patient's husband assumed his wife was engaged in extramarital activities, and struck her in the jaw, fracturing it in two places. Id. at 87-88, 282 S.E.2d at 855. The Court determined the doctor could not have reasonably foreseen the patient would be injured by her husband as a result of his incorrect diagnosis: "[T]here can be no cause of action against her doctor for the battery committed by [her] husband, since such an action is an unforeseeable intervening cause of injuries." Id.

4. Intervening Criminal Act

> The general rule of law is that when, between [an act] and the occurrence of an injury, there intervenes a willful, malicious, and criminal act of a third person producing the injury, but that such was not intended by the [original actor] and could not have been foreseen by him, the causal chain between the [original act] and the accident is broken.

Stone v. Bethea, 251 S.C. 157, 162, 161 S.E.2d 171, 173-174 (1968). In other words, when between the time of the original act or omission and the occurrence of the injury, a third person intervenes with a willful, malicious, and criminal act producing the injury, but the intervening criminal act was not intended by the original actor and could not have been foreseen by him as a probable result of his own actions, the causal link between the original act and the injury is broken. Fortner v. Carnes, 258 S.C. 455, 462, 189 S.E.2d 24, 27 (1972); Stone, 251 S.C. at 162, 161 S.E.2d at 173-174 (citing Johnston v. Atl. Coast Line Ry. Co., 183 S.C. 126, 135, 190 S.E. 459, 462-463 (1937)); Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 448,

494 S.E.2d 827, 835 (Ct. App. 1997). In such case, there is no proximate cause, and therefore, no liability. Id.

Stone addresses an intervening criminal act and how it affects the original actor's liability. Stone, 251 S.C. 157, 161 S.E.2d 171. Stone was injured when her vehicle was struck by a thief driving Bethea's vehicle. Id. at 159, 161 S.E.2d at 172. Stone avouched Bethea's negligence by leaving the keys in his unattended vehicle, leading to it being stolen, was the proximate cause of her injuries. Id. at 160, 161 S.E.2d at 172. On the other hand, Bethea asserted the intervening criminal act of the thief stealing his vehicle insulated him from the resulting injury. Id. at 160, 161 S.E.2d at 172-173. Bethea professed Stone being injured by Bethea's car, after it was stolen and driven negligently by a thief was an unforeseeable consequence of leaving his car unlocked, unattended, with the keys inside. Id. at 161, 161 S.E.2d at 173. The South Carolina Supreme Court declared:

> It is our conclusion that under the evidence in this case that the intervening independent act of negligence and willfulness on the part of the thief who stole [Bethea's] automobile was the sole, proximate and efficient cause of the injury to [Stone] and such could not have been foreseen by [Bethea] under the attendant circumstances and was not a proximate cause resulting from any act of negligence on the part of [Bethea].

Id. at 164, 161 S.E.2d at 174-175. The Court affirmed the trial judge's decision to grant Bethea's motion for directed verdict. Id.

In the case sub judice, the Master determined: (1) the intervening act of the bottle wielder was **not** the sole, proximate and efficient cause of Mellen's injuries; (2) the intervention of the bottle wielder could have been reasonably foreseen by Lane given the attendant circumstances; (3) Lane's actions were the proximate and efficient cause of Mellen's injuries; and (4) Lane is liable to Mellen. There is sufficient evidence in the record to reasonably support the Master's conclusions.

Lane and his companions were drinking over a twelve hour period prior to the altercation at Big John's. The incident occurred around 2 a.m., after

the bar had its "last call." The Master found the testimony of Mellen and his friends more credible than Lane's. He determined Lane made rude comments to Mellen as he exited Big John's and grabbed at Mellen's girlfriend. Lane shoved Mellen in the back, and the Master reasoned this act proximately caused the fracas, without which Mellen would not have been injured. But for Lane's action, there would have been no brawl and no injury. While it is not necessary for Lane to have contemplated the exact result of Mellen being struck with a bottle, the altercation and actions therein were the natural and probable consequences of Lane's initiation of the fight under the attendant circumstances. The intervention of someone hitting Mellen with the bottle did not break the sequence or causal connection between Lane's instigation of the bout and Mellen's injury. Because this intervention was reasonably foreseeable in the attendant circumstances, Lane is not insulated from liability. Thus, the evidence amply supports the Master's factual finding of proximate cause.

5. Damages Awards

Lane argues the evidence in the record does not support the Master's actual damages award to Mellen. Mellen contends the Master erred in denying him punitive damages. We are mindful of the Master-in-Equity's discretion in awarding damages, and the "any evidence" standard of review for actual and punitive damages in the present case. We review the awards seriatim.

a. Actual Damages

Lane maintains the evidence does not support the actual damages award. We disagree.

Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put him in the same position he was in prior to the damages received insofar as this is monetarily possible. See Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). Actual damages are awarded to a litigant in compensation for his actual loss or injury. Laird v. Nationwide Ins. Co., 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964). Actual damages are such as will compensate the party for injuries

suffered or losses sustained. Id. They are such damages as will simply make good or replace the loss caused by the wrong or injury. Actual damages are damages in satisfaction of, or in recompense for, loss or injury sustained. Barnwell v. Barber-Colman Co., 301 S.C. 534, 537, 393 S.E.2d 162, 163 (1989). The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred. Clark, 339 S.C. at 378, 529 S.E.2d at 533.

Actual or compensatory damages include compensation for all injuries which are naturally the proximate result of the alleged wrongful conduct of the defendant. See Rogers v. Florence Printing Co., 233 S.C. 567, 578, 106 S.E.2d 258, 264 (1958). The basic measure of actual damages is the amount needed to compensate the plaintiff for the losses proximately caused by the defendant's wrong so that the plaintiff will be in the same position he would have been in if there had been no wrongful injury. See Rogers, 233 S.C. at 578, 106 S.E.2d at 264; Hutchison v. Town of Summerville, 66 S.C. 442, 448, 45 S.E. 8, 10 (1903).

In awarding actual damages in the instant case, the Master expounded:

> Because I find the evidence as to the assault and battery, the proximate cause, and the nature and extent of damages have been proved by the preponderance of the evidence, I find an award of actual damages is appropriate.
>
> I find that the fractured skull, the need for EMS, the hospitalization at MUSC, loss of a semester at college, the need for the Plaintiff to move in with his parents to recuperate, and the various aspects of his recuperation as detailed by his sister and parents, are all actual damages proximately caused by the Defendant's conduct. Plaintiff's permanent loss of smell and the closed head injury as outlined by Dr. Waid, Plaintiff, and his family are also the direct and proximate result of the assault by Defendant.
>
> The evidence establishes that Plaintiff sustained a painful and debilitating fractured skull. The first few days were

> excruciatingly painful and life threatening. . . . Because of his fragile state, several weeks passed before he was left alone for any significant period. He required help getting around the house and continued to subsist in extreme pain. He was nauseated, weak, confused, and in extreme pain.
>
> . . .
>
> Plaintiff does have some permanent injuries. His sense of smell is virtually non-existent. There are certain citrus smells he notices at times. His lack of smell affects his taste of food. It also presents safety issues. . . .
>
> He suffered a subdural hematoma (i.e., bleeding in his brain) and had a closed head injury. The permanent effects of his injury involve loss of certain "multitasking skills" as testified by the Plaintiff and his family and supported by the medical evidence of Neuropsychologist Randolph Waid.
>
> . . .
>
> Closely associated with the deficiencies in the ability to "multitask" are the secondary factors of increased anxiety, fatigue and frustration. Plaintiff now tends to withdraw from the frivolity of crowds and friendly (and even family) social interaction. Because he becomes mentally fatigued more easily, he is more likely to lose his temper with co-workers or friends. He becomes easily flustered and anxious in social situations.

The Master initially awarded $100,000 in actual damages: $8,000 for past medical expenses, $40,000 for past physical pain and suffering, $12,000 for past emotional distress, $15,000 for past loss of enjoyment of life, and a cumulative $25,000 for actual future damages. Later, the Master amended his actual future damages award, averring:

> Having considered the merits of the Plaintiff's argument [to increase actual future damages] and the life expectancy tables as well as the sufficiency of evidence tending to establish that the Plaintiff will suffer future damages as a result of the injuries sustained as a result of the Defendant's conduct, I hereby alter and amend my prior award of actual future damages as follows:
>
> For future physical pain and suffering, I find actual damages in the amount of $25,000.
>
> For future emotional distress, I find actual damages in the amount of $50,000.
>
> For future loss of enjoyment of life, I find actual damages in the amount of $50,000.

Accordingly, the total actual damages awarded to Mellen amount to $200,000. The record contains sufficient evidence to support the Master's award for actual damages. Mellen was a virile young man in his early 20s when he was injured. There was a plethora of evidence regarding the cause and effect of Mellen's skull fracture to justify the Master's determination of actual damages, and there was no error of law or abuse of discretion.

b. Punitive Damages

Mellen contends the Master erred by denying punitive damages. We disagree.

Punitive damages, alternatively known as exemplary damages, are imposed as punishment. Clark v. Cantrell, 339 S.C. 369, 378-379, 529 S.E.2d 528, 533 (2000). Punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future. Id. Moreover, they serve to vindicate a private right by requiring the wrongdoer to pay money to the injured party. Id.

