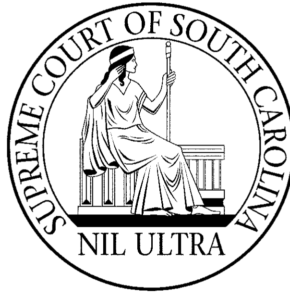

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 17
April 20, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

26635 – In the Matter of James Marshall Biddle 10

26636 – In the Matter of Michael James Sarratt 14

26637 – Suchart Taylor v. SC Department of Motor Vehicles 19

26638 – Home Medical Systems v. SC Department of Revenue 25

26639 – Kevin Gissel v. Charles Hart 37

UNPUBLISHED OPINIONS

2009-MO-019 – Benny Blair v. State
(Lancaster County, Judge Brooks P. Goldsmith)

PETITIONS – UNITED STATES SUPREME COURT

26543 – Donney S. Council v. State Pending

2008-OR-871 – John J. Garrett v. Lister, Flynn and Kelly Pending

2008-OR-1002 – Nathaniel White v. State Pending

2009-OR-038 – Terrence Bryan v. Margaret Bostick Pending

2009-OR-093 – Matthew Harris v. State Pending

PETITIONS FOR REHEARING

26608 – Jeffrey Eugene Davie v. State Pending

26610 – Richard Temple v. Tec-Fab, Inc. Pending

26620 – Samuel Brownlee v. SC DHEC Pending

26623 – State v. Anthony Woods Pending

26624 – State v. Anthony Clark Odom Pending

2009-MO-015 – Uri Dabash v. State Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

4529-State v. Jarod Tapp 44

4530-Eric Jackson v. Bermuda Sands, Inc. 57

4531-Robert K. McCuen v. BMW Manufacturing 64

4532-David K. Straight v. Michael H. Gross 71

UNPUBLISHED OPINIONS

2009-UP-165-State v. Alti Monte Livingston Haskell

PETITIONS FOR REHEARING

4462-Carolina Chloride v. Richland County	Pending
4491-Payne v. Payne	Pending
4493-Mazloom v. Mazloom	Pending
4498-Clegg v. Lambrecht	Pending
4504-Stinney v. Sumter School Dt.	Pending
4505-SCDMV v. Holtclaw	Pending
4507-The State v. J. Hill	Pending
4510-The State v. Hicks	Pending
4511-Harbit v. City of Charleston	Pending
4512-Robarge v. City of Greenville	Pending

4513-Bessie Pringle v. SLR	Pending
4516-State v. Fred R. Halcomb, Jr.	Pending
4517-Campbell v. Jordan	Pending
4518-John and Jane Loe #1 v. Mother	Pending
4522-State v. Bryant, Herbert	Pending
2009-UP-028-Gaby v. Kunstwerke Corp.	Pending
2009-UP-029-Demetre v. Beckmann	Pending
2009-UP-060-State v. Lloyd	Denied 4/15/09
2009-UP-061-State v. McKenzie	Pending
2009-UP-086-State v. Tran	Pending
2009-UP-088-Waterford Place HOA v. Barnes	Pending
2009-UP-092-Logan v. Wachovia Bank	Pending
2009-UP-093-State v. Mercer	Pending
2009-UP-105-Smith, Wilma v. Smith, Arthur	Pending
2009-UP-113-State v. Mangal	Pending
2009-UP-125-Terra Davis-Daniels v. The Pines Apartments	Pending
2009-UP-144-SCDSS v. Heidi F.	Pending
2009-UP-146-SCDSS v. Sandra B.	Pending
2009-UP-147-J. Grant v. City of Folly Beach	Pending
2009-UP-159-Durden, George v. Durden, Shirley	Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4279-Linda Mc Co. Inc. v. Shore	Granted 4/10/09
4285-State v. Danny Whitten	Pending
4314-McGriff v. Worsley	Pending
4316-Lubya Lynch v. Toys “R” Us, Inc	Pending
4325-Dixie Belle v. Redd	Pending
4339-Thompson v. Cisson Construction	Pending
4344-Green Tree v. Williams	Pending
4353-Turner v. SCDHEC	Pending
4355-Grinnell Corp. v. Wood	Granted 4/10/09
4372-Robinson v. Est. of Harris	Granted 4/10/09
4374-Wieters v. Bon-Secours	Pending
4377-Hoard v. Roper Hospital	Pending
4387-Blanding v. Long Beach	Pending
4389-Charles Ward v. West Oil Co.	Granted 4/10/09
4392-State v. W. Caldwell	Denied 4/10/09
4394-Platt v. SCDOT	Pending
4395-State v. H. Mitchell	Granted 4/10/09
4396-Jones (Est. of C. Jones) v. L. Lott	Pending
4401-Doe v. Roe	Pending
4402-State v. Tindall	Granted 4/10/09
4405-Swicegood v. Lott	Pending

4406-State v. L. Lyles	Pending
4407-Quail Hill, LLC v Cnty of Richland	Pending
4412-State v. C. Williams	Pending
4413-Snavely v. AMISUB	Denied 4/10/09
4414-Johnson v. Beauty Unlimited	Pending
4417-Power Products v. Kozma	Pending
4422-Fowler v. Hunter	Pending
4426-Mozingo & Wallace v. Patricia Grand	Pending
4428-The State v. Ricky Brannon	Pending
4437-Youmans v. SCDOT	Pending
4439-Bickerstaff v. Prevost	Pending
4440-Corbett v. Weaver	Pending
4441-Ardis v. Combined Ins. Co.	Pending
4444-Enos v. Doe	Pending
4447-State v. O. Williams	Pending
4448-State v. A. Mattison	Pending
4450-SC Coastal v. SCDHEC	Pending
4451-State v. J. Dickey	Pending
4454-Paschal v. Price	Pending
4455-Gauld v. O'Shaugnessy Realty	Pending
4458-Mcclurg v. Deaton, Harrell	Pending

4459-Timmons v. Starkey	Pending
4460-Pocisk v. Sea Coast	Pending
4463-In the Matter of Canupp	Pending
4467-Pee Dee Stores v. Carolyn Doyle #2	Pending
4469-Hartfield v. McDonald	Pending
4472-Eadie v. Krause	Pending
4473-Hollins, Maria v. Wal-Mart Stores	Pending
4476-Bartley, Sandra v. Allendale County	Pending
4483-Carpenter, Karen v. Burr, J. et al.	Pending
4488-Christal Moore v. The Barony House	Pending
2007-UP-151-Lamar Florida v. Li'l Cricket	Pending
2007-UP-364-Alexander Land Co. v. M&M&K	Pending
2007-UP-498-Gore v. Beneficial Mortgage	Pending
2008-UP-116-Miller v. Ferrellgas	Pending
2008-UP-126-Massey v. Werner Enterprises	Pending
2008-UP-151-Wright v. Hiester Constr.	Pending
2008-UP-187-State v. Rivera	Pending
2008-UP-194-State v. D. Smith	Granted 4/10/09
2008-UP-204-White's Mill Colony v. Williams	Denied 4/10/09
2008-UP-205-MBNA America v. Baumie	Granted 4/10/09
2008-UP-207-Plowden Const. v. Richland-Lexington	Denied 4/10/09
2008-UP-209-Hoard v. Roper Hospital	Pending

2008-UP-240-Weston v. Margaret Weston Medical	Pending
2008-UP-252-Historic Charleston v. City of Charleston	Pending
2008-UP-261-In the matter of McCoy	Denied 4/10/09
2008-UP-285-Biel v. Clark	Pending
2008-UP-289-Mortgage Electronic v. Fordham	Pending
2008-UP-310-Ex parte:SCBCB (Sheffield v. State)	Pending
2008-UP-320-Estate of India Hendricks (3)	Denied 4/10/09
2008-UP-330-Hospital Land Partners v. SCDHEC	Pending
2008-UP-336-Premier Holdings v. Barefoot Resort	Denied 4/10/09
2008-UP-340-SCDSS v. R. Jones	Denied 4/10/09
2008-UP-424-State v. D. Jones	Pending
2008-UP-431-Silver Bay v. Mann	Pending
2008-UP-432-Jeffrey R. Hart v. SCDOT	Denied 4/10/09
2008-UP-512-State v. M. Kirk	Pending
2008-UP-523-Lindsey #67021 v. SCDC	Denied 4/10/09
2008-UP-534-State v. C. Woody	Pending
2008-UP-539-Pendergrass v. SCDPP	Pending
2008-UP-546-State v. R. Niles	Pending
2008-UP-552-Bartell v. Francis Marion	Pending
2008-UP-559-SCDSS v. Katrina P.	Denied 4/10/09
2008-UP-591-Mungin v. REA Construction	Pending

2008-UP-596-Doe (Collie) v. Duncan	Pending
2008-UP-606-SCDSS v. Serena B and Gerald B.	Pending
2008-UP-607-DeWitt v. Charleston Gas Light	Pending
2008-UP-612-Rock Hill v. Garga-Richardson	Pending
2008-UP-629-State v. Lawrence Reyes Waller	Pending
2008-UP-645-Lewis v. Lewis	Pending
2008-UP-646-Robinson v. Est. of Harris	Pending
2008-UP-647-Robinson v. Est. of Harris	Pending
2008-UP-648-Robinson v. Est. of Harris	Pending
2008-UP-649-Robinson v. Est. of Harris	Pending
2008-UP-651-Lawyers Title Ins. V. Pegasus	Pending
2008-UP-664-State v. Davis	Pending
2008-UP-705-Robinson v. Est of Harris	Pending
2008-UP-712-First South Bank v. Clifton Corp.	Pending
2009-UP-007-Miles, James v. Miles, Theodora	Pending
2009-UP-030-Carmichael, A.E. v. Oden, Benita	Pending
2009-UP-035-State v. J. Gunnells	Pending

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James Marshall Biddle, Respondent.

Opinion No. 26635
Submitted March 9, 2009 – Filed April 20, 2009

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis Jr., Senior Assistant Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Irby E. Walker, Jr., of Conway, for respondent.

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

FACTS

On or about October 26, 2006, Complainant retained respondent to represent him in a divorce action. Respondent admits that, between October 2006 and October 2007, there were periods of time when he did not return Complainant's telephone calls. He further

admits that he failed to act diligently in connection with the handling of Complainant's domestic action.

On October 5, 2007, respondent informed Complainant via e-mail that he had spoken with the family court judge who had indicated she would sign an order approving service by publication and that the documents would be sent out the following week. This information to Complainant was premature as respondent had not presented an order to the family court judge.

On December 13, 2007, Complainant sent respondent an e-mail stating that it had been over a year since respondent had been retained. Complainant inquired whether the divorce had been finalized. Respondent replied via e-mail that "[t]he Judge has signed the order approving publication and we are in the process of serving her by publication." This statement was a fabrication as no order of publication had been signed.

On or about February 15, 2008, respondent received notice from the Clerk of Court that Complainant's case had been pending for 365 days and was subject to dismissal. Respondent failed to inform Complainant of this development. Instead, when Complainant e-mailed respondent on March 12, 2008 expressing frustration with the progress of the case, respondent responded by repeating his earlier misrepresentation about the status of the case. Respondent stated, "…the judge has approved the service by publication." Respondent knew that this statement was completely false.

On March 17, 2008, respondent requested a status conference with the family court judge to discuss Complainant's case and to obtain permission to serve the defendant by publication. This request was denied.

On March 18, 2008, respondent sent an e-mail to the family court judge stating that Complainant's case had "slipped through the cracks on me." Respondent requested additional time to serve the defendant by publication.

On March 19, 2008, respondent received a written response from the family court judge denying the request for service by publication and giving respondent thirty (30) days to effect service or the matter would be dismissed. Respondent did not inform Complainant about this development.

On April 21, 2008, respondent received notice that Complainant's case had been dismissed. Respondent failed to inform Complainant of the dismissal. Complainant did not learn of the dismissal until May 9, 2008 when he went to the Clerk of Court's office seeking information on the status of his case.

Respondent has been cooperative with ODC throughout this investigation.

LAW

Respondent admits that by his misconduct he has violated the Rules of Professional Conduct, Rule 407, SCACR, particularly Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client), Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and promptly comply with reasonable requests for information), Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of client), and Rule 8.4 (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael James Sarratt, Respondent.

Opinion No. 26636
Submitted March 9, 2009 – Filed April 20, 2009

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis Jr., Senior Assistant Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Peter D. Protopapas of Lewis & Babcock, LLP, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a public reprimand or the imposition of a definite suspension not to exceed four (4) months. We accept the Agreement and impose a four (4) month suspension from the practice of law. We deny respondent's request to impose the suspension retroactive to September 12, 2008, the date of respondent's interim

suspension. In the Matter of Sarratt, 379 S.C. 607, 667 S.E.2d 266 (2008). The facts, as set forth in the Agreement, are as follows.

FACTS

Matter I

On March 11, 2008, while traveling on I-85 North and I-26 West, respondent was stopped by the Spartanburg County Sheriff's Department. According to the incident report filed by the Sheriff's Department, respondent was stopped for driving 140 mph in a 70 mph zone. Respondent was placed under arrest for reckless driving and issued a citation. On September 25, 2008, respondent pled guilty to speeding 94 mph in a 70 mph zone and the reckless driving charge was marked nolle prosequi.

Matter II

On September 21, 2007, respondent took his dog to a veterinary clinic for treatment. Later the same day, respondent called the clinic to speak with the veterinarian. The office manager informed respondent that the veterinarian was with a customer and unable to take his telephone call. According to the office manager, respondent used vile and profane language during the conversation. The office manager filed an incident report with the police department and, as a result, respondent was charged with unlawful use of a telephone.

On November 19, 2008, respondent's case was heard before a Spartanburg Magistrate. Respondent's counsel moved to dismiss the charge arguing that an unlawful use of telephone charge required that the telephone call be made with the intent and sole purpose of conveying an unsolicited obscene or imminently threatening message or to harass the recipient. Respondent's counsel asserted the purpose of respondent's telephone call to the veterinary clinic was neither unsolicited nor made for the sole purpose of harassing or threatening the office manager. The magistrate dismissed the charge against respondent.

Respondent admits he used some inappropriate language during his telephone conversation with the office manager. He represents that, at the time of the incident, he was very emotional due to the condition of his pet. Respondent apologizes for his conduct.

Matter III

On July 11, 2008, respondent was driving a vehicle belonging to his girlfriend on Highway 74 in Polk County, North Carolina. Respondent's girlfriend was a passenger in the vehicle. An officer with the Polk County Sheriff's Department stopped respondent. During a search, police discovered marijuana and drug paraphernalia on respondent's girlfriend. The police questioned respondent and his girlfriend. According to respondent's counsel, respondent "offered to take the charges as a matter of consideration for [his girlfriend]." Respondent was issued a citation charging him with possession of less than ½ ounce of marijuana and knowingly possessing with intent to use drug paraphernalia.

On November 5, 2008, the drug charges against respondent were brought to trial. After the district attorney presented its case, the trial court granted respondent's motion to dismiss the charges.

Respondent represents that the marijuana and drug paraphernalia found by the Polk County Sheriff's Department did not belong to him; however, in hindsight, he now admits that certain statements made during the traffic stop may have misled the police into believing that respondent was admitting that the marijuana and drug paraphernalia belonged to respondent. Respondent now understands that, as an officer of the court, he has an obligation to ensure he is careful in all communications to avoid any misleading statements.

Matter IV

During its investigation of the marijuana and drug paraphernalia charges, ODC learned that, on January 20, 2008,

respondent had been charged with speeding in Rutherford County, North Carolina. According to respondent's counsel, due to unique procedural rules in North Carolina, respondent had to plead guilty in District Court and appeal the matter to Superior Court in order to obtain a jury trial. After a jury trial on October 6, 2008, respondent was convicted of speeding 93 mph in a 65 mph zone. Respondent was ordered to pay a $100 fine and $254.50 in court costs, and was placed on unsupervised probation for one year.

Matter V

On October 5, 2008, respondent was charged with speeding 92 mph in a 70 mph zone in Columbia County, Florida. He completed a driver improvement course. Accordingly, under Florida law, adjudication of the ticket has been held in indefinite abeyance.