At least three important purposes are served by a punitive damages award: (1) punishment of the defendant's reckless, willful, wanton, or malicious conduct; (2) deterrence of similar future conduct by the defendant or others; and (3) compensation for the reckless or willful invasion of the plaintiff's private rights. Id. The paramount purpose for awarding punitive damages is not to compensate the plaintiff but to punish and set an example for others.

On the issue of punitive damages, the highest burden of proof known to the civil law is applicable. Section 15-33-135 of the South Carolina Code provides: "In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence." S.C. Code Ann. § 15-33-135 (Supp. 2003). Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. Taylor v. Medenica, 324 S.C. 200, 220, 479 S.E.2d 35, 46 (1996); Lister v. NationsBank of Delaware, 329 S.C. 133, 149, 494 S.E.2d 449, 458 (Ct.App.1997).

There is no formula or standard to be used as a measure for assessing punitive damages. However, factors relevant to consideration of punitive damages are: (1) the character of the defendant's acts; (2) the nature and extent of the harm to plaintiff which defendant caused or intended to cause; (3) defendant's degree of culpability; (4) the punishment that should be imposed; (5) duration of the conduct; (6) defendant's awareness or concealment; (7) the existence of similar past conduct; (8) likelihood the award will deter the defendant or others from like conduct; (9) whether the award is reasonably related to the harm likely to result from such conduct; and (10) defendant's wealth or ability to pay. See Gamble v. Stevenson, 305 S.C. 104, 111-112, 406 S.E.2d 350, 354 (1991); see also Welch v. Epstein, 342 S.C. 279, 306, 536 S.E.2d 408, 422 (Ct.App.2000) ("Under Gamble, the trial court is not required to make findings of fact for each factor to uphold a punitive damage award.").

The South Carolina Supreme Court illuminated the discretionary nature of an award of punitive damages in Jordan v. Holt, 362 S.C. 201, 608 S.E.2d 129 (2005):

[The Court of Appeals] must affirm the trial court's finding of punitive damages if any evidence reasonably supports the judge's factual findings. An award of punitive damages is left almost entirely to the discretion of the jury and trial judge. Charles v. Texas Co., 199 S.C. 156, 18 S.E.2d 719 (1942). The rationale for vesting discretion in the trial court was expressed in Lucht v. Youngblood, 266 S.C. 127, 138, 221 S.E.2d 854, 860 (1976):

The fact [the trial judge] heard the evidence and was more familiar than we with the evidentiary atmosphere at trial gives [the trial judge], we think, a better informed view than we have. This is particularly true when the elements of damage are intangibles and the appraisal depends somewhat on the observation of the [witnesses] and evaluation of their testimony.

Finally, we conclude the trial court also conducted a post-trial review of the punitive damages award using the factors outlined by this Court in Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991) and properly set forth its findings on the record. In Gamble, the Court explained the trial court should consider: (1) the defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood that the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) other factors deemed appropriate. Id. The trial court found particularly reprehensible Respondents' ouster of Petitioners from the management of the business and Respondents' constant failure to respond to Petitioners' requests for meetings and financial information. The trial court again noted Respondents' misappropriation of the LLC's assets and use of money for their own personal benefit. The trial court's findings are supported by evidence in the record.

Jordan, 362 S.C. at 207, 608 S.E.2d at 132. In reinstating the punitive damages award, the Court emphasized the application of the Gamble factors, the discretion of the fact finder's award, and the "any evidence" standard applicable to appellate review of punitive damages awards.

Here, in the order denying punitive damages, the Master opined:

> While the Defendant's initial shove of the Plaintiff that set the brawl in motion was intentional, the resulting injuries to Mellen's head were unintentional; however, I specifically found that Defendant was the proximate cause of Plaintiff's injuries since the injuries suffered by the Plaintiff were the natural and foreseeable consequences of the Defendant's actions.
>
> Plaintiff argues that the reckless behavior of the Defendant entitles Plaintiff to punitive damages as a matter of right. . . .
>
> I do not believe that Defendant's reckless conduct necessitates a finding of punitive damages. . . .

We find no error of law in the Master-in-Equity's denial of punitive damages. He weighed each factor before denying a punitive damages award, as set forth in his November 7, 2006, order. While the Master declared in his factual findings, "Lane's shove to Mellen in the back constituted a battery and was an intentional and deliberate act which was willful, wanton, reckless, and malicious under the circumstances," it is completely within his discretion to deny a punitive damages award. The Master found Mellen was successful in proving by the preponderance of evidence Lane's conduct was the proximate cause of his injuries, but he held Mellen fell short of the clear and convincing evidence standard required for a punitive damages award. Because punitive damages are not mandatory or obligatory and within the Master's discretion, the denial of a punitive damages award was proper.

CONCLUSION

We rule Lane's conduct was the proximate cause of Mellen's injuries. We affirm the Master-in-Equity's order awarding actual damages and

denying punitive damages. Accordingly, the orders of the Master-in-Equity are

AFFIRMED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Grinnell Corporation d/b/a Grinnell Fire Protection, **Appellant/Respondent,**

v.

John Wood, **Respondent,**

and

American Home Assurance Company, **Respondent/Appellant,**

and

Government Employees Insurance Company, **Respondent.**

Appeal From Berkeley County
Perry M. Buckner, III, Circuit Court Judge

Opinion No. 4355
Heard February 5, 2008 – Filed March 11, 2008

AFFIRMED

Amy M. Snyder and Sean A. Scoopmire, both of Greenville, for Appellant/Respondent Grinnell Corporation d/b/a Grinnell Fire Protection.

David Whittington, of Summerville, for Respondent John Wood.

Peter H. Dworjanyn, of Columbia, for Respondent/Appellant American Home Assurance Company.

Stephen F. DeAntonio, of Charleston, for Respondent Government Employees Insurance Company.

ANDERSON, J.: Grinnell Corporation d/b/a Grinnell Fire Protection (Grinnell) and American Home Assurance Company (American Home) appeal from an order of the circuit court reforming an automobile insurance policy to include uninsured motorist coverage (UM) and underinsured motorist coverage (UIM) in the amount of $5,000,000. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

The parties agree to the following Stipulation of Facts and Exhibits:

1. On or about May 1, 2000, John Wood was injured in a motor vehicle accident while in the course and scope of his employment with Grinnell Corporation DBA Grinnell Fire Protection.
2. The vehicle driven by John Wood at the time of the accident was owned by Grinnell Corporation DBA Grinnell Fire Protection.
3. American Home Insurance Company (aka American Home Assurance Company and/or AIG) issued a policy of insurance to Grinnell Corporation DBA Grinnell Fire Protection, policy number RMCA5347215

providing automobile insurance coverage for vehicles owned by Grinnell Corporation DBA Grinnell Fire Protection including but not limited to the automobile involved in this accident.

4. The insurance policy in question provides for coverage limits of Five Million Dollars.

5. The documents identified as Exhibits 1, 2, and 3 attached to the stipulation of fact are agreed to by the parties to be true and accurate copies of the original documents in question and authenticated for admissibility into evidence at the hearing on this matter, said exhibits identified as follows:
Exhibit 1 – American Home Assurance Company insurance policy issued to Grinnell Corporation;
Exhibit 2 – Premium Agreement between American Home Assurance Company and Grinnell Corporation; and
Exhibit 3 – American Home Assurance Company offer/rejection form for optional UM/UIM coverage.

All issues of UIM + UM are deemed properly pleaded and raised.

On July 1, 1999, Tyco International (US) Inc. (Tyco), obtained a policy of insurance with American Home. At the time Tyco obtained the policy, Grinnell was a wholly owned subsidiary of Tyco. The policy provided commercial auto coverage with liability limits in the amount of $5,000,000 and applied to vehicles owned and operated by Grinnell. Along with the policy, Tyco and American Home executed a "payment agreement" which required Tyco to reimburse American Home up to $500,000 for each claim American Home paid. Using a standard form, American Home made an "Offer of Additional Uninsured and Underinsured Automobile Insurance Coverages" (the Offer Form) for Tyco's South Carolina policy.

Gerald M. Goetz executed the Offer Form for Tyco's South Carolina policy. At the time, Goetz was serving as Vice President of Risk Management for Tyco. He had worked in the insurance industry as a risk manager since 1978 and earned several degrees relating to risk management.

Goetz signed only the acknowledgement section of the Offer Form. He testified the Offer Form was not completed by Tyco; it was filled out by either American Home or the insurance broker.

Goetz asserted he was fully aware of Tyco's options and the nature of UM and UIM coverage when he executed the form. According to Goetz, Tyco was "effectively self-insured" due to the $500,000 deductible, and explained that Tyco would not have bought additional UM and UIM coverage under any circumstances because doing so would increase its own exposure to liability. Additionally, Goetz professed Tyco desired to purchase minimum UM and UIM coverage because it carried workers' compensation coverage for employees who might be injured while driving company vehicles.

On May 1, 2000, John Wood sustained injuries from an accident while driving a vehicle owned by Grinnell, his employer at the time. The vehicle was insured under the policy American Home issued to Grinnell.