LAW

Respondent admits that his misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to bring the legal profession into disrepute or conduct demonstrating an unfitness to practice law). In addition, respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct) and Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation).

CONCLUSION

We accept the Agreement for Discipline by Consent and impose a four (4) month suspension from the practice of law. We deny respondent's request to impose the suspension retroactive to the date of

his interim suspension. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., WALLER, BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Suchart Taylor, Petitioner,

v.

South Carolina Department of Motor Vehicles, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26637
Heard October 8, 2008 – Filed April 20, 2009

AFFIRMED

C. Bradley Hutto, of Williams & Williams, of Orangeburg, C. Rauch Wise, of Greenwood, Desa Ballard and P. Christopher Smith, Jr., both of West Columbia, and Michael Sean O'Neal, of N. Charleston, and Reese I. Joye, of Joye Law Firm, of N. Charleston, for Petitioner.

General Counsel Frank L. Valenta, Jr., Deputy General Counsel Philip S. Porter, and Assistant General Counsel Linda A. Grice, all of Columbia, for Respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in Taylor v. SC Dep't of Motor Vehicles, 368 S.C. 33, 627 S.E.2d 751 (Ct. App. 2006). We affirm.

FACTS

Petitioner, Suchart Taylor, was involved in an automobile collision on I-26 in Berkeley County. A police officer arrived on the scene to find Taylor in his pickup truck being treated by paramedics. The officer smelled alcohol inside the vehicle and, when he attempted to speak with him, Taylor seemed disoriented and had heavy mouth injuries; he was unable to stand or perform field sobriety tests.

Taylor was taken to the emergency room, where he was advised of his Miranda rights and arrested for DUI. The officer determined Taylor's mouth injuries would prevent him from taking a breath test, so he requested a blood sample. The officer read the implied consent form aloud to Taylor, but did not provide him with a written copy of the form. Taylor refused the blood sample and refused to sign the implied consent form; he was therefore issued a notice that his driver's license would be suspended for ninety days.

Taylor filed for an administrative hearing to challenge the license suspension. The hearing officer upheld the suspension. Taylor petitioned for judicial review contending the license suspension was invalid because he had not been provided with a written copy of the implied consent law, as required by S.C. Code Ann. § 56-5-2951 (2006). The trial court agreed and reversed the license suspension. The Court of Appeals reversed the trial court's ruling; it held Taylor was not prejudiced by the lack of a written copy of the implied consent form because he was read those rights aloud.

ISSUE

Did the Court of Appeals properly hold that Taylor was not prejudiced by the lack of written notice of the implied consent law?

DISCUSSION

The Implied Consent Statute, S.C. Code Ann. § 56-5-2950(a) (2006), provides that a person who drives a motor vehicle in South Carolina is considered to have given consent to chemical tests of his breath, blood, or urine to determine whether the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. The statute provides, in pertinent part:

> No **tests may be administered or samples obtained unless the person has been informed in writing** that:
>
> (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least ninety days if he refuses to submit to the tests and that his refusal may be used against him in court;
> (2) his privilege to drive must be suspended for at least thirty days if he takes the tests or gives the samples and has an alcohol concentration of fifteen one hundredths of one percent or more;
> (3) he has the right to have a qualified person of his own choosing conduct additional independent tests at his expense;
> (4) he has the right to request an administrative hearing within thirty days of the issuance of the notice of suspension; and
> (5) if he does not request an administrative hearing or if his suspension is upheld at the administrative hearing, he must enroll in an Alcohol and Drug Safety Action Program.

S.C. Code Ann. § 56-5-2950(a). (Emphasis supplied). Subsection 56-5-2950(e) provides that the failure to follow policies or procedures set forth in § 56-5-2950 will result in the exclusion from evidence of any tests results, "if the trial judge or hearing officer finds that such failure materially affected the accuracy or reliability of the tests results or the fairness of the testing procedure." Notably, neither section (a) nor section (e) addresses the issue of license suspension for the failure to comply with the procedures set forth therein.

S.C. Code Ann. § 56-5-2951(a), governs the Department of Motor Vehicle's (DMV) suspension of a driver's license for refusing to submit to a test or for certain levels of alcohol concentration. The statute states that the DMV "shall suspend the driver's license . . . of . . . a person who drives a motor vehicle and refuses to submit to a test provided for in Section 56-5-2950;" the statute gives an offender thirty days in which to request an administrative hearing. S.C. Code Ann. § 56-5-2951 (B) (2). The hearing must be held within thirty days and is limited to a determination of whether the person:

> (1) was lawfully arrested or detained;
> (2) was advised in writing of the rights enumerated in Section 56-5-2950;
> (3) refused to submit to a test pursuant to Section 56-5-2950; or
> (4) consented to taking a test pursuant to Section 56-5-2950 (and several conditions relating to administration of the test).

S.C. Code Ann. § 56-5-2951(F) (1-4). We find nothing in section 56-5-2951 which mandates re-issuance of the driver's license if one, or all of the above factors is not met. If the Legislature had intended the lack of written notice (or any other factor) to be a fatal defect, it could have said so in the statute. Giannini v. SC Dep't of Motor Vehicles, 378 S.C. 573, 664 S.E.2d 450 (2008) (if Legislature had intended certain result in a statute it would have said so). Accord S.C. Dep't of Motor Vehicles v. Nelson, 364 S.C. 514, 523, 613 S.E2d 544, 549 (Ct. App. 2005) (requirements for suspension for refusal to consent do not include written notice of implied consent statute).

We hold the criterion in § 56-5-2951(f) are simply factors which the DMV may consider in determining whether to uphold a suspension, i.e., a prejudice analysis. Given that nothing in § 56-5-2951 provides for mandatory re-issuance of a driver's license upon review of these factors, we find an examination of the four factors with an eye toward prejudice is the proper inquiry. Accordingly, the Court of Appeals properly applied a prejudice analysis. Given that it is undisputed Taylor was advised of the

implied consent warning, the Court of Appeals properly found he suffered no prejudice from the officer's lack of written notice. Accordingly, the Court of Appeals' opinion is affirmed.

AFFIRMED.

TOAL, C.J., and Acting Justice Billy A. Tunstall, concur. BEATTY, J., dissenting in a separate opinion in which PLEICONES, J., concurs.

JUSTICE BEATTY: I respectfully dissent. Section 56-5-2950(a) of the South Carolina Code specifically states no tests may be administered or samples obtained unless the person has been informed in writing of certain provisions of the section. S.C. Code Ann. § 56-5-2950(a). It is undisputed that Taylor was not "informed in writing." In my view, the Department of Motor Vehicles cannot suspend a driver's license because driver refused to take a test that the law enforcement officer was not authorized to administer.

The South Carolina Legislature specifically set forth a pre-condition that must be met before any tests may be administered. Section 56-5-2950 is unambiguous and its meaning and intent are clear. The Court may not simply ignore it. I would reverse the decision of the Court of Appeals.

PLEICONES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Home Medical Systems, Inc., Respondent,

v.

South Carolina Department of Revenue, Appellant.

Marvin F. Kittrell, Administrative Law Court Judge

Opinion No. 26638
Heard February 19, 2009 – Filed April 20, 2009

REVERSED

Milton G. Kimpson, Managing Counsel for Litigation; Ray N. Stevens, Director; Harry T. Cooper, Jr, Chief of Staff; and Nicholas P. Sipe, General Counsel for Litigation, all of Columbia, for Appellant.

Erik P. Doerring, Celeste T. Jones, and Robert L. Widener, all of McNair Law Firm, of Columbia, for Respondent.

JUSTICE WALLER: Appellant South Carolina Department of Revenue (DOR) directly appeals from the grant of summary judgment by the

Administrative Law Court (ALC) in favor of respondent Home Medical Systems, Inc. (Taxpayer). We reverse.

FACTS/PROCEDURAL HISTORY

Taxpayer is a retailer of durable medical equipment, medical supplies, and other medical products. At issue in the instant case is whether the following categories of products are exempt from sales tax:

1. *Continuous Positive Airway Pressure (CPAP) and Bi-level Positive Airway Pressure (BiPAP) devices.* These medical devices are approved by the federal Food and Drug Administration (FDA). The CPAP provides positive air pressure to patients who suffer from a variety of diseases including sleep apnea and acute respiratory failure. The BiPAP provides differing pressure during inhalation to patients who suffer from sleep apnea and acute respiratory failure. Both devices are used to provide a patient with proper breathing and require a physician's prescription.

2. *Ventilator devices.* The ventilator is used by a patient to assist in breathing and is normally connected to the patient through a tracheotomy tube. In its simplest form, a ventilator consists of a compressible reservoir, an oxygen air mixture, and a compressor.

3. *Nasal Intermittent Positive Pressure Ventilation (NIPPV) devices.* This is used by a patient to assist in breathing and is normally connected to the patient through the nasal cavity.

4. *Nebulizer devices.* A nebulizer is a specialized air compressor. The compressor forces pressurized air into a breathing cup into which medication is drawn. The nebulizer's pressure mixes with the medication to ease the introduction of the medication into the patient's lungs. The nebulizer does not force the medication into the lungs, but rather vaporizes the medication so the medication is effectively inhaled. This device is used to treat bronchiospasms and other respiratory diseases.

5. *Enteral Nutritional formulas.* These are prescribed for patients who, due to an illness or disease, are unable to consume food products orally. The formula prescribed is selected by the physician based on the caloric and metabolic needs of the individual patient. The formulas may include specific nutrients to treat specific metabolic disorders such as sodium imbalances and protein needs. Enteral formulas are typically administered by: (1) a gravity feed bag and tubing connected to a feeding tube inserted in the patient, or (2) an electronic pump which also requires bags and tubing and connects to a feeding tube or catheter inserted in the patient.

Taxpayer sold the above items to customers who had a Certificate of Medical Necessity (CMN). A CMN is a standard form used by Medicare and Medicaid; it is signed by a physician and details the customer's diagnosis and medical necessity for the item.

After an audit by the DOR, Taxpayer was assessed sales taxes on retail sales of the above-listed medical devices and products.[1] The DOR's Final Agency Determination ruled there was no tax exemption because: (1) the items listed in categories 1-4 above are not "prosthetic devices" since they do not replace a body part; and (2) the enteral nutritional formulas (category 5) were not actually sold pursuant to a prescription, and do not require a prescription to be sold.

Taxpayer asserted the sales were exempt from sales tax and filed for a contested case hearing. After discovery, the parties filed cross-motions for summary judgment.[2] Following a hearing on the motions, the ALC granted summary judgment in favor of Taxpayer.

The DOR filed a motion for reconsideration with the ALC, which was denied, and thereafter filed a Notice of Appeal. Taxpayer filed a motion to

---

[1] The audit covered Taxpayer's sales from July 1, 2000 through June 30, 2003. The proposed assessment was for $299,207.81 in sales taxes, and $ 92,285.51 in interest, for a total of $391,493.32.

[2] The DOR's motion was for partial summary judgment.

dismiss the appeal based on failure to timely serve the Notice of Appeal. This Court certified the case for review pursuant to Rule 204(b), SCACR, and deferred ruling on the motion to dismiss until after full briefing on the issue and oral argument.

ISSUES

1. Did the DOR timely serve the Notice of Appeal?

2. Did the ALC err by finding that the sales tax exemption applies to all items and granting summary judgment in favor of Taxpayer?

DISCUSSION

1. Timeliness of Notice of Appeal

Taxpayer argues we should dismiss the instant appeal because the DOR failed to timely serve the Notice of Appeal. This raises a novel issue regarding the intersection of the South Carolina Rules of Civil Procedure and the ALC Rules.

The ALC's summary judgment order was dated August 28, 2007, and the DOR received the order on August 30, 2007. On September 10, 2007, the DOR filed a "Motion for Reconsideration and to Alter or Amend Judgment Pursuant to ALC Rule 29(D), ALC Rule 68, and Rule 59(e), SCRCP" (Post-Order Motion). The ALC denied the Post-Order Motion on October 1, 2007. The DOR then served the Notice of Appeal on October 9, 2007.

Taxpayer contends that under the ALC rules, the DOR's Post-Order Motion was improper because ALC Rule 68 does not permit a Rule 59(e), SCRCP, motion. Therefore, according to Taxpayer, the Post-Order Motion did not toll the time period for serving the Notice of Appeal.[3] Stated

---

[3] The ALC's order was received on August 30, 2007. An appeal from the ALC must be filed within 30 days. See Rule 203(b)(6), SCACR. If the time period was not tolled, the deadline for filing in this case would have been Monday October 1,

differently, Taxpayer argues Rule 59(e), SCRCP, does not apply to ALC actions.

The ALC rules contemplate a "motion for reconsideration" under ALC Rule 29(D):

> *Motion for Reconsideration.* Any party may move for reconsideration of a final decision of an administrative law judge in a contested case, **subject to the grounds for relief set forth in Rule 60(B) (1 through 5), SCRCP**, as follows:
>
> (1) Within ten (10) days after notice of the order concluding the matter before the administrative law judge, a party may move for reconsideration of the decision, provided that a petition for judicial review has not been filed.
>
> (2) The administrative law judge shall act on the motion for rehearing within thirty (30) days after it is filed, and if no action is taken by the administrative law judge within that period, the inaction shall be deemed a denial of the relief sought in the motion.
>
> (3) The filing of a motion for reconsideration shall not, of itself, stay the order of the administrative law judge or excuse or delay compliance with the order of the administrative law judge.
>
> (4) **The time for appeal for all parties shall be stayed by a timely motion for reconsideration, and shall run from receipt of an order granting or denying such motion**, or if no order is filed regarding the motion, thirty (30) days after notice that the motion was filed.

2007 (because the 30th day fell on **Saturday**, September 29, 2007). See Rule 234(a), SCACR.

> **The filing of a motion for reconsideration is not a prerequisite to filing a notice of appeal from a final decision of an administrative law judge.**

(Emphasis added).

Taxpayer maintains that because ALC Rule 29(D) only allows a motion for reconsideration when there are grounds for relief under Rule 60(b), SCRCP,[4] a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, is not permitted in an ALC case. The DOR, on the other hand, argues the ALC rules specifically allow the Rules of Civil Procedure to apply. ALC Rule 68 provides as follows:

> The South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules may, where practicable, be applied in proceedings before the Court **to resolve questions not addressed by these rules.**

---

[4] Rule 60(b), SCRCP, states:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud, misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

(Emphasis added). The DOR points out there is no ALC rule akin to Rule 59(e), SCRCP,[5] and thus, ALC Rule 68 authorizes a Rule 59(e) motion. Moreover, the DOR contends that because issue preservation rules apply to an appeal from an ALC action, there is a need for a Rule 59(e) type motion. We agree with the DOR's position.

Although a Rule 59(e) motion may effectively seek a reconsideration of issues and arguments, this type of motion is often **required** for issue preservation purposes. See Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). We explained in Elam that "there is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument." Id. at 22, 602 S.E.2d at 779. Indeed, "it is inherently unfair to disallow such an opportunity." Id.

The Elam Court further stated that a "party **must** file [a Rule 59(e), SCRCP] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Id. at 24, 602 S.E.2d at 780. In I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000), we discussed the policy underlying this rule:

> If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party **must** file a motion to alter or amend the judgment in order to preserve the issue for appellate review. Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered **all** relevant facts, law, and arguments.

(Emphasis added, citations omitted).

Put simply, Rule 59(e) motions serve a vital purpose for proper issue preservation. As in other appellate matters, we require issue preservation in administrative appeals. See, e.g., Brown v. South Carolina Dep't of Health

---

[5] Under Rule 59(e), SCRCP, a motion "to alter or amend the judgment" may be made within ten days of receipt of written notice of the entry of the order.

and Envtl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) (issues not raised to and ruled upon by the ALC are unpreserved for appellate review); Carson v. South Carolina Dep't of Natural Res., 371 S.C. 114, 120, 638 S.E.2d 45, 48 (2002) (court sitting in appellate capacity may not consider issues not raised or ruled on by administrative agency); Kiawah Resort Assoc. v. South Carolina Tax Comm'n, 318 S.C. 502, 458 S.E.2d 542 (1995) (same). We therefore hold Rule 59(e), SCRCP, motions are permitted in ALC proceedings. Accordingly, the DOR's Post-Order Motion tolled the time period for filing an appeal, and the Notice of Appeal was timely served. We deny Taxpayer's motion to dismiss.