Wood brought a claim for workers' compensation benefits against Grinnell which was paid. Wood also sought recovery under UM and UIM coverage in the case of John Wood v. Lisa Ackerman and John Doe, 2003-CP-08-615. In that action, which is currently pending, Wood served both American Home and Government Employees Insurance Company (GEICO), the insurance provider for his personal vehicle.

Grinnell filed this separate action against Wood, GEICO, and American Home seeking a declaratory judgment that it had successfully rejected UIM and additional UM coverage under its policy with American Home. GEICO answered, filing a counterclaim against Grinnell and a cross-claim against American Home, asking for a reformation of Grinnell's policy to include additional UM and UIM coverage. GEICO requested a declaration that American Home is the primary insurance provider for UM and UIM coverage. Wood answered and filed a cross-claim against American Home, beseeching a reformation of the policy and damages for bad faith.

Following discovery, Grinnell, GEICO, and Wood filed motions for summary judgment on the issues of the offer of UM and UIM and reformation of the policy. American Home joined in Grinnell's motion at the hearing. The motions were heard on the stipulated facts above. The circuit court granted summary judgment to Wood and GEICO.

STANDARD OF REVIEW

I. Summary Judgment/Sufficiency of Offer

In reviewing the grant of a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56, SCRCP. Pye v. Estate of Fox, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP ("The judgment sought shall be rendered forthwith 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."); Young v. South Carolina Dept. of Disabilities and Special Needs, 374 S.C. 360, 365, 649 S.E.2d 488, 490 (2007); Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006); Houck v. State Farm Fire & Cas. Ins. Co., 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005); Bennett v. Investors Title Ins. Co., 370 S.C. 578, 587, 635 S.E.2d 649, 654 (Ct. App. 2006); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party; Law v. S.C. Dep't of Corrections, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 619, 602 S.E.2d 747, 749 (2004); Moore v. Weinberg, 373 S.C. 209, 216, 644 S.E.2d 740, 743 (Ct. App. 2007); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 213, 609 S.E.2d 565, 567 (Ct. App. 2005).

"When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to

those facts." WDW Props. v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000); Cowden Enterprises, Inc. v. East Coast Millwork Distributors, 363 S.C. 540, 543, 611 S.E.2d 259, 260 (Ct. App. 2005); Goldston v. State Farm Mut. Auto. Ins. Co., 358 S.C. 157, 166, 594 S.E.2d 511, 516 (Ct. App. 2004). In such cases, we are not required to defer to the circuit court's legal conclusions. Dreher v. Dreher, 370 S.C. 75, 79, 634 S.E.2d 646, 648 (2006); J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth., 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999); McGirt v. Nelson, 360 S.C. 307, 310, 599 S.E.2d 620, 622 (Ct. App. 2004); In re Estate of Boynton, 355 S.C. 299, 301-302, 584 S.E.2d 154, 155 (Ct. App. 2003).

The sufficiency of an offer of UIM or UM coverage is a question of law for the court. See Hanover Ins. Co. v. Horace Mann Ins. Co., 301 S.C. 55, 389 S.E.2d 657 (1990); Antley v. Nobel Ins. Co., 350 S.C. 621, 567 S.E.2d 872 (Ct. App. 2002); Bower v. Nat'l Gen. Ins. Co., 342 S.C. 315, 536 S.E.2d 693 (Ct. App. 2000), aff'd, 351 S.C. 112, 569 S.E.2d 313 (2002).

II. Statutory Construction

The issue of interpretation of a statute is a question of law for the court. Univ. of S. California v. Moran, 365 S.C. 270, 275, 617 S.E.2d 135, 137 (Ct. App. 2005); see also Catawba Indian Tribe of South Carolina v. State of South Carolina, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007), cert. denied, Oct. 1, 2007; Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995).

The cardinal rule of statutory interpretation is to determine the intent of the legislature. Bass v. Isochem, 365 S.C. 454, 459, 617 S.E.2d 369, 377 (Ct. App. 2005), cert. dismissed as improvidently granted, 374 S.C. 346, 649 S.E.2d 485 (2007); Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003); Smith v. S.C. Ins. Co., 350 S.C. 82, 87, 564 S.E.2d 358, 361 (Ct. App. 2002); see also Gordon v. Phillips Utils., Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("The primary purpose in construing a statute is to ascertain legislative intent."). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used,

and that language must be construed in the light of the intended purpose of the statute. McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002); Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998); State v. Morgan, 352 S.C. 359, 365-66, 574 S.E.2d 203, 206 (Ct. App. 2002); State v. Hudson, 336 S.C. 237, 246, 519 S.E.2d 577, 581 (Ct. App. 1999). "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." S.C. Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

The legislature's intent should be ascertained primarily from the plain language of the statute. State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Stephen v. Avins Constr. Co., 324 S.C. 334, 339, 478 S.E.2d 74, 77 (Ct. App. 1996). The language must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Mun. Ass'n of S.C. v. AT & T Commc'ns of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004); Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Hudson, 336 S.C. at 246, 519 S.E.2d at 582.

When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005); Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003); Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995); see also City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language."). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or

will. Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct. App. 2001). The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. Durham v. United Cos. Fin. Corp., 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998); Adkins v. Comcar Indus., Inc., 323 S.C. 409, 411, 475 S.E.2d 762, 763 (1996); Worsley Cos. v. S.C. Dep't of Health & Envtl. Control, 351 S.C. 97, 102, 567 S.E.2d 907, 910 (Ct. App. 2002); see also Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970) (observing that where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); Bayle, 344 S.C. at 122, 542 S.E.2d at 739.

If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. Morgan, 352 S.C. at 367, 574 S.E.2d at 207; see also Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) ("[W]here a statute is ambiguous, the Court must construe the terms of the statute."). An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law. Hudson, 336 S.C. at 247, 519 S.E.2d at 582; Brassell, 326 S.C. at 561, 486 S.E.2d at 495; City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck, 330 S.C. 371, 376, 498 S.E.2d 894, 896 (Ct. App. 1998). In construing a statute, the court looks to the language as a whole in light of its manifest purpose. State v. Dawkins, 352 S.C. 162, 166, 573 S.E.2d 783, 785 (2002); Adams v. Texfi Indus., 320 S.C. 213, 217, 464 S.E.2d 109, 112 (1995); Brassell, 326 S.C. at 560, 486 S.E.2d at 494.

A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. See Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct. App. 2005), cert. denied, June 2007; see also Georgia-Carolina Bail Bonds, 354 S.C. at 22, 579 S.E.2d at 336 ("A statute should be given a reasonable and practical construction consistent

with the purpose and policy expressed in the statute."). The real purpose and intent of the lawmakers will prevail over the literal import of the words. Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992).

Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law. See Liberty Mut. Ins. Co., 363 S.C. at 622, 611 S.E.2d at 302; see also Mid-State Auto Auction v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) (stating that in ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole).

LAW/ANALYSIS

Grinnell and American Home argue the offer of additional UM and UIM was a meaningful offer, and concomitantly the circuit court erred in reforming the policy. We disagree.

In addition to mandatory UM coverage, automobile insurance carriers must offer the insured additional UM and UIM coverage. S.C. Code Ann. § 38-77-160 (2002).

> Automobile insurance carriers shall offer, at the option of the insured, uninsured motorist coverage up to the limits of the insured's liability coverage in addition to the mandatory coverage prescribed by Section 38-77-150. Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in

> the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute. . . .

Id. "The purpose of requiring automobile insurers to make a meaningful offer of additional UM or UIM coverage 'is for insureds to know their options and to make an informed decision as to which amount of coverage will best suit their needs.'" Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 262-263, 626 S.E.2d 6, 12 (2005) (citing Progressive Cas. Ins. Co. v. Leachman, 362 S.C. 344, 352, 608 S.E.2d 569, 573 (2005)).

An offer of additional UM and UIM "must be an effective offer that is meaningful to the insured." Todd v. Federated Mut. Ins. Co., 305 S.C. 395, 398, 409 S.E.2d 361, 364 (1991) (citing Dewart v. State Farm Mut. Auto. Ins. Co., 296 S.C. 150, 370 S.E.2d 915 (Ct. App. 1988)). "A noncomplying offer has the legal effect of no offer at all." Progressive, 362 S.C. at 349, 608 S.E.2d at 571. Hanover Ins. Co. v. Horace Mann Ins. Co., 301 S.C. 55, 57, 389 S.E.2d 657, 659 (1990). "If the insurer fails to comply with its statutory duty to make a meaningful offer to the insured, the policy will be reformed, by operation of law, to include UIM coverage up to the limits of liability insurance carried by the insured." Butler v. Unisun Ins. Co., 323 S.C. 402, 405, 475 S.E.2d 758, 760 (1996). Burch v. South Carolina Farm Bureau Mut. Ins. Co., 351 S.C. 342, 345, 569 S.E.2d 400, 402 (Ct. App. 2002).

The Supreme Court of South Carolina adopted a four-part test for determining the sufficiency of an offer of additional UM and UIM in State Farm Mutual Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987). The court elucidated that an offer of additional UM and UIM coverage is meaningful if:

> (1) the insurer's notification process is commercially reasonable, whether oral or in writing; (2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms; (3) the insurer must intelligibly advise the insured of the nature of the optional coverage; and (4) the insured must

> be told that optional coverages are available for an additional premium.

Id.; Progressive 362 S.C. at 349, 608 S.E.2d at 571. "The insurer must satisfy all four prongs of the Wannamaker test to prove there was an effective offer of underinsured motorist coverage, and failure of any one of these prongs vitiates the offer and requires reformation of the policy to include underinsured motorist coverage to the limits of liability." Ackerman v. Travelers Indem. Co., 318 S.C. 137, 144, 456 S.E.2d 408, 411 (Ct. App. 1995) (citing Dewart 296 S.C. 150, 370 S.E.2d 915). "The insurer bears the burden of establishing that it made a meaningful offer." Progressive 362 S.C. at 348-49, 608 S.E.2d at 571. Butler, 323 S.C. at 405, 475 S.E.2d at 759.

In response to the Wannamaker decision, the legislature passed section 38-77-350, which establishes the requirements for forms used in making offers of optional insurance coverages. Progressive, 362 S.C. at 349, 608 S.E.2d at 571. "[W]hen enacting section 38-77-350, the Legislature did not intend to repeal section 38-77-160." Butler, 323 S.C. at 407, 475 S.E.2d at 761. Section 38-77-350 (A) states:

> The director or his designee shall approve a form that automobile insurers shall use in offering optional coverages required to be offered pursuant to law to applicants for automobile insurance policies. This form must be used by insurers for all new applicants. The form, at a minimum, must provide for each optional coverage required to be offered:
> (1) a brief and concise explanation of the coverage,
> (2) a list of available limits and the range of premiums for the limits,
> (3) a space for the insured to mark whether the insured chooses to accept or reject the coverage and a space for the insured to select the limits of coverage he desires,
> (4) a space for the insured to sign the form which acknowledges that he has been offered the optional coverages,

> (5) the mailing address and telephone number of the Insurance Department which the applicant may contact if the applicant has any questions that the insurance agent is unable to answer.

S.C. Code Ann. § 38-77-350(A) (2002).

If the insurer's form complies with these requirements, section 38-77-350(B) provides a conclusive presumption.

> If this form is properly completed and executed by the named insured it is conclusively presumed that there was an informed, knowing selection of coverage and neither the insurance company nor any insurance agent has any liability to the named insured or any other insured under the policy for the insured's failure to purchase any option coverages or higher limits.

S.C. Code Ann. § 38-77-350(B) (2002)[1]. "If the form does not comply with the statute, the insurer may not benefit from the protections of the statute." Progressive, 362 S.C. at 349, 608 S.E.2d at 572 (citing Osborne v. Allstate Ins. Co., 319 S.C. 479, 486, 462 S.E.2d 291, 295 (Ct. App. 1995)).

Grinnell concedes the offer form fails to meet the requirements of section 38-77-350(A), so the conclusive presumption of section 38-77-350(B) does not apply. An insurer's failure to comply with section 38-77-350 does not necessarily presage the lack of a meaningful offer. See Butler 323 S.C. 402, 475 S.E.2d 758. The insurer still has an opportunity to prove an offer is meaningful under the requirements of Wannamaker. See Antley, 350 S.C. at 633, 567 S.E.2d at 878. "Whether a meaningful offer was made depends on the facts and circumstances of a particular case." Croft v. Old Republic Ins. Co., 365 S.C. 402, 420, 618 S.E.2d 909, 918 (2005).

[1] This section was amended with an effective date of June 14, 2006, but the amendment would not affect our analysis of the form as it was executed on July 1, 1999.

Grinnell and American Home assert that while the offer form fails to meet the requirements of 38-77-350(A), the offer form still meets the requirements of Wannamaker. We disagree.

It is axiomatic that a form which fails under the requirements of section 38-77-350(A) would not meet the requirements of Wannamaker without evidence outside of the offer form. Section 38-77-350(A) sets forth the minimum requirements of a form offering optional coverage. Butler 323 S.C. at 408, 475 S.E.2d at 761. "[A] form does not necessarily constitute a meaningful offer simply because it was approved by the Department of Insurance." Floyd, 367 S.C. at 262, 626 S.E.2d at 12. To meet its burden of proof, an insurer must provide evidence outside of the offer form itself to prove satisfaction of the Wannamaker test.

An illustration of this principle can be seen in McDowell v. Travelers Property & Casualty Company, 357 S.C. 118, 590 S.E.2d 514 (Ct. App. 2003). In McDowell an employee sought reformation of his employer's policy on the ground that there was not a meaningful offer of additional UM and UIM coverage. Id. This court conducted a Wannamaker analysis after concluding the offer form did not meet the requirements of section 38-77-350(A). Id. We ruled the insurer had made a meaningful offer because the contract between the parties provided the necessary information which was missing from the offer form. Id. at 124, 590 S.E.2d at 517 ("McDowell's only contention under the Wannamaker analysis is that Travelers failed to provide the premium amounts for the optional UIM coverage. Although the offer form contained no premium amounts in the blanks provided, the contractual agreement between Goodyear and Travelers includes a detailed formula for calculating the premium for UIM coverage."). Essentially, the contract "cured" the offer form's insufficiency. However, without the contract, the insurer would not have provided the necessary information.

The present case is distinguishable from McDowell. In McDowell, the sole deficiency was the offer form's failure to provide premium amounts. Id. This court determined the offer was still meaningful under Wannamaker because premiums could be established from the parties' contract. Id. In the case sub judice, the offer form had several shortcomings; there is no evidence

American Home cured these defects by providing the necessary information in some other way.

While the form stated that additional coverage was available up to the policy limits, the actual offers of optional coverages printed on the form were for amounts far less that the $5,000,000 policy limit. The increased premium charges were left blank even though the form itself states that they must be completed. The form had been filled out to state that "Single Limit[s]" of additional coverage were selected, which is clearly inconsistent with a denial of additional coverage. Lastly, the form required signatures next to the boxes where the insured elects not to choose optional coverage, but no one signed those blanks.

To illustrate the offer form was a meaningful offer, Grinnell and American Home point to evidence of Grinnell's level of sophistication and understanding of UM and UIM insurance coverage.

> [E]vidence of the insureds [sic] knowledge or level of sophistication is relevant and admissible when analyzing, under Wannamaker, whether an insurer intelligibly advised the insured of the nature of the optional UM or UIM coverage. It is a subjective inquiry to the extent the insured may offer evidence of his understanding, or lack thereof, of the nature of UM or UIM coverage. It also is an objective inquiry because the factfinder should consider the insureds [sic] knowledge and level of sophistication in determining whether the insurer intelligibly explained such coverage to the insured.

Croft v. Old Republic Ins. Co., 365 S.C. 402, 420-21, 618 S.E.2d 909, 918 (2005).

Some of the omissions in the offer form cannot be reconciled regardless of how sophisticated the insured may be. For example, the actual offers of optional coverages were for amounts far less than the $5,000,000 policy limit, and the form had been filled out to state that "Single Limit[s]" of additional coverage were selected. Such serious errors may not be mitigated

by the insured's stature. The sophistication level of the insured, while relevant to the sufficiency of the advice given by the insurer, does not completely relax the requirement that an insurer make a meaningful offer of additional UM and UIM coverage. Indeed, insurers are required to make a meaningful offer to even the most sophisticated parties because "the Legislature has recognized that commercial insureds, like non-commercial insureds, undoubtedly run the gamut from the ill-informed to knowledgeable purchasers." Id. at 420, 618 S.E.2d at 918.

CONCLUSION

We hold that American Home did not make a meaningful offer of additional UM and UIM. We rule the circuit court properly reformed the policy of insurance to include UM and UIM coverage in the amount of the policy limits.

Accordingly, the order of the circuit court is

AFFIRMED.

THOMAS, J., concurs.

SHORT, J., dissents in a separate opinion.

SHORT, J., (dissenting): I respectfully dissent.

The majority opinion distinguishes the facts and circumstances of this case from those in this court's opinion in McDowell v. Travelers Property & Casualty Company, 357 S.C. 118, 590 S.E.2d 514 (Ct. App. 2003). I conclude McDowell applies and would reverse the trial court's reformation of the parties' contract.

In McDowell, this court found a meaningful offer despite the failure of the offer form to meet the Wannamaker test. Id. See State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987) (adopting a four-part test for determining the sufficiency of an offer of optional UM and UIM). The court noted that failure to meet the statutory requirements "does not necessarily require reformation of the policy. Rather, the insurer bears the burden of establishing it made a meaning offer. . . ." McDowell, 357 S.C. at 123, 590 S.E.2d at 516. I find the insurer met that burden in this case.

In the typical case, the insured is the party seeking reformation. This case presents the more unusual circumstance of the insured arguing the offer was meaningful and a third party seeking reformation. Under the parties' payment agreement, Tyco is essentially self-insured for the first $500,000 of a claim. Gerald Goetz, the Vice President of Risk Management for Tyco, clarified the valid business purpose for denying optional UM and UIM. Goetz explained that Tyco would not have bought additional UM and UIM because doing so would expose it to additional liability. Gerald Goetz asserted he was knowledgeable and aware of his options when declining additional UM and UIM. Goetz had worked in the insurance industry as a risk manager for over thirty years and had extensive education relating to risk management.