2. Application of the Sales Tax Exemption

The DOR argues the ALC erred in finding Taxpayer is entitled to the sales exemption for the above-categorized products.

State law sets the retail sales tax on tangible personal property at five percent. See S.C. Code Ann. § 12-36-910(A) (2000). By statute, however, there is a sales tax exemption for "medicine and prosthetic devices sold by prescription." S.C. Code Ann. § 12-36-2120(28)(a) (2000 & Supp. 2008).

"To assist in the administration of this exemption," the DOR promulgated a regulation which defines both medicine and prosthetic devices:

> "Medicine" – a substance or preparation used in treating disease.
>
> "Prosthetic Device" – an artificial device to replace a missing part of the body.

S.C. Code Reg. § 117-332 (Supp. 2008). The regulation further provides as follows, in pertinent part:

> The sale of prescription lenses that replace a missing part of the eye are exempted from the tax, as for example eyeglasses prescribed for a person whose natural lenses have been surgically removed.
>
> Eyeglasses, contact lens, hearing aids and orthopedic appliances, such as braces, wheelchairs and orthopedic custom-made shoes, do not come within the exemption at Code Section 12-36-2120(28).

Id.

In a 2003 Revenue Ruling, the DOR issued an advisory opinion on this exemption, and opined as follows, in relevant part:

> *Medicine sold by prescription.* In order for this exemption to be applicable, the medicine must be of a type that requires a prescription, the sale must require a prescription, and must actually be sold by prescription….
>
> *Prosthetic devices sold by prescription.* In order for this exemption to be applicable, … the sale must require a prescription and the device must actually be sold by prescription and the device must replace a missing part of the body. **A device that merely replaces a missing function is not exempt.**

S.C. Rev. Rul. #03-02 (2003) (emphasis added).

Despite the DOR's long-standing construction of this exemption,[6] the ALC found that the department's policies had "contorted the plain language of the statute to severely limit the scope of the exemption." The ALC stated that "the definition of prosthetic device has been updated as the field of medicine has progressed" and therefore found all of the devices at issue in the instant case are prosthetic devices. Furthermore, the ALC held that

[6] These regulatory definitions have been in continuous use since 1978.

Regulation 117-332's definition of "prosthetic device" was inconsistent with "current medical definitions and as such should be rejected as contrary to the intent of the General Assembly to provide an exemption for 'prosthetic devices sold by prescription.'"

The DOR argues the ALC erred in invalidating the agency's definition of prosthetic device and by improperly broadening the definition. We agree.

The language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption. TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998); see also Southeastern-Kusan, Inc. v. South Carolina Tax Comm'n, 276 S.C. 487, 489, 280 S.E.2d 57, 58 (1981) ("As a general rule, tax exemption statutes are strictly construed against the taxpayer."). Moreover, "[r]egulations authorized by the Legislature have the force of law." Goodman v. City of Columbia, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995). Nonetheless, a regulation may not alter or add to a statute. Id.

The sales tax exemption enumerated in section 12-36-2120(28)(a) is for "medicine and prosthetic devices sold by prescription." Taxpayer submitted a multitude of definitions for "prosthetic devices" and "prosthesis" in support of its motion for summary judgment. Based on our review of the record, we agree with the DOR's observation that many of these definitions have as a primary definition one that is consistent with the regulatory definition, e.g. "an artificial replacement of a body part." Accordingly, we find Regulation 117-332 reasonably defines "prosthetic devices."

Moreover, while it is clear that one current, accepted definition in the medical community is a broad one which encompasses not only a device to replace a missing part of the body, but also a device to replace missing functionality, we emphasize that simply because another definition exists does not mean the ALC is empowered to invalidate an otherwise proper regulatory definition. See Drummond v. State, Dep't of Revenue, 378 S.C. 362, 370, 662 S.E.2d 587, 591 (2008) (because the ALC is part of the executive branch, it has "no authority to rule on the facial validity" of a

regulation); cf. Goodman, supra (unless a regulation improperly alters or adds to a statute, a court may not invalidate it).

Finally, we note the ALC's ruling that the regulatory definition was not sufficiently expansive goes against the rule that a statutory tax exemption must be strictly construed against the taxpayer. TNS Mills, Inc. v. South Carolina Dep't of Revenue, supra.

In sum, we hold that the ALC erred in applying its own, broad definition of prosthetic device to find that Taxpayer's durable products were prosthetic devices.

Regarding the enteral nutritional formulas, the ALC found they were "medicine sold by prescription."[7] The DOR argues that because the formulas are "over the counter" (OTC) products[8] which do not **require** a prescription, the ALC erred. Furthermore, the DOR contends that CMNs are not equivalent to a prescription. We agree.

As discussed above, the DOR has set forth a definition for "medicine by prescription" – the medicine must be of a type that requires a prescription, the sale must require a prescription, and it must actually be sold by prescription. Taxpayer argues that a prior legislative version (a 1970 reimbursement statute) more explicitly stated the requirement – "medicines required by law to be sold only by prescription" – and therefore, the current language is not **exclusively** for medicines that require a prescription. In our opinion, however, the current statutory language – "medicine … sold by prescription" – clearly evidences a legislative intent that the exemption be

---

[7] We recognize the ALC found that all the items at issue – even the durable devices – were medicine sold by prescription. In making this determination, the ALC relied on the definition of medicine for pharmacists found in S.C. Code Ann. § 40-43-30(16). We agree with the DOR that this definition has no application to the definition of medicine in the sales tax exemption statute found in section 12-36-2120(28)(a). See § 40-43-30 (where statute specifies that the definitions are for "purposes of **this** chapter") (emphasis added).

[8] One example the DOR highlights is PediaSure with Fiber which can be purchased at a grocery store.

only for those medicines requiring a prescription. See TNS Mills, Inc., supra (tax exemption statute must be given its plain, ordinary meaning and must be strictly construed **against** the claimed exemption).[9]

CONCLUSION

We hold the ALC rules allow a Rule 59(e), SCRCP, motion, and therefore deny Taxpayer's motion to dismiss the appeal. Additionally, we reverse the ALC's decision which found Taxpayer's products tax exempt.

REVERSED.

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

---

[9] Moreover, in another section of the sales tax exemption statute, the Legislature seems to have made a distinction between prescription and OTC medicines. The statute provides the following exemption:

> (63) prescription and over-the-counter medicines and medical supplies, including diabetic supplies, diabetic diagnostic equipment, and diabetic testing equipment, sold to a health care clinic that provides medical and dental care without charge to all of its patients.

§ 12-36-2120. Thus, if the Legislature had intended to include OTC medicines in the exemption at issue here, it could have used language evidencing that intent.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kevin Gissel and Christina Gissel (Formerly Christina Eckley),	Petitioners,
v.	
Charles Hart and Gene Hart,	Respondents.
Wade A. McEachern,	Petitioner,
v.	
Charles Hart and Gene Hart,	Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26639
Heard February 18, 2009 – Filed April 20, 2009

REVERSED

Donald H. Howe, of Howe and Wyndham, and Walter Bilbro, Jr., both of Charleston, for Petitioner.

Steven L. Smith, of Smith & Koontz, of North Charleston, for Respondents.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in Gissel v. Hart, 373 S.C. 281, 644 S.E.2d 772 (Ct. App. 2007). We reverse.

FACTS

In the summer of 2003, Petitioners, the Gissels and McEachern, filed separate complaints against Homes America Inc., Southern Showcase Housing, Inc, Charles Hart, Gene Hart, and Amery English.[1] The complaints alleged Charles Hart and Gene Hart were agents, servants, and employees of Homes America, Inc, and that Homes America had sold them both mobile homes in early 2001.[2] Petitioners alleged they were advised by the Harts that they could finance land/home packages with concrete footings included in the purchase price. However, upon delivery, the mobile homes were improperly installed and had numerous deficiencies which were never remedied. The complaints alleged causes of action for negligence, fraud, and breach of contract with fraudulent intent against Homes America, Southern Showcase Housing, Charles Hart, Gene Hart, and Amery English. Each of the complaints alleged the deficiencies were the result of the negligence and recklessness of the defendants "jointly, severally or in the alternative." The complaints sought actual and punitive damages.

Southern Homes moved to dismiss the complaint and refer the matter to arbitration as required by the parties' contract. Thereafter, Charles Hart and Gene Hart, who were individually named in the complaints, filed a separate motion to dismiss and moved to refer the matter to arbitration.

By orders dated January 13, 2004, the motions to compel arbitration were granted. Judge Jefferson found the contract's arbitration provision,

---

[1] Homes America was merged into Southern Showcase Homes, Inc in April 2000. English was apparently employed by Homes America. The complaints do not list specific allegations against English, and he was not a party to this appeal.

[2] The Gissels contracted to purchase a mobile home for $73,919.00; McEachern's contract price was $76,855.00.

which was contained on the top of the first page of the contract (Form 500) in bold type, underlined capital letters, binding. It states:

> **NOTICE OF ARBITRATION PROVISION: THIS CONTRACT CONTAINS A BINDING AGREEMENT TO ARBRITRATE ALL CLAIMS, DISPUTES AND CONTROVERSIES ARISING OUT OF OR IN CONNECTION WITH THIS CONTRACT.**

After an arbitration hearing, Southern Homes settled with the Gissels and McEachern, leaving the Harts as sole defendants. The arbitrator then entered awards in favor of the Gissels and McEachern against the Harts. The Gissels were awarded $55,000.00 actual, consequential and incidental damages against Charles Hart and Gene Hart, jointly and severally; they were awarded $45,000.00 punitive damages against Charles Hart, individually, and $45,000.00 punitive damages against Gene Hart individually. McEachern was awarded $53,000.00 actual, consequential and incidental damages against Charles Hart and Gene Hart, jointly and severally, and $45,000.00 punitive damages against Charles Hart, individually, and $45,000.00 punitive damages against Gene Hart individually.

The Harts appealed to the circuit court and moved to vacate the arbitrator's award, contending there was no evidence presented to the arbitrator that they had acted outside the scope of their employment for Homes America. The circuit court denied the Hart's motion to vacate and confirmed the arbitrator's award.

The Court of Appeals vacated the arbitrator's award against the Harts; it found the complaints did not clearly assert claims against the Harts in their individual capacities, such that there was no basis on which to predicate an award of punitive damages. The Court affirmed the awards to the extent they imposed damages against the Harts in their representative capacities as agents, servants and employees of Homes America. The Court of Appeals denied rehearing, and this Court granted certiorari.

ISSUE

Did the Court of Appeals err in ruling there was no basis upon which to impose individual liability against the Harts?

SCOPE OF REVIEW

The determination of whether a claim is subject to arbitration is subject to *de novo* review. Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. Aiken v. World Finance Corp. of South Carolina, 373 S.C. 144, 644 S.E.2d 705 (2007).

DISCUSSION

Arbitration is a favored method of settling disputes in South Carolina. Unless a court can say with positive assurance that an arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered. Aiken v. World Finance Corp., infra; Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596-97, 553 S.E.2d 110, 118-19 (2001). However, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. Id. at 596, 553 S.E.2d at 118. Courts generally hold broadly-worded arbitration agreements apply to disputes in which a "significant relationship" exists between the asserted claims and the contract in which the arbitration clause is contained. Id. at 598, 553 S.E.2d at 119 (quoting Long v. Silver, 248 F.3d 309 (4th Cir.2001)).

When a dispute is submitted to arbitration, the arbitrator determines questions of both law and fact. Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award. An award will be vacated only under narrow, limited circumstances. Pittman Mortgage Co. v. Edwards, 327 S.C. 72, 75-76, 488 S.E.2d 335, 337 (1997). An arbitrator's award may be vacated when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law. Technical College

v. Lucas and Stubbs, 286 S.C. 98, 333 S.E.2d 781 (1985); S.C. Code Ann. § 15-48-130(a).

However, for a court to vacate an arbitration award based upon an arbitrator's manifest disregard of the law, the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable. Id.; Trident Technical College v. Lucas and Stubbs, 286 S.C. 98, 333 S.E.2d 781 (1985). Case law presupposes something beyond a mere error in construing or applying the law. Even a "clearly erroneous interpretation of the contract" cannot be disturbed. Id. at 108, 333 S.E.2d 787. The focus is on the conduct of the arbitrator and **presupposes something beyond a mere error in construing or applying the law**. Id. at 108, 333 S.E.2d at 787. (Emphasis supplied). Accord Harris v. Bennett, 332 S.C. 238, 503 S.E.2d 782 (Ct. App. 1998). An arbitrator's "manifest disregard of the law," as a basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principle yet refused to apply it. Weimer v. Jones, 364 S.C. 78, 610 S.E.2d 850 (Ct. App. 2005). Factual and legal errors by arbitrators do not constitute an abuse of powers, and a court is not required to review the merits of a decision so long as the arbitrators do not exceed their powers. Pittman, supra.

Here, the Court of Appeals recognized the four statutory grounds on which an arbitrator's award may be vacated, to wit:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C.A. § 10(a) (1)-(4) (West Supp.2006).[3]

The Court of Appeals did not rule specifically on any of the above grounds, but noted the Harts' argument that the arbitrator exceeded his powers inasmuch as there was no basis for an award of damages against them individually. The Court of Appeals then looked to the allegations of the **complaint** in order to determine whether the award was proper. This was error.

The Harts effectively concede an arbitrator **may** apportion punitive damages between joint tortfeasors citing D.E. Ytreberg, Apportionment of punitive or exemplary damages as between joint tortfeasors 20 ALR3d 666 (1968) (indicating that a majority of jurisdictions permit apportionment of such damages). However, the Harts nonetheless contend it was proper for the Court of Appeals to review the factual basis of the complaint to determine whether they were, in fact, individual parties to the action. We disagree.

The complaint is irrelevant to the determination of whether or not the arbitrator manifestly disregarded the law. What is dispositive is the fact that the Harts specifically filed their own motion to dismiss and moved to have the matter sent to arbitration. They clearly did not dispute that they were named as defendants, and they did not contend they should be dismissed as parties at that time. They should not now be permitted to complain on appeal. Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) (party may not complain on appeal of error which his own conduct induced).

Moreover, in holding the Harts were not individually sued as parties, the Court of Appeals cited cases concerning whether defendants were sued in

[3] S.C. Code Ann. § 15-48-130 (a) sets forth similar state grounds.

their individual, rather than **official** capacities. The cited cases, however, deal with claims against **state** agencies, counties, school boards, etc., and involve public official immunity under state tort claims acts. See e.g., Urquhart v. Univ. Health Sys. of E. Carolina, Inc., 566 S.E.2d 143, 145 (N.C. Ct. App. 2002); Paquette v. County of Durham, 573 S.E.2d 715, 719 (N.C. Ct. App. 2002); McKagen v. Windham, 59 S.C. 434, 38 S.E. 2 (1901).

The present case, however, does not involve tort claims immunity. Even if the Harts were acting as agents of Homes America, there is nothing preventing them from being held independently liable for torts committed in the scope of their employment. Cf. Dickert v. Metropolitan Life Ins., 311 S.C. 218, 428 S.E.2d 700 (1993) (co-employee may be held individually liable for intentional tort committed while acting within the scope of employment).

Moreover, the complaints here specifically named the Harts as individual defendants, and alleged they were jointly and severally liable, or liable in the alternative. It is clear that the Harts were named as individual defendants, and the Court of Appeals erred in looking to the complaint to determine otherwise. The Court of Appeals' opinion is reversed and the arbitrator's award is reinstated.

REVERSED.

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

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

The State, Respondent,

v.

Jarod Wayne Tapp, Appellant.

Appeal From Charleston County

Daniel F. Pieper, Circuit Court Judge

Opinion No. 4529

Heard January 6, 2009 – Filed April 9, 2009

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Timothy Clay Kulp, of Charleston, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

THOMAS, J.: Jarod W. Tapp, Appellant, appeals his convictions for murder, criminal sexual conduct in the first degree, and first degree burglary. Tapp challenges the State's introduction of DNA evidence recovered from Victim, as well as the expert testimony of crime scene analyst and victimologist, Mike Prodan. Tapp also claims the State failed to disclose exculpatory evidence, and alleges error on the part of the trial judge in failing to grant directed verdicts on all charges at the close of the State's case.

FACTS AND PROCEDURAL BACKGROUND

Victim was last seen around 10:00 p.m. on the night of Thursday, May 15, 2003.[1] The following day, Friday, May 16, 2003, at the request of Victim's parents, property manager, Mrs. Mumpower, conducted a wellness check. She knocked several times on Victim's door and then opened the door using a key. She testified she made no attempt to open the door without the key and therefore cannot determine whether the door was locked or unlocked when she arrived. As Mrs. Mumpower opened the door, she noticed a great deal of blood on the living room floor; she immediately closed the door and contacted police.

The police arrived at Victim's apartment around 5:30 p.m. on Friday May 16, 2003. First responders initially noticed a large blood stain near the television in the living room, some spatter in different places in the living room, and blood trailing off toward the hallway. Police then discovered Victim's nude body in a hallway bathroom, kneeling on the floor, doubled

[1] In May of 2003 Victim was in the process of moving her place of residence from the apartment in which she was killed, to another location.

over the rim of the tub. Victim had noticeable stab wounds about the face and neck, as well as abrasions, akin to carpet burns, on her knees and face.

An examination of the apartment, including the doors and windows, revealed no indication of any forced entry. During the course of processing the scene, several latent fingerprints were lifted from various locations throughout the apartment, but none were discovered in the bathroom where Victim was found.

An autopsy confirmed that Victim's death was the result of homicide, occasioned by two perforations to the jugular vein caused by stab wounds to the neck. The autopsy also revealed "battle signs" including a fractured nose, two breaks in the jaw bone, a black eye, and bruises to both ears. Although no trauma was discovered to the genital region, the coroner conducted a "rape kit" procedure, in which Victim's oral, vaginal, and rectal cavities were swabbed for DNA evidence. These swabs did not reveal the presence of sperm cells; however, the vaginal and rectal swabs tested positive for the protein p30, indicating the presence of semen.

DNA analysis was conducted on various items of trace evidence as well as the vaginal and rectal swabs. The swabs did not produce a full DNA profile but did produce a "mixture profile" or a "partial profile" of Victim and another individual.[2] Because of the mixed nature of the profile, the State's expert DNA analyst, Mr. Ortuno, could only match a minimum number of loci. While these matches did not rule out Tapp, the results demonstrated the statistical probability of a randomly selected and unrelated individual in the general population as being the source of the evidence to be one in twenty-three.

---

[2] Although the swabs revealed the presence of semen, there was no complete DNA sample. The expert explained the test for semen looks for the presence of a particular protein called p30. The expert testified: "[The test] is sensitive for the presence of p30 at extremely low levels. The amount of DNA necessary to develop a DNA profile is greater than the minimum threshold amount of p30 that's needed for [the] test to be positive. So it is not uncommon for a positive p30 semen presence test [to] yield no DNA profile other than the individual source, in this case, Victim."

In order to conduct a more thorough DNA analysis, samples were sent to ReliaGene laboratories in New Orleans, Louisiana for Y-STR testing. Y-STR testing has the capability of producing a more accurate DNA profile when there is a mixture of male and female DNA present in the sample. In this test, the State's DNA expert, Larsen, was able to compare the "male extract" from the vaginal swab against the Y-STR profile, which extracts only loci along the Y chromosome, unique to men. The results of this test demonstrate that the "male extract" from the vaginal swab matched Tapp's standard sample on all 10 loci that the Y-STR test examines. The results of this test could not exclude Tapp as the source of the DNA, and at the time of trial, the statistical probability of a randomly selected and unrelated individual being the source of the DNA was: one in 12,000 among Blacks, one in 17,800 among Whites, and one in 1,000 among Hispanics.[3]

Tapp filed a motion to suppress the DNA because the State did not demonstrate it was planning to offer evidence that the DNA sample could have been deposited in Victim during the timeframe between when she was last seen alive and when her body was discovered. The trial court made no specific ruling on the admissibility of the DNA before trial, and the evidence was admitted at trial through the State's expert witnesses Ortuno and Larsen *without objection* by Tapp.

During the investigation, Tapp gave two statements to the police. Initially, he gave a statement admitting he had been in Victim's home on a prior occasion to use the phone and restroom. Some months later, Tapp gave a second statement to the police in which he informed them that he and Victim had engaged in sexual intercourse on multiple occasions, but that he could not recall their last encounter. Tapp sought to introduce the second statement. Although the trial court did not admit the second statement, it left open the opportunity for Tapp to take the stand and testify to his prior sexual relationship with Victim.

---

[3] These odds were much different than those generated and reported when the test was first conducted. However, this was a result of ReliaGene's database, from which the statistical analysis is drawn, having increased considerably in size between the time of the initial testing and trial.

Among the State's various expert witnesses, the court qualified agent M. Prodan, over Tapp's objection, as an expert in crime scene analysis and victimology. Prodan described his expertise as:

> Crime scene analysis is a technique where a combination of forensics, behavior, victimology, crime scene assessment, crime scene reconstruction [sic] are put together to make an assessment of a violent crime to determine everything from victim's [sic] risks to becoming a victim of a violent crime, motive of the offender, possible characteristics and traits of the offender, interview and investigational strategies for the . . . crime

Furthermore, Prodan describes victimology specifically as:

> [T]he study of a victim. [It] is to try to determine why this particular victim was selected to be a victim of a violent crime, be it a sexual assault, homicide, a stalking, an abduction, or the like. The question is at what risk was this person of becoming a victim. And if they were a victim of a homicide, at what level was their risk, but also, what problem is solved by this person's death.

Agent Prodan, through a review of crime scene photos, autopsy reports, and other information provided by the police and prosecution, developed an opinion as to Victim's particular risk level. Prodan also gave an opinion as to possible ways in which the altercation between Victim and the perpetrator transpired.

At some time during the investigation, the State discovered that Ryan, Victim's roommate's boyfriend, may have had a key to the apartment in which Victim was murdered. This was testified to by State's witness, Solveig Heintz, and then again, later in the trial, by agent Prodan.[4] Tapp alleges this

---

[4] We note that Tapp points out that Heintz testified that Ryan may have *used* a key, and Prodan testified that Ryan may have *had* a key to the

information was not disclosed by the State, and when it was testified to for the second time by agent Prodan, Tapp unsuccessfully moved the trial court for a mistrial.

At the close of the State's case, Tapp unsuccessfully moved for directed verdicts on all counts. Tapp put on no evidence in his defense.

ISSUES ON APPEAL

I. Did the State's failure to provide evidence to support that the DNA sample was deposited in Victim sometime between the time she was last seen alive and when her body was discovered render the evidence irrelevant?

II. Did the trial court err in qualifying agent Prodan as an expert witness and allowing his testimony?

III. Did the trial court err in denying Tapp's motion for a mistrial?

IV. Did the trial court err in denying Tapp's motion for directed verdict?

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

ANALYSIS

I. DNA Evidence

The trial judge is given broad discretion in ruling on questions concerning the relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion. State v. Aleksey, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000).

Tapp argues the trial court erred in failing to exclude the DNA evidence obtained from the swabs because the State failed to present

---

apartment and that this distinction is why an objection was not made until later in the trial.

evidence that the DNA obtained from Victim was deposited between the time she was last seen alive and when her body was found. Tapp argues that the State's failure to demonstrate that the DNA was deposited during the time period in which the assault and murder occurred renders the evidence irrelevant. This argument is not preserved for appeal

Generally speaking, without the trial court making a final ruling on an issue, the issue is not preserved for appellate review. See State v. Rice, 375 S.C. 302, 323, 652 S.E.2d 409, 419 (Ct. App. 2007) (stating that "[u]nless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for appeal"). Similarly, a motion *in limine* is not a final determination on the matter and does not preserve the issue for appeal. State v. Govan, 372 S.C. 552, 557, 643 S.E.2d 92, 94 (2007); State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). "The moving party, therefore, must make a contemporaneous objection when the evidence is introduced." Forrester, 343 S.C. at 637, 541 S.E.2d at 840; see Govan, 372 S.C. at 557, 643 S.E.2d at 94; State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996); see also State v. Laster, 261 S.C. 521, 521, 201 S.E.2d 241, 241 (1973) (pointing out that the South Carolina Supreme Court has repeatedly held that if objections are not interposed to the introduction of evidence during the trial, they cannot be raised for the first time on appeal); but see State v. Mueller, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410-11 (Ct. App. 1995) (stating that a contemporaneous objection need not be made if there is no other evidence introduced between the ruling *in limine* and the introduction of the evidence at trial).

In the case at hand, although Tapp made a pre-trial motion entitled a "motion to suppress DNA evidence," which he claims was not a motion *in limine*, this motion was never finally ruled upon by the trial court. Furthermore, Tapp made no contemporaneous objection to the DNA evidence before, during, or after its introduction by the State. Accordingly, the issue of whether it was error to allow the DNA evidence is not properly before this court.[5] See Rice, 375 S.C. at 323, 652 S.E.2d at 419 (without final ruling or contemporaneous objection the issue is not preserved for review).

---

[5] While we note that there was discussion, at trial, on the issue of the admissibility of the DNA evidence, much of it pertained to if, and to what extent, such evidence could be mentioned in opening argument. However, a

II. Expert Testimony

a. Qualification

Tapp first alleges that it was error for the trial court to qualify Prodan as an expert witness. We disagree. [6]

Reversal of a trial court's qualification of an expert witness requires the complaining party to prove both an abuse of discretion and prejudice. See Jenkins v. E.L. Long Motor Lines Inc., 233 S.C. 87, 94, 103 S.E.2d 523, 527 (1958) (stating that the trial court's ruling on the qualification of an expert would not be disturbed in the absence of an abuse of discretion); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004) (demonstrating that there must be both error on the part of the trial court, as well as prejudice to the complaining party to warrant reversal). "An abuse of discretion occurs when there is no evidence to support the trial judge's factual conclusion or when the ruling is based on an error of law." Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 354, 559 S.E.2d 327, 334 (Ct. App. 2001); Bayle v. S.C. Dep't of Transp., 344 S.C.115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001). In order to demonstrate prejudice, there must be a "reasonable probability that the jury's verdict was influenced by the challenged evidence or lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005); State v. White, 372 S.C. 364, 374, 642 S.E.2d 607, 611 (Ct. App. 2007).

The qualification of an expert witness and the admissibility of the evidence offered by him/her is a matter within the sound discretion of the trial court. Fields, 363 S.C. at 26, 609 S.E.2d at 509; State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990); White, 372 S.C. at 373, 642 S.E.2d at 611; State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006), rev'd on other

---

thorough review of the record reveals the trial judge made no specific ruling on Tapp's motion to suppress at any time prior to or during the trial.

[6] While Tapp argues the qualification of Prodan and the admission of his testimony as a single issue, we see the analysis to in fact be twofold: (1) whether Prodan was properly qualified; and (2) whether the testimony was properly admitted. See State v. Morgan, 326 S.C. 503, 509, 485 S.E.2d 112, 115, (Ct. App. 1997) (highlighting that the testimony of a properly qualified expert witness may still be found inadmissible).

grounds, ___ S.C. ___, 671 S.E.2d 606 (2009). Generally, "for a court to find a witness competent to testify as an expert, the witness must be better qualified than the fact finder to form an opinion on the particular subject of the testimony." White, 372 S.C. at 375, 642 S.E.2d at 612; see Ellis, 358 S.C. at 525, 595 S.E.2d at 825; Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002).

A party seeking to qualify a witness as an expert bears the burden of showing that the witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony. State v. VonDohlen, 322 S.C. 234, 471 S.E.2d 689 (1996); State v. Shumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); White, 372 S.C. at 375, 642 S.E.2d at 612; see Honea v. Prior, 295 S.C. 526, 369 S.E.2d 846 (Ct. App. 1988) (there is no exact requirement concerning knowledge, education or skill necessary). Defects in the quality and quantity of the expert's education or experience do not automatically disqualify him/her as an expert; rather it goes to the weight to be afforded to the expert's testimony. White, 372 S.C. at 375, 642 S.E.2d at 612; see Brown v. Carolina Emergency Physicians, P.A., 348 S.C. 569, 580, 560 S.E.2d 624, 629 (Ct. App. 2001) (holding "[a]ny defect in the education or experience of an expert affects the weight and not the admissibility of the expert's testimony").

In this case, the record provides sufficient evidence, in the form of Prodan's education and experience, to support the decision of the trial court to qualify Prodan as an expert witness. See Hedgepath, 348 S.C. at 353, 559 S.E.2d at 334 (stating an abuse of discretion occurs when there is no evidence to support trial judge's conclusion). We defer to the trial court's discretion that Prodan was "better qualified than the finder of fact to form an opinion on the particular subject of [his] testimony." White, 372 S.C. at 375, 642 S.E.2d at 612. We note that trial courts in this state have, on prior occasions, qualified experts in the field of crime scene analysis. See, e.g. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006). Observing that "victimology" is merely a factor, or subset of crime scene analysis as defined by Prodan, it is unnecessary, and we therefore decline to rule whether it would be proper for a trial court to qualify an expert in the field of "victimology." Accordingly, based on our standard of review and the trial court's discretion in qualifying a witness as an expert, we find no error in Prodan's qualification.

b. Admissibility of Expert Testimony

Tapp argues that it was error to admit Prodan's testimony because it was irrelevant and unduly prejudicial. We agree.[7]

At the close of voir dire Tapp objected to the introduction of all Prodan's testimony as irrelevant and unduly prejudicial, arguing it was "pure speculation . . . highly prejudicial . . . [and that it] would serve to confuse the jury . . . [and] inject issues into the case for which there [was] no foundation."[8] Tapp avers, and we agree, it was error to allow the testimony over these objections.

Relevant evidence, is evidence "having any tendency to make[] the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Rule 401, SCRE; State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). However, not all relevant evidence is admissible. See Rule 403, SCRE (stating that "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury").

Expert behavioral testimony is relevant to the extent it makes the existence of a fact more or less probable; however, such testimony still remains subject to SCRE 403, and should be excluded if its prejudicial effect substantially outweighs its probative value. State v. Shumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (finding that expert testimony and behavioral evidence make it more or less probable that the offense occurred); see State v. Morgan, 326 S.C. 503, 509, 485 S.E.2d 112, 115 (Ct. App. 1997) (interpreting Shumpert as holding expert behavioral testimony is relevant but still subject to challenge because the probative value is outweighed by its prejudicial effect).

---

[7] Tapp presents other arguments as to why the testimony should have been excluded, including an argument that the testimony cannot withstand a Jones analysis under State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979). However, we need not address those arguments.

[8] This objection was properly renewed when Prodan was called as a witness in front of the jury.

In order to reverse the trial court's admission of evidence we must find (1) an abuse of discretion on the part of the trial judge; and (2) likely prejudice. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004).

Accordingly, our first inquiry is whether the trial court abused its discretion in allowing Prodan's testimony. An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249-50 (Ct. App. 2006).

A review of the record reveals numerous instances in which Prodan offered testimony which was wholly irrelevant and/or extremely prejudicial, including:

> Q: [D]id you access whether or not this was a killing related to the drug trade in any way?
>
> A: I did. And it was not.

However, despite noting that this was not a drug related homicide, the State continued to elicit roughly thirty-four lines of testimony regarding various types of drug related homicides.

Prodan then testified extensively as to how perpetrators may pick a victim and why, ultimately concluding that there was likely a level of familiarity between Victim and the perpetrator, but could not specify what that level of familiarity that was.

> Q: [W]hat was your opinion as to whether she would have been at some level familiar . . . with her killer?
>
> A: There would have been some type of knowledge…could be personal, in other words, they know each other from an intimate level all of the way down to a business level. Or it could be knowledge . . . where the offender has knowledge of Victim and her routine…but she has little or no personal knowledge of . . . her. *It might be something as simple as she recognized him from somewhere in the apartment complex.* (emphasis added).

In light of the fact that Tapp was known to reside in the apartment below Victim, and that Prodan could not opine as to a particular level of familiarity, this statement is overly prejudicial to Tapp. Furthermore, despite recognizing the possibility the door was "just left unlocked and someone [may have] happened to walk in," Prodan averred that because there was no blood or sign of physical struggle at the door, Victim knew or at least did not feel immediately threatened by the perpetrator. Prodan seemed to conclude where Victim was when she first saw the perpetrator, how she felt when she saw him, and what she thought when she saw him.