I would find Goetz made a knowing and informed decision in rejecting the optional coverage. See id. at 124-25, 590 S.E.2d at 517 (finding the risk manager made a knowing and informed decision). Furthermore, like the court in McDowell, I would consider the arrangement between the contracting parties in this case and conclude the insurer met its burden of proving it made a meaningful offer to Tyco. Moreover, Goetz's sophistication is a factor to consider in determining whether Tyco received a meaningful offer. See Anders v. S.C. Farm Bureau Mut. Ins. Co., 307 S.C. 371, 376, 415 S.E.2d 406, 409 (Ct. App. 1992) (finding the sophistication of the insured is a factor that may be considered in determining if an offer of optional insurance is meaningful).

Although this offer may not have been meaningful to the typical insured, under these circumstances, considering the sophistication of the insured, I find the offer meaningful. See Croft v. Old Republic Ins. Co., 365 S.C. 402, 420, 618 S.E.2d 909, 918 (2005) (stating "[w]hether a meaningful offer was made depends on the facts and circumstances of a particular case"). Accordingly, I would reverse.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

E. Bruce Morgan, Appellant,

v.

South Carolina Budget and Control Board and South Carolina Retirement Systems, Respondents.

Appeal From Administrative Law Court
Marvin F. Kittrell

Opinion No. 4356
Heard February 5, 2008 – Filed March 13, 2008

AFFIRMED

William E. Whitney, Jr., of Union, for Appellant.

Kelly H. Rainsford and David K. Avant, both of Columbia, for Respondents.

CURETON, A.J.: In this action to determine the cost to purchase non-qualified service credit (Non-Qualified Service) under South Carolina Retirement Systems (Retirement Systems), E. Bruce Morgan appeals the

order of the Administrative Law Court (ALC) requiring the purchase price to be calculated based on Morgan's highest salary. We affirm.

FACTS

From 1982 to 1991, Morgan worked for the State of South Carolina and earned eight years of service credit in Retirement Systems. Morgan later withdrew these contributions. From 1991 to 1997, Morgan worked for the State of North Carolina and earned public service credit toward his retirement account (N.C. Public Service). Morgan rejoined Retirement Systems in November 2000 when he became Mayor of the City of Union, South Carolina.

In 2004, Morgan sought to increase his service credit in Retirement Systems. On August 20, 2004, Morgan submitted a request to Retirement Systems to purchase credit for his N.C. Public Service and additional credit equal to the amount he had previously earned between 1982 and 1991 for his South Carolina service, but had later withdrawn (Withdrawal Service). Retirement Systems acknowledged receipt of his request and informed him processing might take up to ninety days. On October 4, 2004, Retirement Systems notified Morgan he could purchase Withdrawal Service credit for $18,995.95 until April 2, 2005. After Retirement Systems received verification of Morgan's N.C. Public Service, it notified Morgan he could purchase N.C. Public Service credit for $35,562.91 until April 16, 2005.

Soon thereafter, Morgan visited Retirement Systems in person to discuss how it had calculated the price of his N.C. Public Service credit. During this visit, Morgan also inquired about purchasing Non-Qualified Service credit. Retirement Systems informed Morgan it had based the price of his Public Service credit on the $33,592.00 salary indicated in the Withdrawal Service invoice. Furthermore, Retirement Systems advised Morgan if he elected not to buy Withdrawal Service first, it could recalculate the purchase price of his Public Service credit and Non-Qualified Service credit using his then-current salary of $6,610.00. Retirement Systems stated Morgan could purchase up to five years of Non-Qualified Service based on

the $6,610.00 salary. Retirement Systems did not advise Morgan he was currently not qualified to purchase Non-Qualified Service.[1]

Subsequently, Morgan submitted a written request to purchase Non-Qualified Service credit and N.C. Public Service credit based on the $6,610.00 salary. Morgan's letter specified he would purchase Withdrawal Service credit later. Pursuant to this letter, Retirement Systems recalculated the price of Morgan's N.C. Public Service credit as $6,998.03. The October 28, 2004, invoice for Morgan's N.C. Public Service credit included a postscript indicating "you are not eligible to purchase non qualified service until you have reached 5 years of earned service." Four weeks later, Morgan purchased N.C. Public Service credit from Retirement Systems.

On November 29, 2004, Morgan again called Retirement Systems, which erroneously advised him he could purchase Non-Qualified Service credit after his N.C. Public Service credit purchase posted. Nine days later, Retirement Systems corrected this error by advising Morgan he must have five years of earned service before he could purchase Non-Qualified Service credit. Morgan stated he would first purchase his Withdrawal Service credit, which would satisfy the earned-service requirement, and would later submit his request to purchase Non-Qualified Service credit. However, instead of purchasing Withdrawal Service credit first, Morgan visited Retirement Systems and requested to purchase Non-Qualified Service credit. Despite the fact Morgan had already completed the purchase of N.C. Public Service credit, Retirement Systems instructed Morgan to complete a new written request to purchase that credit, and he did so.

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[1] It appears Retirement Systems was unaware at this time that Morgan's salary would increase within a few months. Had Morgan declined to purchase Withdrawal Service credit, Retirement Systems could not have used his former career-high salary of $33,592 to calculate the purchase price of other types of credit. Consequently, had Morgan continued to work at the $6,610.00 salary until he earned five years of retirement credit, Retirement Systems could have calculated the cost of Non-Qualified Service credit using his $6,610.00 salary.

On December 14, 2004, Morgan called Retirement Systems and inquired whether he could purchase just enough Withdrawal Service credit to make him eligible to purchase Non-Qualified Service credit. Retirement Systems informed him he could do so, but if he did, he would be unable to purchase the remainder of his Withdrawal Service until the following fiscal year.[2] Morgan submitted a written request to Retirement Systems to purchase Withdrawal Service credit, providing Retirement Systems with information about the Smith Barney IRA account he intended to use to fund the purchase. Two weeks later, Retirement Systems notified Morgan the information he had provided was insufficient because it failed to indicate whether the Smith Barney IRA consisted of pretax funds. On January 10, 2005, Morgan started a new state job at a career-high salary of $89,000.00.

Morgan did not contact Retirement Systems again until February 7, 2005, when he inquired about purchasing Withdrawal Service credit using rollover funds from his Wachovia account. In March 2005, Morgan purchased Withdrawal Service credit pursuant to the October 4, 2004, invoice using funds from a different account than before. Thereafter, Retirement Systems informed Morgan that Wachovia had overpaid, and Morgan requested Retirement Systems apply the overpayment to his purchase of Non-Qualified Service credit. When Morgan learned the cost, he declined to purchase the Non-Qualified Service credit. On April 21, 2005, Retirement Systems refunded the overpayment to Wachovia for deposit in Morgan's account.

In May 2005, with no other service available for Morgan to purchase, Retirement Systems confirmed the cost of Non-Qualified Service credit as $155,750.00, based on his $89,000.00 salary. Morgan appealed in a letter to the Director of Retirement Systems. Retirement Systems issued a final agency determination confirming $155,750.00 as the cost of Morgan's Non-Qualified Service credit. Morgan contested and requested the ALC hear this matter. The ALC affirmed Retirement Systems' final agency determination. This appeal followed.

[2] See S.C. Code Ann. § 9-1-1140(K).

STANDARD OF REVIEW

Review of a decision by the ALC is confined to the record. S.C. Code Ann. §§ 1-23-380(A)(4), 1-23-610(C) (Supp. 2006). "The findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence." Kearse v. State Health & Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). "'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981).

LAW/ANALYSIS

Morgan argues the ALC erred in declining to estop Retirement Systems from calculating the cost of Morgan's Non-Qualified Service credit using his current, career-high salary because Retirement Systems' misinformation and delays prevented Morgan from completing his purchase before his salary increased. We disagree.

Under South Carolina law, active members of Retirement Systems may establish service credit for public service, non-qualified service, and previously withdrawn service by making payments into the system. S.C. Code Ann. § 9-1-1140 (Supp. 2007). Furthermore:

> An active member who has five or more years of earned service credit may establish up to five years of nonqualified service by making a payment to the system to be determined by the board, but not less than thirty-five percent of the member's current salary or career highest fiscal year salary, whichever is greater, for each year of credit purchased.

§ 9-1-1140(E). Of the three types of purchasable service credit listed above, only previously withdrawn service credit may substitute for earned service. § 9-1-1140(J).

Misrepresentations by government officials acting within the proper scope of their authority may subject the government to estoppel. McCrowey v. Zoning Bd. of Adjustment of City of Rock Hill, 360 S.C. 301, 305-06, 599 S.E.2d 617, 619 (Ct. App. 2004) (citing S.C. Coastal Council v. Vogel, 292 S.C. 449, 453, 357 S.E.2d 187, 189 (Ct. App. 1987)). However, estoppel is not appropriate where a government official or employee with limited authority erroneously provides advice beyond the scope of his authority. McCrowey, 360 S.C. at 305, 599 S.E.2d at 619 (citing DeStefano v. City of Charleston, 304 S.C. 250, 257-58, 403 S.E.2d 648, 653 (1991)). Estoppel will not lie against a government entity where a government employee gives erroneous information in contradiction of statute. Office of Personnel Management v. Richmond, 496 U.S. 414, 415-16 (1990). Simply stated, equity follows the law. Smith v. Barr, 375 S.C. 157, 164, 650 S.E.2d 486, 490 (Ct. App. 2007).