Additionally, with little to support its relevance to this case, the State elicited roughly twenty-seven lines of testimony from Prodan regarding torture, and more specifically sexual sadism. During this testimony, Prodan described in graphic detail the behavior of sexual sadists, as well as the characteristic traits of attacks by sexual sadists, including "infliction of injuries on sexual parts of the body, the genitals, the breasts, the buttocks, [and] on occasion the thighs."

Furthermore, with no foundation or relevance to this case, the State elicited testimony regarding how a "killer or rapist's drug use [would] affect the crime scene." As well Prodan delved into what the perpetrator's conscious or subconscious thoughts may have been when he "posed" Victim's body in the bathroom.

Finally Prodan offered substantial testimony as to the various ways in which a sexual assault may occur, be it a "blitz," a "surprise" or a "con." Although offering no opinion as to what method the perpetrator employed in this case, he elaborated quite extensively on each method. Additionally, when prompted by the Solicitor, Prodan drew up a hypothetical scenario in which the perpetrator came to the door saying that his car broke down and asks to come in to use the telephone; or a situation in which the perpetrator would say "I see that you are moving . . . in order to initiate conversation." Both of these purely speculative scenarios mirror too precisely facts or circumstances that the State sought to prove existed in the present case.

Initially, we note much of Prodan's elaborations, hypotheticals, and summations are irrelevant to the case at hand. Further, we find the probative value of Prodan's testimony to be quite low. Unlike other experts who form an opinion based on an objective method or procedure, the relevant portions

of Prodan's testimony seem to be nothing more than subjective summaries of inferences. The threat of prejudice and confusion of the issues in this case outweighs the probative nature of Prodan's testimony particularly with excessive reference and discussion of wholly unrelated issues including, but not limited to: drug related homicides, torture, sexual sadism, and estimations as to the perpetrator's conscious and subconscious thinking. Moreover, the development of hypothetical scenarios nearly identical to this case with no basis to suggest that such indeed occurred, or was even more likely than not to have occurred, are highly prejudicial and serve no probative purpose. Accordingly, the trial court abused its discretion in allowing this testimony.

We next turn to whether the trial court's abuse of discretion in allowing this testimony prejudiced Tapp. In order to demonstrate prejudice, there must be a "reasonable probability that the jury's verdict was influenced by the challenged evidence or lack thereof." White, 372 S.C. at 374, 642 S.E.2d at 611; Fields, 363 S.C. at 26, 609 S.E.2d at 509.

Here we find Prodan's testimony was of the type that had a reasonable probability to influence the jury's verdict. Considering the irrelevant and prejudicial nature of much of this testimony, as well as factoring in that it was introduced as expert testimony, and referenced in closing argument, it is reasonably probable that the jury's verdict was influenced by this testimony. Tapp was accordingly prejudiced by the introduction of this evidence.

CONCLUSION

Therefore, the ruling of the trial court is **AFFIRMED IN PART, REVERSED IN PART,** and **REMANDED** for a new trial consistent with this ruling.[9]

HUFF and LOCKEMY, JJ., concur.

---

[9] In light of our decision on this issue, it is not necessary for this Court to decide the remaining issues on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that an appellate court need not address remaining issues when a decision on a prior issue is dispositive); Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (need not address all issues when decision on a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Eric Jackson, Appellant,

v.

Bermuda Sands, Inc., Custom Outdoor Furniture and Restrapping, Inc., and Grosfillex, Inc., Defendants,

of whom Grosfillex, Inc. is the Respondent.

Appeal From Horry County
J. Michael Baxley, Circuit Court Judge
John L. Breeden, Circuit Court Judge

Opinion No. 4530
Heard March 4, 2009 – Filed April 14, 2009

AFFIRMED

Darrell Thomas Johnson, Jr., and Warren Paul Johnson, both of Hardeeville, for Appellant.

G. Michael Smith, of Conway, for Respondent.

HEARN, C.J.: Eric Jackson appeals the entry of summary judgment in favor of Grosfillex, Inc., regarding claims of products liability stemming from the collapse of a chair in which Jackson sat while he was staying at the Bermuda Sands Resort hotel (Bermuda Sands). We affirm.

FACTS

Jackson and his family were guests at Bermuda Sands in Myrtle Beach, South Carolina. During their stay, Jackson visited the indoor swimming pool located on the premises, and while there, attempted to sit in a white resin chair located by the pool. Upon partially sitting down, the chair collapsed underneath Jackson, breaking into several pieces and causing him to fall to the ground. As a result of the fall, Jackson claimed to have suffered injuries to his back and legs, causing physical pain, mental anguish and suffering, as well as alleging it caused and will cause Jackson to incur medical costs and loss of wages.

Shortly after the collapse, the broken chair was disposed of by a Bermuda Sands maintenance person, Hinson Sellers, and was therefore unavailable for introduction into evidence or for testing by the parties. As a result, the exact manufacturer of the broken chair was also not known to the parties with complete certainty.[1]

Thereafter, Jackson brought an action for actual and punitive damages against Bermuda Sands for negligence in failing to maintain its premises in a reasonably safe condition, as well as against Grosfillex, as alleged manufacturer, and Custom Outdoor Furniture and Restrapping, Inc., as alleged distributor of the broken chair, for negligence, recklessness, strict liability, and breach of implied warranty. Bermuda Sands settled with Jackson via mediation and was dismissed as a defendant. Grosfillex and

[1] For the purposes of the summary judgment hearing only, all parties agreed to assume the chair that collapsed was a Grosfillex product supplied to Bermuda Sands by Custom Outdoor Furniture and Restrapping, Inc., but that if the motion was denied, the issue would still be litigated.

Custom Outdoor filed motions for summary judgment, which were ultimately granted by the circuit court. Jackson appeals the grant of summary judgment[2] in favor of Grosfillex.

LAW/ANALYSIS

Jackson asserts the circuit court erred in finding: the unsupervised use and abuse of chairs in hotels was not foreseeable to Grosfillex; degradation of resin chairs due to chemical exposure, eventually leading to the inevitable failure of the chairs, was not a foreseeable event that should have been anticipated; Jackson's failure to identify the cause of an alleged crack was fatal to the claim; and, expert testimony was insufficient, where Jackson's experts arrived at the scientific conclusion most probable given the inability to examine the broken chair. We disagree and affirm.

Products liability in South Carolina is governed by section 15-73-10 of the South Carolina Code (2005) which states:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if
>
> (a) The seller is engaged in the business of selling such a product, and

[2] When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the trial court under Rule 56, SCRCP. Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E2d 437, 443 (Ct. App. 2005). Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences 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).

> (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in subsection (1) shall apply although
>
> (a) The seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

An action for products liability may be brought under several theories, including negligence, strict liability, and warranty. Rife v. Hitachi Const. Mach. Co., Ltd., 363 S.C. 209, 215, 609 S.E.2d 565, 568 (Ct. App. 2005). In a products liability action, regardless of the theory of recovery pursued, a plaintiff must establish three elements: (1) he was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant. Id. (citations omitted). In addition, liability for negligence also requires proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design. Id. at 215, 609 S.E.2d at 569 (citations omitted). Here, Jackson has failed to establish elements (2) and (3).

Section 15-73-30 of the South Carolina Code (2005) incorporates by reference section 402A of the Restatement (Second) of Torts (1965) wherein it explains:

> g. Defective condition. The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by

> the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.

(emphasis added). Moreover, in order to successfully prosecute a products liability claim, a plaintiff must prove the product defect was the proximate cause of the injury sustained. Rife, 363 S.C. at 215, 609 S.E.2d at 569 (citations omitted). "Proximate cause requires proof of causation in fact and legal cause." Id. at 216, 609 S.E.2d at 569. "Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence." Id. "Legal cause is proved by establishing foreseeability." Id.

The key element of proximate cause in South Carolina is foreseeablity. Id. The test of foreseeability is whether the injury to another is the natural and probable consequence of the complained-of act. Id. In order for an act to be a proximate cause of the injury, the injury must be a foreseeable consequence of the act. Id. However, an intervening force may be a superseding cause that relieves an actor from liability, although the intervening cause must be one that could have been reasonably foreseen or anticipated. Id. at 217, 609 S.E.2d at 569 (citing Small v. Pioneer Mach., Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997)).

Regarding any misuse or abuse of the chairs, Jackson has failed to prove the chair that collapsed was in a defective condition when it was shipped by Grosfillex. In addition, a manufacturer may not be held liable for the subsequent mishandling or other superseding act which causes the injury. See Section 402A(g) Restatement (Second) Torts. Jackson asserts precisely this, namely: because Grosfillex's chairs are typically used at hotels, and deposition testimony indicated chairs are frequently subjected to extreme

conditions such as being used on the street, thrown off balconies or into pools, as well as multiple people sitting in a chair at one time, Grosfillex should be on notice that the resin chair it produces is defective in its current state. The circuit court recognized that Jackson failed to prove not only the existence of a crack, which Jackson's expert, Harry Edmondson, maintained could be the only explanation for the collapse, but also whether any such crack existed in the chair at the time it left the manufacturer.

Edmondson conducted certain tensile tests on an exemplar Grosfillex chair which showed that the chair passed the applicable American Society for Testing Materials (ASTM) standards for strength requirements, which also validated the affidavit filed by Grosfillex's Vice-President of Manufacturing and Logistics, Daniel Yearick. However, Edmondson admitted he had no way of knowing whether there were any cracks in the chair or whether it had been subject to abuse, and could only guess or speculate as to how any alleged crack could have occurred, because the Grosfillex chairs were made pursuant to industry standards. Accordingly, Grosfillex cannot be held liable for the intervening and superseding acts of the ultimate users of its products, which could not have been reasonably foreseen or anticipated.

Moreover, Jackson's claims regarding chemical degradation are based not on any tangible evidence derived from the collapsed chair or the Bermuda Sands environment; rather, they amount to mere speculation and conjecture. A jury issue is created when there is material evidence tending to establish the issue in the mind of a reasonable juror. Small, 329 S.C. at 461, 494 S.E.2d at 841 (citation omitted) (discussing submission of an issue to the jury in the context of a directed verdict motion). "However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury." Id. "Our courts have recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court." Id. "A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture, or speculation." Id. Finally, assertions as to liability must be more than mere bald allegations made by the non-moving party in order to create a genuine issue of material fact. Baughman v. Am. Tel. and Tel. Co., 306 S.C. 101, 117, 410 S.E.2d 537, 546 (1991).

Here, Jackson contends the environment which surrounded the collapsed chair at the hotel, including subjection to chlorine, suntan lotions and UV rays, caused degradation to the chair's resin material which ultimately led to its collapse. In addition, Jackson claims that, because Grosfillex knew the majority of its resin chairs would be used in situations where they would be subjected to similar chemicals, it should have been on notice that its chairs were all going to degrade and fail, thereby rendering its chairs defective in their current state. In support of this contention, Jackson again relied primarily on the deposition testimony and affidavit of Edmondson. At the outset, Edmondson admitted he had not tested for the existence of UV stabilizers which Yearick and Grosfillex claim are included in the composition of the chairs. Similarly, Edmondson's claims regarding the effect of chlorine, suntan lotions, and other chemical agents on Grosfillex chairs were not based on first-hand knowledge derived from scientific testing; instead, Edmondson relied on two references he found on the internet. Edmondson himself admitted the applicability of the references to the collapsed chair in this instance amounted to guesses and speculation. Therefore, his unsupported assertions of chemical degradation warrant our affirmance of the circuit court's grant of summary judgment.

CONCLUSION

Jackson's contentions fail every part of the test for establishing liability in a products liability claim. First, Jackson cannot prove the collapsed chair was defective, or that any alleged defective nature of the chair caused the accident; nor can Jackson prove the chair, when it collapsed, was in the same condition it was in when it left Grosfillex. Without test results on the collapsed chair, Jackson's claims of misuse or abuse and chemical degradation also fail the tests for proximate cause and foreseeability. As a result, the circuit court did not err in finding Jackson had failed to establish a triable issue of fact. The decision of the circuit court is therefore

AFFIRMED.

PIEPER, J., and LOCKEMY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert K. McCuen, Respondent

v.

BMW Manufacturing Corporation and Twin City Fire Insurance Company, Appellants

---

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

Opinion No. 4531
Heard February 18, 2009 – Filed April 15, 2009

REVERSED

Samuel C. Weldon, of Greenville, for Appellants.

Kathryn Williams, of Greenville, for Respondent.

SHORT, J.: BMW Manufacturing Corporation (BMW) appeals the circuit court's order upholding the Appellate Panel of the Workers' Compensation Commission's (Appellate Panel) finding that Robert McCuen sustained a compensable neck injury arising out of and in the course of his employment with BMW and awarding him benefits for his injury. We reverse.

FACTS

McCuen began working for BMW as a dent repair technician in April of 2000. McCuen inspected and repaired minor dents and other imperfections on vehicles as they neared completion on the assembly line. As a dent technician, he utilized stationary florescent lights to detect imperfections. Once he detected an imperfection, McCuen used various tools to correct the dent. McCuen stated it was BMW's preference to correct the dents on the assembly line[1] and, as a result, he assumed awkward positions in an attempt to "push the dents out." According to McCuen, as a dent technician, he used both of his hands and applied a continuous force.

McCuen testified that prior to working for BMW, he had never experienced any problems with his neck, hands, arms, or wrists. However, on October 26, 2001, he began to develop pain in his right wrist while still employed with BMW. McCuen testified he reported the pain to BMW's infirmary. Consequently, BMW transferred McCuen to another area on the assembly line. He began complaining of pain in his right forearm and he was transferred to a computer data entry position. Shortly thereafter, on November 13, 2001, McCuen left BMW for medical leave and did not return to work.[2] After leaving BMW, McCuen began to complain of pain in his left wrist.

---

[1] However, if a vehicle had a large dent, the repairs were made off the assembly line.

[2] BMW terminated his employment in May of 2002.

McCuen's problems with both of his wrists continued, and he sought additional medical treatment. According to McCuen, several doctors were unable to diagnose the problem with his wrists. Ultimately, McCuen was referred to Dr. Joseph Kutz, a hand specialist in Kentucky. Eventually, Dr. Kutz diagnosed McCuen with bilateral carpal tunnel syndrome. During the summer of 2002, Dr. Stephen Gardner, a Greenville neurosurgeon, performed carpal tunnel surgery on both of McCuen's wrists. Dr. Gardener released McCuen from his care in September 2002. However, in December 2002, McCuen made an appointment with Dr. Gardner for problems with his neck, and underwent surgery on January 13, 2003. McCuen admitted his neck problems did not develop until months after he left BMW and he was unable to explain how he hurt his neck.

Before, during, and after McCuen's employment with BMW, McCuen owned and operated a landscaping business. McCuen testified at the hearing that he "had two guys that did most of the work," and sometimes he helped. However, at his deposition, he stated he did not have any employees, but he had "a friend that helped [him] some." Diana German, a former co-worker, testified McCuen worked in her yard on two separate occasions after he left BMW. Another former co-worker, Heather Lazo, also testified McCuen told her he was doing most of the landscaping himself. Additionally, McCuen assisted in the organization of a dent removal business after he left BMW.

McCuen filed a claim for benefits under the South Carolina Workers' Compensation Act. S.C. Code Ann. §§ 42-1-10 to 42-19-40 (1976 & Supp. 2008). This case originally came before the single commissioner, who found McCuen sustained compensable injuries to his neck, upper extremities, and hands by accident under South Carolina Code Section 42-1-160. Specifically, the single commissioner found McCuen had no pain or other difficulties with his neck, upper extremities, and hands prior to his employment with BMW. The commissioner specifically noted McCuen's job as a dent technician "involved forcing his neck, arms, and entire body into very awkward positions . . . ." Further, the single commissioner stated McCuen's "neck and entire upper extremity symptoms are associated manifestations of his condition."

BMW appealed the single commissioner's decision to the Appellate Panel, and the Appellate Panel affirmed the single commissioner's decision, sustaining the order in its entirety. Subsequently, BMW appealed the Appellate Panel's decision to the circuit court, challenging only the portion pertaining to a sustained injury to the neck. The circuit court affirmed the Appellate Panel's order, finding substantial evidence existed supporting the "finding that [McCuen] sustained a compensable injury to his neck as a result of the injury by accident." This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Stone v. Traylor Bros., Inc., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004).

The substantial evidence rule governs the standard of review in a workers' compensation decision. Frame v. Resort Servs. Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004). The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record. Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005). However, an appellate court can reverse or modify the Appellate Panel's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(6) (2005); Bursey v. S.C. Dep't of Health & Envtl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004).

> "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, 276 S.C. at 135, 276 S.E.2d at 306.

"[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). In workers' compensation cases, the Appellate Panel is the ultimate finder of fact. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. Hargrove v. Titan Textile Co., 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004). The final determination of witness credibility and the weight to be accorded evidence is reserved for the Appellate Panel. Bass v. Kenco Group, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005).[3]

LAW/ANALYSIS

BMW argues the Appellate Panel erred by finding McCuen suffered a compensable injury to his neck arising out of and in the course of his employment because it is not supported by substantial evidence. We agree.

For an injury to be compensable, it must arise out of and in the course of employment. S.C. Code Ann. § 42-1-160(A) (Supp. 2008). An injury

---

[3] The South Carolina General Assembly recently overhauled South Carolina's Workers' Compensation laws. These statutory changes affect claims for injuries occurring on or after July 1, 2007. See 2007 S.C. Acts 111, Part IV, Section 2 ("Except as otherwise provided for in this act, this act takes effect July 1, 2007, or, if ratified after July 1, 2007, and except [as] otherwise stated, upon approval by the Governor and applies to injuries that occur on or after this date.") (Emphasis added.) The injuries in this case began on October 26, 2001.

arises out of employment if a causal relationship between the conditions under which the work is to be performed and the resulting injury is apparent to the rational mind, upon consideration of all the circumstances. Rodney v. Michelin Tire Corp., 320 S.C. 515, 518, 466 S.E.2d 357, 358 (1996). "The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." Clade v. Champion Labs., 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998).

Here, the sole issue on appeal is whether McCuen's neck injury arose out of and during the course of his employment with BMW.[4] Most of the testimony and medical reports presented at the hearing before the single commissioner were devoted to McCuen's injury to his hands and wrists. There is little reference and discussion of his neck injury in the Record on Appeal. Additionally, McCuen testified he first experienced soreness in his neck after he stopped working at BMW. McCuen stated he thought the problems with his hands and arms developed because his job as a dent technician required him to continually apply pressure on the joints in his hands. When asked what he believed caused the neck injury, he responded: "I don't know what, exactly, that was. I think it had to do with something from the way I was in the awkward positions." On cross-examination, McCuen admitted he did not know how he hurt his neck. Furthermore, McCuen testified he did not experience any neck problems until three or four months after he had stopped working for BMW. McCuen also did not report any problems with his neck to any physician until an appointment with Dr. Kutz in February of 2002.

The portions of the record McCuen relies upon in his brief to support his substantial evidence argument do not specifically assert his neck injury arose during and in the course of his employment with BMW. Instead, the record indicates McCuen injured his hands and wrists while working as a dent technician at BMW, but he did not know how or when he injured his neck. In fact, Dr. Gardener's medical reports reflect most of his time and attention was focused on the care and treatment of McCuen's wrists. While there is some mention of neck pain in the reports, they do not indicate

[4] BMW does not dispute the compensability of McCuen's wrist injuries.

McCuen's neck problems resulted from his carpal tunnel syndrome or the work injury to his wrists. In a letter responding to a telephone conversation with McCuen's attorney, Dr. Gardner clarified that McCuen's "carpal tunnel syndrome while aggravated by his activity in the auto industry was not the cause of it, but certainly delayed onset is very typical." Dr. Gardner did not indicate McCuen's neck injury was caused or aggravated by his employment with BMW. The record also confirms McCuen operated his own landscaping company before, during, and after he worked for BMW. McCuen testified that in his landscaping business, he trimmed bushes, over-seeded yards, and cut lawns; however, he had to dissolve the company in March 2002 because of the pain in his hands. Two former co-workers testified McCuen continued doing landscaping work himself after he left BMW. The work included blowing leaves and cutting down a large bush. These incidents occurred before McCuen began experiencing neck pain.

CONCLUSION

We find substantial evidence does not exist in the record to support the Appellate Panel's finding that McCuen's neck injury arose out of and during the course of his employment with BMW. Therefore, the circuit court's order is

REVERSED.

THOMAS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David K. Straight,	Appellant,

v.

Michael H. Goss, Pamela W. Goss, Timberline Building Systems, Inc., Allied Products and Services, LLC, Custom Built Trusses, Inc., Commerce Properties, LLC., and Structural Component Systems, Inc.,	Respondents.

Timberline Building Systems, Inc., Michael H. Goss, and Pamela W. Goss	Third- Party Plaintiffs

v.

Eagle's Nest Homes, Inc.	Third- Party Defendants

Appeal From Greenwood County
L. Henry McKellar, Special Referee

Opinion No. 4532
Heard March 3, 2009 – Filed April 16, 2009

AFFIRMED

Robert L. Buchanan, Jr., of Aiken, for Appellant.

Everett A. Kendall, II, of Columbia, for Respondents.

HUFF, J.: In this shareholder derivative action, David K. Straight appeals from an order of the special referee finding largely in favor of Michael H. Goss (Goss) and his wife, Pamela W. Goss (Pam). In particular, Straight appeals the referee's findings relating to his claims the Gosses, as directors of Timberline Building Systems, Inc. (Timberline), (1) received excess wages in the nature of salary overrides; (2) misappropriated a corporate opportunity by purchasing property the Gosses then leased to Timberline, which the Gosses thereafter conveyed to their corporation, Commerce Properties, LLC (Commerce Properties), and caused Timberline to pay rent to cover the Gosses' taxes and mortgage on the property and also pay the rent of the Gosses' truss company; (3) misappropriated a corporate opportunity by creating a truss company, Custom Built Trusses, Inc. (CBT), which ultimately was succeeded by the Gosses' company Structural Component Systems, Inc., and used Timberline employees and materials for the benefit of the truss company; and (4) made inappropriate distributions to themselves through another of the Gosses' companies, Allied Products and Services, LLC (Allied). We affirm.

FACTUAL/PROCEDURAL HISTORY

In 1983, Straight, along with Larry Gandolfi and another person, formed Eagle's Nest Homes, Inc. (Eagle's Nest), a company that distributes panelized buildings through independent representatives. In the spring of 1983, Straight and Gandolfi were searching for a multi-sided house to market and found that a business called Deltec Homes produced a multi-sided, round house. Straight called Deltec and made an appointment with Goss, Deltec's

marketing manager.[1] Eagle's Nest purchased panelized houses from Deltec for approximately one year and thereafter purchased the round houses from Kingsberry Homes, a company for which Goss had previously worked and to which Goss had returned. Thereafter, Straight, Gandolfi, and Goss began exploring the possibility of starting a new company to manufacture panelized houses for Eagle's Nest.

In January 1986, Goss prepared a prospectus for a company called Timberline Manufacturing, Inc. On February 28, 1986, Straight, Gandolfi, and Goss signed a letter of intent, setting forth the parties' agreement in regard to the formation of the company. In particular, the letter of intent provided the company would be devoted exclusively to the production and delivery of Eagle's Nest homes, with other businesses and products added as warranted from retained earnings. It further stated Eagle's Nest homes would be purchased exclusively from the company, provided that pricing and delivery terms were competitive. The letter of intent also placed responsibility of day-to-day management of the company on Goss as president, and set his compensation at $1,000 a week plus two percent of sales orders, not to exceed $80,000 a year without prior approval of Timberline's board of directors. Goss testified the purpose of Timberline was to capture the manufacturing profits that suppliers Deltec and Kingsberry had previously realized from Eagle's Nest homes.

In September 1986, Timberline Building Systems, Inc. was incorporated by Straight, Gandolfi, Goss, and Pam, with these four likewise listed as the initial directors. However, shortly after incorporation, Straight, Gandolfi, Goss, and Pam each owned twenty-three percent of the company, with the president of Eagle's Nest, John Chester, owning the remaining eight percent, and Goss and Chester became the directors of Timberline's board. Thereafter, Straight and Gandolfi fired Chester from Eagle's Nest, resulting

[1] Both Goss and Gandolfi had engineering backgrounds. Goss testified he designed the round houses.

in Chester's dismissal as a director of Timberline in 1991, and Pam's replacement of him on the board.[2]

Timberline manufactured the panelized homes, and Eagle's Nest sold them. As part of its production of the homes, Timberline would fabricate them, provide drawings, codes, and packing lists needed to build the homes, load them, and contact the trucking company for delivery to the job site. At some point, Timberline also manufactured some homes for American Accent Homes, Inc. (American Accent), a company started by Straight and Gandolfi in 1986, which was the only other Timberline customer of any significance.[3] For a period of about four to six years, Timberline provided between eight to twelve houses a year for American Accent. During this time, in March 1990, Straight bought Gandolfi's interest in Eagle's Nest. Straight wanted to shut down American Accent, but Gandolfi instead talked Straight into selling his interest in American Accent to another man, Mr. Helms. While Straight sold his shares in American Accent, Gandolfi retained his shares. A conflict eventually developed between Straight and Gandolfi regarding American Accent. As a result, Straight requested Timberline initiate a lawsuit against American Accent.[4] Timberline subsequently incurred over $184,000 in legal fees related to the action against American Accent.

---

[2] At some point, Straight acquired Gandolfi's shares in Timberline and the company bought Chester's shares, resulting in Straight owning fifty percent of Timberline and Goss and Pam together owning the remaining fifty percent.

[3] The only other evidence of Timberline producing homes for other customers is that it manufactured about four panelized packages for some local individuals as well as one for Goss and one for a Timberline employee.

[4] It appears that Straight felt he was "duped" by Gandolfi when Gandolfi talked him into selling Helms his shares in American Accent, but Gandolfi, who was also supposedly selling his shares, either repurchased those shares or negated the transaction in order for Helms and Gandolfi to shut Straight out of American Accents. Goss testified American Accent and Eagle's Nest had the same marketing approach, Straight wanted American Accent out of that market, and Straight told Goss he wanted to "squash" American Accent and he was going to "crush" them because American Accent was competing

Allied Products and Services, LLC was a separate company set up by Goss and Pam. From 1993 through 1998, Timberline transferred funds to Allied totaling $341,772. According to Goss, the company was set up based on a model of one of Straight's companies, and with the advice of both an accountant and an attorney, for the purpose of distributing equal profits to the Gosses as were distributed to Straight. Allied did not manufacture any products, but did provide some payroll services to Timberline in the early years of the company.

While Timberline initially leased premises for the manufacture of the panelized homes, the leased premises incurred two separate fires over the years and were acquired by a new landlord, who wanted to take over the building occupied by Timberline. Thereafter, Goss and Pam found and purchased at an auction for themselves property (the Wickes property) that met Timberline's needs in August 1997, and in early 1998, Timberline moved to this new facility. Rent was charged to Timberline based on the recommendation of an economic development director as to what constituted competitive rent for that space. The Wickes property was subsequently transferred to Commerce Properties in December 1999.

---

with Eagle's Nest. Because American Accent had an agreement with Timberline that it would buy houses exclusively from Timberline, Straight believed Timberline could initiate a lawsuit against American Accent to enforce that agreement. Straight, on the other hand, maintained that he had an agreement drawn up between Timberline and American Accent which not only made Timberline an exclusive provider, but also placed limitations on the product Timberline produced for American Accent. Straight contended that American Accent violated the agreement, informing people it could make any type of home, including the round house. While Goss's position was that the lawsuit was instituted solely for Straight's and Eagle's Nest's benefit, Straight asserted it was beneficial to Timberline as well. This lawsuit started around 1994 and ended in 1995 or 1996.

In June 1998, Pam purchased truss manufacturing machinery and started a company called Custom Built Trusses (CBT). In July 1998, CBT began building trusses in one of the buildings located on the Wickes property. In October 1998, CBT's articles of incorporation were filed listing Pam as the registered agent for and incorporator of the business. CBT supplied the trusses Timberline needed for the manufacture of panelized houses, with cost based on the price charged by Timberline's previous supplier before that company's latest price increase.

Over time, Timberline experienced serious financial difficulties as sales declined substantially. It delivered its last home for Eagle's Nest in March 2000. Goss began closing Timberline down at that time and continued that process until around June of that year. CBT ceased operating on December 31, 2000. In January 2001, Goss and Pam began operating Structural Component Systems, Inc., a company that is the successor of CBT. In April 2001, Straight filed this action. Thereafter, in June 2005, Timberline filed for bankruptcy and this matter was automatically stayed. Straight moved the bankruptcy court to lift the stay and, as a result of negotiations between Straight and the bankruptcy trustee, the bankruptcy court modified the stay to allow the action to move forward, provided all proceeds recovered in the action be transmitted to the trustee and be property of the bankruptcy estate.

This matter was heard by a special referee by order of reference dated September 29, 2005. The referee noted Straight had abandoned his individual claims and chose to continue on the derivative claims alone, asserting the following four causes of action in his derivative suit: (1) negligent mismanagement; (2) conversion, (3) breach of fiduciary duty, and (4) civil conspiracy. The referee found the specific claims by Straight included the payment of excess wages to the Gosses, the use of Timberline employees and material for CBT, the purchase of the Wickes property and development of the truss business, and the transfer of funds to Allied from Timberline. The referee further noted the Gosses had brought a counterclaim against Straight and a third party claim against Eagle's Nest for money owed Timberline and for minority shareholder oppression.

After considering the evidence, the referee determined (1) no excess salary had been received by the Gosses, (2) the funds initially provided by Timberline for the payment of CBT employees were offset by the trusses delivered to Timberline but not paid to CBT, (3) Timberline did not have the ability to acquire the Wickes property and no funds of Timberline were improperly used to improve the Wickes property for the benefit of Commerce, (4) Timberline did not have the capital and resources necessary for the creation of a truss business and the truss business therefore was not a business opportunity for Timberline, and Timberline was treated fairly in all respects by CBT, and (5) the transfer of funds to Allied, along with certain payments of attorney's fees and special commissions, were essentially distributions of profits to the shareholders, and after considering the distributions made, the Gosses had received $21,449.97 more than Straight in distributions which the Gosses should return to Timberline based upon Straight's assignment of his claims to the company. Further, as equitable considerations, the referee found Straight used his influence as Timberline's primary customer to continually defeat price increases and used coercion, by continually threatening to remove all his business. He further found Straight made only a nominal initial investment in Timberline, refused to guarantee any bank loans, and risked nothing for his fifty percent ownership of Timberline for which he in turn received large returns. He also determined Straight routinely insisted upon liquidation and distribution of monies from Timberline. He concluded Straight's "conscious harassment of the Gosses" constituted unclean hands, and Straight was seeking to be unjustly enriched by his claims of misappropriated corporate opportunities. The referee determined there was no negligent mismanagement, no misappropriation of corporate assets or opportunities, no breach of fiduciary duty and no civil conspiracy by the Gosses, and found the imposition of a constructive trust sought by Straight would be inappropriate under the circumstances. He also determined Straight came into the court with unclean hands and such a defense could be properly raised in a derivative claim.

ISSUES

1. Whether the Gosses violated their duties as Timberline's officers and directors by engaging in undisclosed conflict of interest transactions with the corporation and failed to prove the fairness of the transactions.

2. Whether there was a claim stated upon which to offset the amount of the attorney's fees or the special discounts against the conflict of interest transactions.

3. Whether the defense of unclean hands applies to conflict of interest transactions or matters unrelated to the litigation.

4. Whether the common paymaster doctrine applies when employees are paid by one corporation but work exclusively for another when there is no common ownership.

5. Whether corporate directors are liable for misappropriated corporate opportunities when no disclosure was made to disinterested shareholders.