Estoppel based on erroneous advice is inappropriate under the facts of this case. Retirement Systems administers South Carolina's state-employee retirement plans. Providing plan members with correct information concerning their rights and benefits is therefore within Retirement Systems' purview. Morgan argues Retirement Systems misled him concerning his eligibility to purchase Non-Qualified Service. However, eligibility to purchase service credit is purely statutory. Retirement Systems had no discretion to determine an individual member's eligibility and thus lacked authority to contradict the statute. Therefore, estoppel is improper here under both McCrowey and Richmond.

Morgan further argues Retirement Systems should be estopped because Retirement Systems' delays in processing his requests for service credit prevented him from effecting the purchases before his salary increased. The doctrine of equitable estoppel may be enforced in a court of law as well as in equity matters." Strickland v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 471 (2007). "The party asserting estoppel bears the burden of establishing all

its elements." Estes v. Roper Temp. Servs., 304 S.C. 120, 122, 403 S.E.2d 157, 158 (Ct. App. 1991). A government entity may be equitably estopped in matters that do not affect the due exercise of its police power or the application of public policy. Grant v. City of Folly Beach, 346 S.C. 74, 80, 551 S.E.2d 229, 232 (2001). Estoppel may apply against a government agency. Id. A party asserting estoppel against the government 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." Id. Absent even one element, estoppel will not lie against a government entity. Id. However, citizens are presumed to know the law and are charged with exercising "reasonable care to protect [their] interest[s]." Smothers v. U.S. Fidelity and Guar. Co., 322 S.C. 207, 210-11, 470 S.E.2d 858, 860 (Ct. App. 1996).

Morgan's estoppel argument fails on the first two elements. First, Morgan argues he lacked knowledge because Retirement Systems misled him as to the truth of his situation by failing to inform him he could purchase Non-Qualified Service credit only after he purchased Withdrawal Service credit. Furthermore, Morgan argues Retirement Systems improperly encouraged him to apply to purchase Non-Qualified Service credit immediately after his purchase of N.C. Public Service credit posted. However, section 9-1-1140 clearly outlines eligibility requirements for each type of service.[3] Therefore, Morgan had the means to discern for himself whether he was eligible to purchase service credit, and thus, he failed to satisfy the first element.

[3] Morgan attempts to analogize Landing Dev. Corp. v. City of Myrtle Beach, 285 S.C. 216, 329 S.E.2d 423 (1985), in which estoppel was appropriate where an individual had relied upon the City's consistent but improper representations concerning a zoning ordinance, and the City later sought to enforce the ordinance. However, that case is distinguishable from the one at bar because Morgan at all times had the ability to review the statute for himself. Moreover, no evidence indicates Retirement Systems consistently misinterpreted the statute.

For the second element, justifiable reliance, Morgan argues he missed his "deadline" because he relied on Retirement Systems to guide him and process his requests timely, but Retirement Systems instead misinformed him and caused delays. However, Retirement Systems misinformed Morgan on only one occasion, correcting its error within nine days. No evidence suggests Morgan acted on this misinformation until after Retirement Systems had correctly informed him of the need to purchase Withdrawal Service credit first.[4] Furthermore, no evidence suggests Retirement Systems was aware of any "deadline." Retirement Systems noted Morgan was confident he would be re-elected as mayor and wanted to purchase additional service before he got a "real job." However, we do not find these notations sufficient to establish Retirement Systems knew Morgan's salary would increase significantly on January 10, 2005. Rather, Retirement Systems appears to have handled a multitude of Morgan's requests, both for information and for action, in a reasonably timely manner. Lacking any evidence he justifiably relied on the misinformation, Morgan failed to satisfy the second element as well.

For the final element, a prejudicial change in position, the record reflects Morgan's salary increase permanently raised his cost of purchasing additional service credit. This element alone is satisfied. However, without all three elements, Morgan's estoppel argument fails.

[4] Morgan often repeats Retirement Systems' statement, "You will not be penalized due to our delay." A reasonable person might expect this statement to preclude Retirement Systems from imposing any late-filing penalties due to processing delays. However, Morgan seems to interpret it as an unlimited promise by Retirement Systems to indemnify him against any and all changes that might occur during the pendency of his request, including those changes within his control. We disagree with this view. Morgan undoubtedly knew the effective date and amount of his new salary and had the power to decline to accept it. He elected to accept it in spite of any consequences to his cost of purchasing retirement credit.

Equitable estoppel against a government entity requires successful proof of all three elements. Morgan successfully proved a prejudicial change in position, but he failed to prove either lack of knowledge or justifiable reliance. Therefore, estoppel against Retirement Systems is inappropriate in this matter.

CONCLUSION

Retirement Systems should not be estopped from using Morgan's January 10, 2005, salary to calculate the cost of Non-Qualified Service credit, because Morgan fails to satisfy two of the three required elements for estoppel against a government entity. Morgan has proved neither lack of knowledge nor justifiable reliance. Without proving all three elements, Morgan is not entitled to estoppel. Accordingly, the order of the ALC is

AFFIRMED.

HEARN, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Gary Robert Moore, Appellant.

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

Opinion No. 4357
Submitted January 1, 2008 – Filed March 13, 2008

AFFIRMED

Appellate Defender Aileen P. Clare, 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; and Solicitor John Gregory Hembree, of Conway, for Respondent.

PIEPER, J.: Appellant Gary Robert Moore (Moore) was convicted of felony driving under the influence and leaving the scene of an accident involving death. Moore asserts the trial court erred in refusing to suppress evidence removed from his brother's truck because the search exceeded the scope of consent. He also asserts the trial court erred in failing to declare a mistrial when the solicitor implied that Moore had an affirmative duty to modify his statement to police. We affirm.[1]

STATEMENT OF FACTS

On the night of October 19, 2002, and into the early morning of October 20, 2002, a truck driving on Highway 17 in Horry County hit a pedestrian walking on the median and drove off. Police investigated this traffic fatality, received a witness report describing the vehicle involved, collected remaining parts of the car from the scene of the crime, and notified news media. Thereafter, an off duty officer reported a truck with a matching description and called in its tag number. Officers then used that tag number and went to the home of Moore and his brother. Both Moore and his brother were informed of the hit and run incident and were asked by the police to give consent to process the vehicle. Moore's brother notified the police that the he owned the truck but that Moore typically drove it. Both brothers consented verbally and in writing to allow processing of the truck by the South Carolina Highway Patrol. In an abundance of caution, a search warrant was obtained before taking parts off the vehicle. That warrant was challenged as defective at trial; however, the state indicated to the court that it was proceeding on its theory of consent and the efficacy of the search warrant was never addressed by the trial court. Moore concedes on appeal that the search warrant issue is not preserved for our review.[2]

When processing was completed on the vehicle, parts were missing and the battery had been removed and placed in the bed of the truck. The truck

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

[2] While we note the existence of a valid search warrant may satisfy our concerns about the evidence seized, we nonetheless feel compelled to address the arguments on appeal since the state requested the trial court to proceed only on the consent theory.

was inoperable at that point and had to be towed for return. Because of these actions, Moore asserts the officers exceeded the scope of any consent given. Moore's motion to suppress the evidence was denied by the trial court.

At trial, Moore also asserted that the solicitor improperly commented on his constitutional right to remain silent by suggesting the defendant had a duty to contact the police to correct a mistake in his statement to the police. The trial court denied the motion and gave a cautionary instruction to the jury.

From these rulings, the defendant now appeals.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). The appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." Wilson, 345 S.C. at 6, 545 S.E.2d at 829.

ANALYSIS

I

Did the trial court err by denying Moore's motion to suppress based on the allegation that investigating officers exceeded the scope of consent by removing parts of the truck and returning it in an inoperable condition?

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) (citations omitted). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). In an

appeal from a motion to suppress evidence based on Fourth Amendment grounds, our review is limited to determining whether any evidence supports the circuit court's decision. State v. Bowman, 366 S.C. 485, 501, 623 S.E.2d 378, 386 (2005).

As to his consent argument, Moore primarily relies on State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001). Forrester stands for the proposition that under the South Carolina Constitution, "suspects are free to limit the scope of the searches to which they consent." Id. at 648, 541 S.E.2d at 843. "When relying on the consent of a suspect, a police officer's search must not exceed the scope of the consent granted or the search becomes unreasonable." Id. "The scope of the consent is measured by a test of 'objective' reasonableness- what would the typical reasonable person have understood by the exchange between the officer and the suspect?" State v. Mattison, 352 S.C. 577, 585-86, 575 S.E.2d 852, 856 (Ct. App. 2003) (citation omitted). Admittedly, a cursory review suggests a search which partially dismantled the truck and left it inoperable arguably exceeded the scope of consent given. See State v. Garcia, 127 N.M. 695, 698, 986 P.2d 491, 494 (N.M. App. 1999), cert. granted, 128 N.M. 150, 990 P.2d 824 (N.M. Aug. 11, 1999) (No. 25,837) (although an individual consenting to a vehicle search should expect the search to be thorough, he need not anticipate the search to include the destruction of his vehicle).

However, the case at hand is distinguishable from the authority upon which Moore relies. While Moore might have had some interest in the truck being searched pursuant to his status as a permissive user, even if the search of his brother's truck exceeded the scope of Moore's consent, it did not violate Moore's privacy interests. South Carolina cases such as Forrester, which address the scope of consent given to investigating officers, pertain to the expansion of an existing search to incorporate a compartment or container not covered by the consent given. In the case at hand, the issue is not whether the investigating officers intruded into a protected, private or hidden area, but rather, the issue is whether they exceeded the scope of consent by damaging or dismantling the truck they were searching. The damaging or dismantling of Moore's truck may give some right of recourse to Moore's brother, but affords no specific constitutional right to Moore himself based on the facts presented in this case.

Initially, we question whether Moore's constitutional rights were violated due to his lack of any reasonable expectation of privacy in the vehicle since consent to search was also given by his brother, the true owner of the vehicle in question. As previously mentioned, this case does not involve a violation of Moore's right to privacy. For Fourth Amendment purposes, "[a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." U.S. v. Jacobsen, 466 U.S. 109, 113, 133, 104 S.Ct. 1652, 1656 (1984) (citing U.S. v. Place, 462 U.S. 696, 696, 103 S.Ct. 2637, 2638 (1983)). The only evidence presented was that Moore was a regular driver of the vehicle and thus, was a permissive user of the vehicle. Even if Moore were the only one to regularly drive the vehicle, since Moore's brother, the owner, also consented to the search and seizure of the vehicle, Moore cannot now claim that any alleged possessory interest in the vehicle was infringed or violated.

In the context of a passenger occupant, the United States Supreme Court in Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421(1978), addressed whether evidence seized in an automobile in which defendants had been passengers should have been suppressed. The Court held that:

> "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections. There is no reason to think that a party whose rights have been infringed will not, if evidence is used against him, have ample motivation to move to suppress it. Even if such a person is not a defendant in the action, he may be able to recover damages for the violation of his Fourth Amendment rights, or seek redress under state law for invasion of privacy or trespass.

Rakas, 439 U.S. at 133-34, 99 S.Ct. at 425 (citations omitted). While there may be circumstances under which a non-owner driver can demonstrate the requisite expectation of privacy under Rakas to gain standing, no such circumstances have been presented in this case. Assuming, arguendo, that a person may have some expectation of privacy over that person's own vehicle parked in the backyard of his own residence, Moore's constitutional claim is nonetheless unavailing. While Moore has demonstrated he resided at the location, the record still does not suggest such a privacy interest in the vehicle itself to invoke further scrutiny by this court. He did not have sole custody of the vehicle nor was he stopped while he was using the vehicle. We see nothing more of record than his status as a permissive user. Any concern raised by virtue of the vehicle's location in the backyard, especially under the South Carolina Constitution, was rectified by the consent to take the vehicle from the backyard. Further, as the trial court indicated, the only evidence used against him was visually accessible on the outside of the vehicle. Thus, any reasonable expectation of privacy Moore may have had in the vehicle was not infringed. Additionally, Moore has failed to particularize any injury in fact that he has suffered as a result of the search. Accordingly, we find neither a violation of his Fourth Amendment rights nor a violation of Art. 1, Section 10 of the S.C. Constitution.

Furthermore, the investigating officers had probable cause to search the vehicle obviating the need for expanded consent or for analyzing the scope thereof. "Generally, a warrantless search is per se unreasonable and thus violative of the Fourth Amendment's prohibition against unreasonable searches and seizures." State v. Bultron, 318 S.C. 323, 331, 457 S.E.2d 616, 621 (Ct.App.1995) (citing State v. Bailey, 276 S.C. 32, 274 S.E.2d 913 (1981)). "However, a warrantless search will withstand constitutional scrutiny where the search falls within one of a few specifically established and well delineated exceptions to the Fourth Amendment exclusionary rule." Bultron, 318 S.C. at 331-32, 457 S.E.2d at 621 (citing State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986)). These exceptions include: (1) search incident to a lawful arrest; (2) "hot pursuit"; (3) stop and frisk; (4) automobile exception; (5) "plain view" doctrine; (6) consent; and (7) abandonment. State v. Dupree, 319 S.C. 454, 456-57, 462 S.E.2d 279, 281 (1995), cert. denied, 516 U.S. 1131, 116 S.Ct. 951 (1996).

"The burden of establishing probable cause as well as the existence of circumstances constituting an exception to the general prohibition against warrantless searches and seizures is upon the prosecution." Bultron, 318 S.C. at 332, 457 S.E.2d at 621. The record establishes the requisite probable cause in this case. Officer Harrelson testified that a witness who viewed the collision described the truck as "a camouflaged type colored vehicle, an older pickup truck and the clincher was that the license tag was mounted on the left side of the bumper which is something you don't see often." That description was then conveyed to news media, and a day or two later an off duty officer called in a license plate number of a vehicle matching that unique description. From that license plate information, Officer Harrelson was able to obtain an address for the suspect vehicle. Upon arriving at that address, Officer Harrelson saw the suspect vehicle in the driveway behind the residence. Through visual inspection of that vehicle, Officer Harrelson noticed that the license plate was off center, the truck was so rusty that at night it could appear camouflage in color, and that it had sustained damage to front end. Before giving the consent to take the vehicle, and after being given Miranda warnings, Moore voluntarily told the officer he had been driving on the night in question around the time of the incident. He further indicated that he thought he hit an animal or a bump or something and that there were no mechanical problems with the car. This combination of information is sufficient to establish that the officer had probable cause which, when combined with one of the exceptions to the warrant requirement, justifies a warrantless search of the vehicle.

As to those previously listed exceptions, we first look to the automobile exception. "The two bases for the exception are: (1) the ready mobility of automobiles and the potential that evidence may be lost before a warrant is obtained; and (2) the lessened expectation of privacy in motor vehicles which are subject to governmental regulation." State v. Cox, 290 S.C. 489, 491, 351 S.E.2d 570, 571 (1986) (citations omitted). In Cox, the court found that "under the automobile exception, probable cause alone is sufficient to justify a warrantless search." Id. at 492, 351 S.E.2d at 571-72 (citing California v. Carney, 471 U.S. 386, 105 S.Ct. 2066 (1985)).

Furthermore, in State v. Weaver, 374 S.C. 313, 320-21, 649 S.E.2d 479, 483 (2007), the supreme court noted that if there is probable cause to search a vehicle at the time it is seized, this rationale does not disappear merely because the vehicle is taken into police custody or immobilized. The court also indicated that it does not matter if a few days have passed before the search is conducted. While the majority in Weaver suggests it does not matter whether the vehicle was on private or public property and the dissent took exception thereto, we need not address any further the public / private dichotomy since the concerns of both the majority and the dissent are met by the consensual act of Moore and his brother allowing the police onto the property to take the vehicle. Therefore, under the automobile exception to the warrant requirement, the presence of probable cause validated the search and seizure of the vehicle despite the scope of consent given and impoundment of the vehicle by investigating officers.

We conclude, under the circumstances presented, the record herein does not support a violation of any reasonable expectation of privacy assertion by Moore to warrant suppression of the evidence and we also conclude that Moore failed to particularize any specific injury suffered. Moreover, even if the officers exceeded the scope of consent, their search of the vehicle was still lawful under the automobile exception to the warrant requirement and the evidence was appropriately admitted into Moore's trial.[3]

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[3] Appellate rules provide that we may affirm a decision upon any grounds appearing in the record. Rule 220(c), SCACR (2006). In that regard, we note that the plain view doctrine is also potentially applicable and was addressed by the trial court. However, one of the elements of the doctrine recognized by the South Carolina Supreme Court case is inadvertent discovery. State v. Culbreath, 300 S.C. 232, 237, 387 S.E.2d 255, 257 (1990). Shortly after Culbreath was decided, the United States Supreme Court in Horton v. California, 496 U.S. 128, 130, 110 S.Ct. 2301, 2304 (1990), ruled that the plain view exception to the Fourth Amendment's warrant requirement applies even if the discovery of the evidence was not inadvertent, if the other requirements of the exception are satisfied. Due to our disposition and in light of the fact that the South Carolina Supreme Court has not yet indicated whether Horton will impact South Carolina jurisprudence, especially as it may apply to the South Carolina Constitution, we need not address this issue.

II

Did the trial court err by failing to declare a mistrial when the solicitor allegedly suggested that Moore had an affirmative duty to modify his statement to police?

Moore argues that during closing arguments the solicitor made an impermissible comment on the defendant's right to remain silent when he stated the following:

> Remember this. Tim Novembrino, a friend of his, Tim Novembrino said, "After the police talked with him, he comes up and says immediately runs to the phone." He says,
>
> "Tim, I was with you last night. Right?"
>
> "No, you wasn't at my house."
>
> "I spent the night with you on the 20th, the 19th going into the 20th. Right?"
>
> "No."
>
> "Well, I told the police that."
>
> Tim Novembrino said, "You better go back and tell the police something different because that is not true."
>
> People, you can consider that as evidence of a guilty mind.