STANDARD OF REVIEW

A shareholder's derivative action, as well as an action for stockholder oppression, is one in equity. McDuffie v. O'Neal, 324 S.C. 297, 302-03 476 S.E.2d 702, 705 (Ct. App. 1996). Therefore, this court may find facts in accordance with our own view of the preponderance of the evidence. Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008). However, we are not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility. Sloan v. Greenville County, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003).

LAW/ANALYSIS

Engaging in Undisclosed Conflict of Interest Transactions

Straight first contends the special referee erred in failing to properly analyze the Gosses' conflict of interest transactions under section 33-8-310 of the South Carolina Code (2006). In particular, he argues the Gosses engaged in three conflict of interest transactions: (1) the payment of salary overrides for the years 1995, 1996, and 1997, (2) the purchase of property and creation of a truss company by the Gosses, initially funded by Timberline assets, and (3) distributions of money to Allied from 1993 to 1998. We disagree.

Section 33-8-310 which governs standards of conduct for directors and officers of a corporation involving conflict of interest transactions, provides as follows:

> (a) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one of the following is true:
>
> (1) the material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors, and the board of directors or a committee authorized, approved, or ratified the transaction;
>
> (2) the material facts of the transaction and the director's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction; or
>
> (3) the transaction was fair to the corporation.

If (1) or (2) has been accomplished, the burden of proving unfairness of any transaction covered by this section is on the party claiming unfairness. If neither (1) nor (2) has been accomplished, the party seeking to uphold the transaction has the burden of proving fairness.

(b) For purposes of this section, a director of the corporation has an indirect interest in a transaction if (1) another entity in which he has a material financial interest or in which he is a general partner is a party to the transaction or (2) another entity of which he is a director, officer, or trustee is a party to the transaction and the transaction is or should be considered by the board of directors of the corporation.

(c) For purposes of subsection (a)(1), a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of directors (or on the committee) who have no direct or indirect interest in the transaction, but a transaction may not be authorized, approved, or ratified under this section by a single director. If a majority of the directors who have no direct or indirect interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a direct or indirect interest in the transaction does not affect the validity of any action taken under subsection (a)(1) if the transaction is otherwise authorized, approved, or ratified as provided in that subsection.

> (d) For purposes of subsection (a)(2), a conflict of interest transaction is authorized, approved, or ratified if it receives the vote of a majority of the shares entitled to be counted under this subsection. Shares owned by or voted under the control of a director who has a direct or indirect interest in the transaction, and shares owned by or voted under the control of an entity described in subsection (b)(1), may not be counted in a vote of shareholders to determine whether to authorize, approve, or ratify a conflict of interest transaction under subsection (a)(2). The vote of those shares, however, is counted in determining whether the transaction is approved under other sections of Chapters 1 through 20 of this Title. A majority of the shares, whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

§ 33-8-310.

Salary Overrides

Straight contends the special referee erred in finding Goss's salary overrides in 1995, 1996, and 1997 were proper as they were neither disclosed nor approved and, therefore, were only valid if they were fair to the corporation. He argues the Gosses failed to meet their burden to establish fairness under section 33-8-310(b) as they failed to offer any evidence of fairness given the declining business and increased cash needs of Timberline during this time. We disagree.

Straight testified, based on his concern that someone running Timberline would be able to increase salary and diminish the shareholders' ability to pull out profits, the parties agreed a salary of approximately $80,000 a year would be paid to Goss and that any other income he would

earn would come from distributions and profits. At trial, he presented a document purporting the Gosses received excess wages of $214,233 in 1995, $66,864 in 1996, and $101,670 in 1997, while the number of packages Timberline produced for Eagle's Nest during those years was declining.

As previously noted, the letter of intent provided Goss was to receive a salary of $1,000 per week plus a sales override of two percent, not to exceed $80,000 per year "without prior approval of Timberline's Board of Directors." Thus, contrary to Straight's testimony, Goss's salary was not strictly limited to $80,000 a year with his only other source of income from the company to be income received as distribution of profits, as the letter of intent clearly contemplates Goss's salary may increase with board approval. The record shows that at a Timberline Board of Directors meeting on May 12, 1993, directors Goss and Pam, after noting Timberline's recent improved profitability, approved an increase in overrides to five and a half percent of sales.[5] At this time, Pam had replaced Chester as a director when Straight and Gandolfi voted Chester off the board. According to Goss, the by-laws required a minimum of two directors, and because Straight and Gandolfi refused to serve on the board, the only other available person to take the position was Pam. Certainly by 1995 and thereafter, the only three shareholders in Timberline were Straight, Goss, and Pam, with Straight owning fifty percent and Goss and Pam owning the remaining fifty percent. Accordingly, Straight was aware from the letter of intent that the board could increase the compensation for Goss. He was further aware it became necessary for Pam to replace Chester on the board when he refused to serve. He therefore knew that Goss and Pam, as the directors, would be determining whether Goss's salary could exceed $80,000 a year.

In addition to Straight's knowledge that Goss and Pam could make changes to the compensation, there is evidence of record that the Gosses made significant financial and sweat equity contributions to Timberline. In particular, although the letter of intent anticipated initial capital requirements of approximately $195,000 or less, with half the amount to be contributed by

---

[5] The order of the referee notes that in December 1998, the board reduced the override to three percent of sales.

the Gosses and the other half to be contributed by Straight and Gandolfi, the record shows Straight and Gandolfi actually contributed only $25,000 and refused to co-sign any loans to finance any further necessary capital.[6] According to Goss, the business was ultimately started with $150,000 in funds. Goss stated he and Pam put $25,000 of capital into the business by borrowing from their pension. The parties had agreed the remaining $100,000 was to be borrowed, and the bankers Goss met with requested Straight and Gandolfi co-sign for a loan. However, Straight and Gandolfi adamantly refused to sign any notes. One of the bankers ultimately agreed to loan Timberline money on the Gosses' personal guarantee if Straight and Gandolfi "put up $50,000." The Gosses ultimately gave their personal guarantee to obtain a loan from the bank. Although Straight maintained he and Gandolfi also provided a $50,000 loan to Timberline, Goss testified this loan was only short term, being made in September and paid off by the following February, and was a way to satisfy their banker and get around the fact Straight and Gandolfi had refused to co-sign on the loan. Thereafter, Goss and Pam guaranteed all of Timberline's loans and letters of credit, at times pledging their own personal assets.[7] Additionally, Goss testified over the course of years he and Pam both worked sixteen hour days, as well as some weekends, and had invested their money and personally guaranteed debts of Timberline.

Paragraph four of the official comments for section 33-8-310 discusses the "fairness" of a transaction and provides as follows:

---

[6] It is of further interest to note Goss testified this start-up capital of $25,000 contributed by Straight and Gandolfi was paid for by Eagle's Nest, whereby that company paid for a house manufactured by Kingsberry twice, paying Kingsberry for the home and then issuing a $25,000 check to Timberline for the same home, in order to improperly deduct the expense of their capital contribution.

[7] When Timberline ultimately ceased production, it was still obligated on a $150,000 note. After selling some land owned by Timberline to pay down the note, a balance of approximately $85,000 remained, which the Gosses were forced to assume as they had personally guaranteed the note.

> The fairness of a transaction for purposes of section 8.31 (Section 33-8-310) should be evaluated on the basis of the facts and circumstances as they were known or should have been known at the time the transaction was entered into. For example, the terms of a transaction subject to section 8.31 (Section 33-8-310) should normally be deemed "fair" if they are within the range that might have been entered into at arms-length by disinterested persons.

Given Straight's knowledge of the compensation parameters set forth by the letter of intent along with his refusal to serve on the board, leaving Pam as the only alternative director, and in consideration of the Gosses' concerted efforts and financial support of Timberline, we believe the Gosses have met their burden of showing the fairness of the additional overrides paid in 1995, 1996, and 1997. Additionally, based upon other equity considerations discussed further in this opinion, we find no error in the referee's determination that the Gosses were entitled to the salaries received during these years.

Land Purchase and Truss Company

Straight next contends the special referee erred in failing to find improper the Gosses' purchase of the Wickes property and formation of the truss company without disclosure to Straight. Straight argues the Gosses had a direct interest in the payment of rent by Timberline to themselves, and an indirect interest in the supply of trusses by CBT to Timberline. He asserts these transactions violated the South Carolina Business Corporations Act's statutory approval of such conflicts of interest as provided in section 33-8-310 because there was neither disclosure nor approval.[8] We disagree.

---

[8] Straight also summarily asserts the referee further erred in applying the business judgment rule to these transactions, as such a rule is not applicable to conflict of interest transactions. A reading of the referee's order discloses, however, that the referee did not reference this rule in regard to Straight's claims that the land purchase and truss business transactions were conflicts of

Straight complains the Gosses purchased the Wickes property, appraised at $1,300,000, for only $304,000, and Timberline could have done the same with no out-of-pocket investment required of Timberline or its shareholders. Additionally, he maintains that the rent charged to Timberline enabled the Gosses to make the mortgage payments and pay taxes on the property, and further asserts Timberline paid CBT's rent. As for the truss company, Straight asserts the Gosses failed to disclose the existence of CBT until he confronted Goss in December 1999 after receiving an anonymous clipping in the mail. He claims the Gosses also used Timberline to supply significant labor, materials, and rent for CBT.

The Wickes Property

The record shows that on November 1, 1991, following the first fire at the property initially leased by Timberline, the Timberline Board approved the negotiation and purchase of land and the construction of a new building for Timberline. While Straight and Gandolfi agreed to such an investment by Timberline, they informed Goss they were unwilling to give any guarantees or make any investment in it. Shortly thereafter, Timberline acquired eight acres of raw land in Hodges, South Carolina. Timberline however remained at the leased premises, where a second fire ultimately occurred on the property in 1994. At this time, Timberline was on a month-to-month lease, and the new landlord decided to take over the area leased to Timberline for his own use, requiring Timberline to vacate the premises.

Goss testified he and Pam searched Greenwood and the neighboring counties for a suitable location to lease, but were unable to find one that suited Timberline's needs. Eventually, Goss learned that the Wickes property was to be auctioned, and he and Pam subsequently purchased it for $304,000 in August 1997. The Gosses obtained a mortgage in the amount of $415,000, giving their personal guarantee, and used the difference to make improvements to the property. Goss testified Timberline did not buy the

---

interest, but rather did so in regard to Straight's assertions of negligent mismanagement of Timberline.

property because, in speaking with its banker, he knew Timberline could not borrow the money without Straight's guarantee. When presented with the idea of purchasing land and a building and mortgaging it, Straight clearly indicated to Goss that Straight would have no part of it and Goss would have to "do it alone." Timberline thus did not have the financial ability to secure a mortgage on the property. Additionally, rent of $4,527 a month was charged to Timberline after Goss consulted the executive director of The Greenwood County Economic Alliance as to what constituted competitive rent for that space. Goss further testified he informed Straight of the new rent charged Timberline and Straight "seemed happy with it."

Based on the evidence that Timberline did not have the financial ability to acquire the Wickes property and the rent charged to Timberline was competitive for the area leased, we find no error in the special referee's refusal to find purchase of the Wickes property by the Gosses was improper under section 33-8-310, as the evidence supports the fairness under the circumstances. Additionally, as with the salary overrides, based upon the other equity considerations we find no error in the referee's determination that the transactions involving the Wickes property were reasonable under the circumstances.

The Truss Business

Goss testified that Pam purchased truss machinery and started CBT in the summer of 1998. CBT and Timberline were located in the same compound, on the Wickes property, but Timberline was in one building and CBT was in another. Until a conversation with Straight in December 1999, Goss did not inform Straight about the existence of CBT. He and Pam borrowed the money in their names to start the business because Straight had made it clear he was not willing to co-sign, he wanted to take out Timberline's available retained earnings, and he had made it abundantly clear he was not willing to engage in any other business opportunities. Goss testified Timberline was "maxed out," it could not borrow the money without back-up guarantees, it did not have the retained earnings needed to engage in a business opportunity, and it could not afford the equipment necessary for a truss business. According to Goss, they were in a difficult situation because Timberline had only one customer, Eagle's Nest, and Straight kept

threatening to pull Eagle's Nest's business from them. Given the limitations with Timberline, he and Pam were trying to find a way to keep Timberline operating and to provide another source of income for themselves. Goss explained he did not discuss CBT with Straight before the December 1999 conversation because he had experienced a very difficult year with his son's illness and death, and in his preceding conversations with Straight, Straight had "basically washed his hands of [Timberline]." Additionally, the truss company did not make a profit until 2002, and had he "thrown the [CBT] business losses on top of the Timberline losses," Timberline would have been in an even more difficult situation. Goss stated that at the end of their December 1999 conversation about the Gosses' decision to go into the truss business, Straight indicated to Goss that it was "just fine with him."

Goss maintained that upon advice from his attorney and accountant, CBT and Timberline were operated as separate companies and in arm's length transactions with competitive pricing. The Gosses made improvements to the Wickes property to accommodate Timberline's needs. According to Goss, the only improvements made by Timberline to the property involved the running of electrical and compressor lines the business needed and possibly "another item or two." Goss admitted that for a very short period of time, while his wife was out of town tending to their son's medical situation, some materials ordered for CBT were inadvertently included on the Timberline account, but the matter was corrected in an adjustment at the end of the year. Goss also admitted that some employees who worked exclusively for CBT were paid from the Timberline payroll account. Goss explained that Timberline had five key employees that were vital to the continued operation of Timberline. Around the time CBT had started, Timberline was having difficulty keeping all these employees on their payroll. Two of Timberline's more experienced and key people were moved into the truss business with the expectation at some point Eagle's Nest business would return. According to Goss and two of the former employees of Timberline and CBT, the two businesses had different managers, different time cards, and different time clocks. Goss testified, and also presented evidence from his accountant, that Timberline incurred expenses with CBT for trusses, and that there was an annual accounting of the goods and services between the two companies. At the

conclusion of the reconciliation, Timberline was indebted to CBT in the amount of $14,878.

As for the rent, the testimony does not show, as Straight contends, that Timberline paid CBT's rent. Rather, CBT entered its own lease agreement with Commerce to pay $1,500 a month in rent for a much smaller area than Timberline's. Rent was charged on a prorated basis, with both Timberline and CBT paying $2.50 per square foot. While CBT apparently made only $1,500 in monetary payments, its remaining rent accrued on the books and there is no evidence this rent was paid by Timberline.

Further, CBT charged Timberline the same price Timberline had been paying its previous truss provider before that company announced a fifteen percent price increase. Accordingly, Timberline actually saved that fifteen percent difference when it obtained trusses from CBT. Additionally, Timberline benefited from the arrangement inasmuch as it received custom quotes faster, the quality of the trusses was somewhat superior, it received the trusses themselves more quickly, and it incurred no delivery charge.

Based on the foregoing evidence, we find no error in the referee's determinations that the funds provided by Timberline for the payment of CBT employees were offset by the trusses delivered to Timberline but not paid to CBT, that Timberline did not have the ability to acquire the Wickes property and no funds of Timberline were improperly used to improve the Wickes property for the benefit of Commerce, and that Timberline did not have the capital and resources necessary for the creation of a truss business and the truss business was not a business opportunity for Timberline. We further find no merit to Straight's assertions the Gosses improperly used Timberline to supply labor, materials, and rent for CBT. Accordingly, we hold the special referee did not err in failing to find the truss company transactions improper under section 33-8-310, as the evidence supports the fairness under the circumstances. Finally, as with the salary overrides and the Wickes property purchase, based upon the other equity considerations we find no error in the referee's determination that the transactions involving the truss business were reasonable under the circumstances.

Allied Distributions

Straight further contends the special referee erred in his determination regarding the Allied distributions to the Gosses. He argues the referee improperly tied the Allied distributions to the American Accent legal fees and special discounts because Goss's testimony on the matter was not credible, it was reasonable for Timberline to incur these fees on its own behalf, and the special discounts were made for legitimate business reasons. We disagree.