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005); State v. Rowlands, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). Granting of a mistrial is a serious and

extreme measure which should only be taken when the prejudice can be removed no other way. Stanley, 365 S.C. at 34, 615 S.E.2d at 460.

While the state may not directly or indirectly refer to or comment upon a defendant's exercise of a constitutional right, namely his right to remain silent, here the solicitor was commenting on what he characterized as Moore's attempt to create a false alibi. Furthermore, the solicitor simply restated the testimony that was already in the record without objection. "Improper comments on a defendant's failure to testify do not automatically require reversal if they are not prejudicial to the defendant." Gill v. State, 346 S.C. 209, 221, 552 S.E.2d 26, 33 (2001). "The defendant bears the burden of demonstrating that improper comments on his refusal to testify deprived him of a fair trial." Id. "Furthermore, even if the solicitor makes an improper comment on the defendant's failure to testify, a curative instruction emphasizing the jury cannot consider [the] defendant's failure to testify against him will cure any potential error." Id.

The trial judge first gave a cautionary instruction to the jury during trial that the testimony of the witness about instructing Moore to call the police was not to be held against the defendant and the judge further reminded the jury that the defendant had the constitutional right to remain silent. In the final charge, the judge again stated that Moore did not have the duty to report to or call the police. The judge also reiterated the defendant's right to remain silent and that the defendant's silence may not be considered against him. Even if the comment by the solicitor was inappropriate, which we do not so hold, having considered the entire record and the charge as a whole, the trial judge cured the alleged improper inference by the solicitor, if any. Accordingly, any alleged error did not prejudice Moore and was therefore harmless.

CONCLUSION

For the aforementioned reasons the judgment of the trial court is hereby

AFFIRMED.

HUFF, J., and GOOLSBY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kelvin Thomas, Appellant,

v.

Jeffery Dootson, DMD, Respondent.

Appeal From Richland County
James R. Barber, III, Circuit Court Judge

Opinion No. 4358
Heard January 8, 2008 – Filed March 13, 2008

REVERSED AND REMANDED

Robert B. Ransom, of Columbia, for Appellant.

Charles E. Hill and R. Hawthorne, both of Columbia, for Respondent.

KITTREDGE, J: This is an appeal from a directed verdict for Dr. Jeffrey Dootson in a medical malpractice case. The disposition of this appeal turns on whether there is evidence that Dr. Dootson had notice that a surgical drill overheated prior to the injury to the patient, Kelvin Thomas. Viewing the evidence in a light most favorable to Thomas, as we must, we find

evidence Dr. Dootson had notice that the surgical drill was defective prior to the injury. As a result, we reverse and remand for a new trial.

I.

During oral surgery, Thomas' mouth was severely burned by a malfunctioning drill. Thomas filed a medical malpractice claim against Dr. Dootson and Palmetto Richland Memorial Hospital.[1] The trial court directed a verdict for Dr. Dootson at the close of Thomas' case.

The critical issue at trial, and before us on appeal, is whether Dr. Dootson had notice the surgical drill overheated prior to Thomas' injury. The case was tried on the premise that the surgical drill was defective. Beginning with his opening statement at trial, Dr. Dootson's counsel stated, "[t]he reason this injury occurred is quite simple. There was an equipment malfunction. The surgical drill that Dr. Dootson was using overheated and burned Mr. Thomas' mouth." This concession was reiterated on appeal, as Dr. Dootson acknowledged:

> There has never been any real dispute that a defective surgical drill resulted in the burn to Thomas' lip. Indeed, the fact was essentially presumed at trial, since the Hospital, which had provided the drill, had already settled out of the case. The central issue at trial, therefore, was whether Dr. Dootson breached his standard of care by using the drill during the surgical procedure.

Dr. Dootson is bound by his concessions. See Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (stating an issue conceded at trial is procedurally barred from appellate review); Shorb v. Shorb, 372 S.C. 623, 628 n.3, 643 S.E.2d 124, 127 n.3 (Ct. App. 2007) (holding a party is bound by a concession in his brief).

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[1] The claim against the hospital was settled prior to trial.

Dr. Dootson on appeal attempts to resurrect the need for expert testimony and recast the issue by stating, "[i]f the equipment at issue had been something simpler and more common, that argument might have some merit. The problem for Thomas, though, is that the proper operation of a surgical drill is *not* something within the lay knowledge of jurors." (emphasis in original). We believe the concession, as noted above, removed the need for expert testimony regarding standard of care concerning the operation of the surgical drill.

Were we in any event inclined to adopt Dr. Dootson's argument that his argument concerning the need for expert testimony is properly before us, we would reject it. Generally, expert testimony is required in medical malpractice cases to show the doctor failed to conform to the required standard of care; however, an exception exists when "the common knowledge or experience of laymen is extensive enough for them to be able to recognize or infer negligence on the part of the doctor and also to determine the presence of the required causal link between the doctor's actions and the patient's medical problems." Pederson v. Gould, 288 S.C. 141, 142, 341 S.E.2d 633, 634 (1986). The South Carolina Supreme Court has held a tubal ligation rendering an intrauterine device or any other birth control device useless constitutes a matter of common knowledge. Green v. Lilliewood, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (1978). If the subject matter of Green is within the common knowledge exception, a claim arising from a surgical drill that burns skin on contact would fall well within the common knowledge or experience of laymen.

We turn to the dispositive issue of notice to determine if evidence of notice existed. When reviewing a directed verdict, this court will view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Bultman v. Barber, 277 S.C. 5, 7, 281 S.E.2d 791, 792 (1981). "A jury issue exists where the evidence is susceptible of more than one reasonable inference." Jones v. Ridgely Commc'ns, Inc., 304 S.C. 452, 454, 405 S.E.2d 402, 403 (1991). "When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000).

Further, this court stated in Weaver v. Lentz, 348 S.C. 672, 680-81, 561 S.E.2d 360, 365 (Ct. App. 2002):

> [I]t is not unusual for a case to have contradictory evidence and inconsistent testimony from a witness. In a law case tried before a jury, it is the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve. Under such circumstances, it is not the function of this Court to weigh the evidence and determine the credibility of the witnesses.

In the case at hand, Thomas presented testimony Dr. Dootson was warned of a drill overheating in a previous surgery and the drill being used for Thomas' surgery was hot. At trial, the following exchange occurred without objection during the questioning of surgical technician, Michael Ellis:[2]

> Q: Mr. Ellis, there's no question, you said, that the drill malfunctioned?
> A: Correct.
> Q: No question that Dr. Dootson was warned about this drill?
> A: Correct.
> Q. After you had warned him and after it started getting hot, did Dr. Dootson do anything to check the drill to see whether it was still safe to use?
> A. No.

Ellis also testified when Dr. Dootson passed him the drill prior to Thomas' injury, Ellis noticed the drill was "warmer than normal."

[2] Dr. Dootson argues Ellis solely warned Dr. Dootson a drill malfunctioned in a prior surgery; however, this is not necessarily consistent with the testimony and is a question for the jury when weighing the testimony.

Additionally, the following colloquy occurred without objection during the direct examination of surgical technician, Charlotte Rivers:

> Q: After you noticed the drill was getting hot, did you say anything to Dr. Dootson?
> A: No.
> Q: And why not?
> A: He had already been told that the drill was hot.
>
> . . . .
>
> Q: Was [Dr. Dootson] aware there was a problem with the drill before [Thomas] got burned?
> A: Yes.

Accordingly, a jury question was presented on the issue of notice, rendering a directed verdict inappropriate.

II.

The trial court excluded some of the testimony regarding notice as hearsay. We address this assignment of error now in the interest of judicial economy. See Floyd v. Horry County Sch. Dist., 351 S.C. 233, 234, 569 S.E.2d 343, 344 (2002) (addressing the merits in the interest of judicial economy).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Conversely, statements offered not for the truth of the matter asserted, but rather as evidence of notice, do not constitute hearsay. Player v. Thompson, 259 S.C. 600, 610, 193 S.E.2d 531, 535 (1972).

From an evidentiary standpoint, the facts and analysis in Player mirror those in this case. In Player, the court held testimony a filling station attendant told the defendant she had slick tires prior to the accident did not

constitute hearsay. Id. The testimony was not offered to prove the tires were slick, but only to establish the defendant had notice of her tires' condition prior to the accident. Id. Other evidence established the slickness of the tires. Id.

Similarly in this case, Thomas attempted to offer additional testimony from Rivers that Dr. Dootson had been warned the drill was hot prior to the injury. The trial court improperly ruled the statement was hearsay. The testimony, just as in Player, was not offered for the truth of the matter asserted, but rather as evidence of notice. The argument for admissibility is at least equally strong here as in Player, for here we are presented with a concession concerning the defective condition of the surgical drill. It was error to exclude this testimony.

We decline to address the remaining issues. See Ringer v. Graham, 286 S.C. 14, 20, 331 S.E.2d 373, 377 (Ct. App. 1985) (determining discussion of remaining issues was unnecessary when an issue was dispositive in reversing a directed verdict).

III.

The grant of the directed verdict is reversed, as is the ruling excluding Rivers' testimony. We remand for a new trial.

REVERSED AND REMANDED.

HEARN, C.J., and THOMAS, J., concur.