Goss testified that Allied was a company they used to enable him to receive an equal amount of distributions from Timberline that Straight received in the nature of legal fees incurred in the American Accent lawsuit and some "special deals" Straight obtained from Timberline. According to Goss, Straight requested Timberline sue American Accent because American Accent was competing with Eagle's Nest in its sale of dealerships.[9] Goss

[9] Goss testified about what he learned over time in regard to these dealerships sold by Eagle's Nest. When Timberline first started, Eagle's Nest was charging $3,000 for a dealership, which was essentially the right to sell a panelized house. By the end, the price of a dealership had risen to $10,000. Goss stated that Eagle's Nest would have three to four hundred dealers, whom they called reps, who made $8,000 to $10,000 a year in nonrefundable deposits. The person only had three to four months time from the date of deposit to have the house shipped. Because it was almost impossible for these dealers, for whom there was no required specialized training, to make the necessary preparations for delivery, which included obtaining financing, finding land, choosing the style of home, and putting in a foundation, only fifty to seventy-five of these reps would actually take a home. The remainder would lose their deposits, which became nonrefundable revenue for Eagle's Nest. Goss testified to a particular meeting he attended with some of the potential reps wherein he began to explain what needed to be taken care of before a house arrived. He was interrupted by an Eagle's Nest employee who told the attendees their only responsibility was "to bring coffee and donuts." When Goss confronted Straight about selling such a complicated product to people and indicating there was such little work involved, Straight informed

stated the lawsuit did not benefit Timberline at all, as American Accent was contributing to Timberline's profitability and Goss did not want to lose that business, but Straight insisted and Goss wanted to accommodate Straight. Goss agreed to proceed with the lawsuit as long as he received an equal distribution. Because Timberline risked losing its status as an S corporation if any unequal distributions were made, Straight agreed that Goss and Pam would receive an equal amount in distribution as were incurred in American Accent legal fees by Timberline. Accordingly, upon Straight's suggestion that compensation could be made to a consulting company, and after receiving advice from an accountant and an attorney on the matter, Goss used Allied as the vehicle to handle the offsetting distributions. Minutes from a July 1993 board meeting reflect that Timberline had been asked by Straight to join in the American Accent lawsuit because Straight believed American Accent was competing unfairly with Eagle's Nest. According to the minutes, the board approved the action and further approved Goss receiving "compensation distributions equal to the legal fees incurred in this legal matter." A memo from Timberline's attorney in the American Accent litigation indicates Timberline had incurred legal fees of $184,416.92 related to that lawsuit.

Goss also testified that in 1992, Straight wanted to take distributions from Timberline in the form of a two and a half percent "special discount," to be received on top of the eight percent volume rebate Eagle's Nest was receiving from Timberline. According to Goss, this was during a time Straight was arguing with Gandolfi, and Straight was seeking a way to receive the money from Timberline without Gandolfi benefiting. Accordingly, Straight came up with the idea of this discount, and agreed that Goss would take out a like amount. Timberline's board meeting minutes from February 1991 reflect that Eagle's Nest requested a special two and a half percent discount, and that the board approved the request, noting "a like dollar amount . . . will also be granted to Mr. Goss." Again, Allied was used as the distribution vehicle for the Gosses.

---

him that he was not in the business of selling panelized houses, but was in the "business of business," and he did not care if Eagle's Nest ever sold a house.

While Straight asserts on appeal that the evidence shows Goss's testimony was wholly unreliable, a thorough review of the entire record convinces us otherwise. Implicit within the referee's order is that the referee found Goss was credible and Straight was not. Though the actions of the Gosses may appear inappropriate at first blush, an understanding of the workings between the parties and their various businesses gives credence to Goss's testimony regarding the reasons behind the actions he and his wife took.

Goss testified at length to Straight's actions that required the various reactions by Goss. For instance, although Straight acknowledged in the letter of intent that he and Gandolfi were to contribute half of the initial capital investment, the two provided only $25,000 in a questionable transaction from Eagle's Nest, only provided a short term loan to the company in order to satisfy the bank in regard to their investment in the company, and refused to co-sign or guarantee any loans. This placed Goss and Pam in the position of having to personally guarantee Timberline's loans and letters of credit alone, taking on all of the risk of the company. At the same time, Straight made clear to Goss that he had no intention of ever guaranteeing any loans or investing any more money in Timberline. Goss also testified that Straight consistently insisted that Timberline's profits be distributed, thereby leaving no retained earnings in the business with which to invest in assets or other lines of business. Goss further testified that Straight insisted that Timberline bring a legal action against American Accent, Timberline's only other customer of any significance, even though only Straight and Eagle's Nest stood to gain from such an action, and Timberline would only lose this additional business. Additionally, Goss related that although the parties had agreed from inception that they would follow the Kingsberry pricing model in setting the prices Timberline would charge for the panelized houses, Straight fought Goss on each price increase mandated by the increased price of materials for Timberline, and Straight refused to pay based on that pricing model as originally agreed. According to Goss, Straight called him in 1997 and told Goss he was not going to worry about Timberline anymore, essentially washing his hands of Timberline. The record shows that while neither Straight nor the Gosses held a majority of the shares in Timberline, Straight owned fifty percent of the business and was the sole customer for the

times most pertinent to this litigation. As such, Straight held a certain control over Goss and Timberline, and constantly threatened to remove Eagle's Nest's business if Goss failed to comply with his requests. In fact, Straight's own expert, Professor John Freeman, testified that in his judgment, Straight was a "co-control shareholder." When asked if such a shareholder, who is "also the ninety-five percent customer" of a corporation could be guilty of corporate oppression if he threatens to take the business away from the corporation, he responded that if the business is being threatened by a controlling party causing the business to suffer, that could be a form of corporate oppression.

Aside from this support of the record, Goss also presented evidence from two independent witnesses as to his credibility. Reed Fickling, an employee of an insurance agency, testified he provided insurance for Timberline and Goss, and Goss was not his friend, but simply a client. Fickling testified that from his experience with Goss, Goss "was totally truthful and totally honest" and he would trust him implicitly. Willie Garvin, an accountant who provided services to Timberline until it ceased operations, testified Goss had "a very strong" reputation in the Greenwood business community, and he had heard someone comment that Goss "was as honest a person as they had ever met." Garvin stated he found Goss to be "straightforward and responsive" in answering questions in regard to the business.

While the record shows Goss enjoyed a reputation of honesty in the business community, no such evidence was submitted by Straight. On the other hand, counsel for the Gosses successfully impeached Straight's testimony before the referee. Contrary to Goss's testimony, Straight stated he wanted Timberline to be successful and never told Goss he was washing his hands of Timberline. He further denied planning to remove Eagle's Nest's business from Timberline. However, when confronted, Straight acknowledged he wrote a letter to Gandolfi in 1991, which indicated plans to cease doing business with Timberline. In the letter, Straight proposed he give Gandolfi his shares in American Accent in exchange for Gandolfi's stock in Timberline, and as inducement for the agreement stated the deal would be more than fair to Gandolfi, as Eagle's Nest was "planning on ceasing doing business with Timberline to open its own plant to increase profits."

Additionally, Goss maintained that Straight called him in 1997 and implied he was going "to go out and do something different." Straight admitted he faxed a document to Goss dated January 14, 1997, which was a proposal for the licensing of a new panelized house manufacturing facility located in a Native American community. Implicit within this document was a threat by Straight to take Eagle's Nest business away from Timberline.

Based on the foregoing, we find the evidence supports Goss's assertions that the legal fees and special discounts were provided for the benefit of Straight and the parties agreed that these monies would be considered distributions to Straight, for which the Gosses would receive the equivalent through payments made to Allied. Accordingly, we find no error in the referee's determination in this regard.

Offset of Attorney's Fees and Special Discounts

Straight next contends the special referee erred in offsetting the attorney's fees and special discounts against the Allied disbursements, essentially performing an accounting, because there was no claim upon which to base the offset. He argues the referee went beyond the scope of the pleadings in awarding such relief, and even if a counterclaim or third party claim had requested the relief, such claims would be barred by the statute of limitations. We disagree.

A reading of the order shows the special referee did not perform an accounting as asserted by Straight. Nor did he address, nor rely on, any counterclaim or third party claim of respondents as the basis for his decision regarding treatment of the payments to Allied. Rather, the referee considered Straight's claim that the Gosses wrongfully caused Timberline to distribute funds to themselves through Allied and the Gosses' defense that these payments were proper inasmuch as they were actually shareholder distributions paid to equalize distributions made to Straight in the form of attorney's fees and special discounts. The referee found that Allied provided the means to level the distribution of money to Timberline shareholders, with offsetting distributions to Straight through the attorney's fees and special discounts and to the Gosses through disbursements to Allied, and that these

were essentially distributions of profits to shareholders. Because the assertions regarding the attorney's fees and special discounts were the Gosses' defense to Straight's claims of wrongful payments through Allied, we find no merit to his argument.

Unclean Hands

Straight also contends the special referee erred in using the doctrine of unclean hands to "support the offset of attorney's fee and special discounts or for any other purpose." He argues the doctrine does not apply to conflict of interest transactions, as the test is whether the plaintiff is untainted with regard to the particular transaction of which he complains, and in order for a plaintiff to be precluded from recovering in equity under this doctrine, he must have acted unfairly in a matter that is the subject of the litigation. He maintains Timberline is the real party in interest and is the victim of the Gosses' wrongdoing, and Timberline could not have participated in the wrongdoing.[10] We disagree.

"When this court is sitting in equity, and thus viewing evidence for its preponderance, we are to consider the equities of both sides, balancing the two to determine what, if any, relief to give." Anderson v. Buonforte, 365 S.C. 482, 493, 617 S.E.2d 750, 755 (Ct. App. 2005). "The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998). "'He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief.'" Emery v. Smith, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. App. 2004)

---

[10]Straight summarily asserts Timberline is the real party in interest. However, in his order the special referee noted from the outset, although this action is ostensibly for the benefit of Timberline, as a practical matter the only beneficiary of the lawsuit would be the only shareholder who is not an officer or director, Straight. Straight does not challenge this finding.

(quoting Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945)). "The decision to grant equitable relief is in the discretion of the trial judge." Soden, 333 S.C. at 568, 511 S.E.2d at 379.

Contrary to Straight's assertion, the equitable defense of unclean hands is available in a shareholder derivative action. See Gaudiosi v. Mellon, 269 F.2d 873, 882 (3rd Cir. 1959) (stating "even in a stockholders' derivative action 'unclean hands' on the part of a plaintiff will require dismissal of the action"); Rosenfeld v. Zimmer, 254 P.2d 137, 139 (Cal. Ct. App. 1953) (holding the doctrine of unclean hands is applicable in a stockholders' derivative action); Forkin v. Cole, 548 N.E.2d 795, 805 (Ill. App. Ct. 1989) (holding shareholder's derivative actions are inventions of courts of equity, and even though a party may merely be a nominal plaintiff bringing suit on behalf of a corporation, equity requires that a shareholder derivative action cannot be maintained if the nominal plaintiff has unclean hands in connection with the transactions which are the bases for the litigation or has participated or acquiesced in, or benefited from the conduct of which he now complains); Suter v. Mazyck, 226 S.W.3d 837, 843 (Ky. Ct. App. 2007) (noting defense of unclean hands applies specifically to a stockholder's derivative action and the plaintiffs must have not engaged in conduct which would forfeit their right to seek equitable relief for the malfeasance of the corporate directors, officers, or majority shareholders); Tierno v. Puglisi, 719 N.Y.S.2d 350, 353 (N.Y. App. Div. 2001) (holding that in order to establish the defense of unclean hands to a stockholder's derivative action, the evidence must demonstrate that the plaintiff's conduct was immoral or unconscionable, that the conduct of the plaintiff was directly related to the subject matter in litigation and that the party asserting the doctrine of unclean hands was thereby injured); Becker v. Becker, 225 N.W.2d 884, 885 (Wis. 1975) (holding in a derivative action the equitable defense of unclean hands is available against a plaintiff shareholder for the purpose of defeating his derivative suit because a "plaintiff who is subject to an equitable defense should not be able to avoid that defense by bringing suit in a representative capacity").

Straight does not challenge on appeal the specific findings of the referee that his conscious harassment of the Gosses constitutes unclean

hands, or that he came into court with unclean hands in that the following actions by Straight were unfair and inequitable: (1) putting himself in conflict of interest by being a dominant shareholder in Timberline while controlling its major customer, (2) causing Timberline to sue its only other customer, (3) subordinating the interests of Timberline to those of Eagle's Nest, (4) setting an eight percent volume rebate when Timberline's sales to Eagle's Nest were below break-even, (5) surreptitiously recording telephone calls with Goss, (6) looting Timberline's assets, specifically the manufacturing design plans for the round house, and (7) threatening to move Eagle's Nest business to another builder after causing Timberline to lose its only other customer and thereafter conspiring and attempting to open Eagle's Nest's own manufacturing facility. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding that an unappealed ruling is the law of the case).

Furthermore, Straight's own inequitable conduct came directly to bear on the transactions of which Straight now complains. Straight refused to contribute his time or money to Timberline while damaging the corporation's financial position by subordinating the interests of Timberline to those of Eagle's Nest. These actions left Timberline in no condition to either purchase the Wickes property or form a truss company. They also left the Gosses struggling to maintain Timberline through their own contributions of time and financial resources and resulted in their making the salary overrides and Allied distributions. Accordingly, we find the special referee did not err in holding the doctrine of unclean hands precluded Straight from recovering against the Gosses.

Common Paymaster Doctrine

Straight next argues the special referee erred in using the common paymaster doctrine in regard to the payment by Timberline of CBT employees. Straight asserts such a doctrine does not apply here because the two companies were not commonly owned, but simply had "interlocking ownership and directors." We disagree.

A reading of the special referee's order shows he did not rely on a common paymaster doctrine. Rather, the referee simply noted that Timberline and CBT essentially engaged in a "common paymaster scheme" for the payment of labor, which is not an uncommon approach with related companies. The referee did not make any findings whether the common paymaster doctrine would apply in a situation where some, but not all, of the shareholders have two companies in common. Further, there is evidence of record that use of one payroll account for two companies may have cost-saving benefits and is an appropriate practice. Most importantly, there is evidence to support the referee's finding that the funds paid by Timberline for CBT labor were offset by the trusses CBT provided for Timberline, that the accounts were reconciled at the end of each year, and that at the end of 2000, Timberline actually owed CBT over $14,000. Accordingly, there was clearly no harm to Timberline in the employment of a common paymaster scheme under the circumstances.

Misappropriation of Corporate Opportunities

Finally, Straight argues the acquisition of the Wickes property and formation of CBT were corporate opportunities for Timberline which the Gosses misappropriated for themselves. He asserts the special referee improperly relied on his conclusion that Timberline was financially incapable of taking advantage of the opportunities presented because Timberline would have had the funds available had the Gosses not removed them through the improper Allied and salary override payments. He further maintains CBT used Timberline to "bankroll" itself, and used Timberline employees, material and rent to nourish CBT. He thus contends the use of Timberline assets during a decline in business, along with the monies removed by the Gosses, resulted in the demise of Timberline but the success and survival of CBT, which ultimately evolved into Structural Component Systems. Accordingly, Straight claims the Gosses should be ordered to return Structural Component Systems and the Wickes property to Timberline, or the court should impose a constructive trust in favor of Timberline on these assets. We disagree.

"A constructive trust results 'when circumstances under which property was acquired make it inequitable that it be retained by the one holding legal title. These circumstances include fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution.'" Macaulay v. Wachovia Bank of S.C., N.A., 351 S.C. 287, 294, 569 S.E.2d 371, 375 (Ct. App. 2002) (quoting Hendrix v. Hendrix, 299 S.C. 233, 235, 383 S.E.2d 468, 469 (Ct. App. 1989)). "A constructive trust 'arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust.'" Smith v. S.C. Ret. Sys., 336 S.C. 505, 529, 520 S.E.2d 339, 352 (Ct. App. 1999) (quoting McNair v. Rainsford, 330 S.C. 332, 356, 499 S.E.2d 488, 501 (Ct. App. 1998)).

> In general, a constructive trust may be imposed when a party obtains a benefit "which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty."

Id. (quoting SSI Medical Servs., Inc. v. Cox, 301 S.C. 493, 500, 392 S.E.2d 789, 793-94 (1990)).

As previously stated, the evidence of record supports the Gosses' actions when considered in conjunction with those of Straight. There is evidence Straight consistently insisted on the distribution of Timberline profits, insisted Timberline engage in an expensive lawsuit with Timberline's only other customer, refused to invest any further funds beyond his nominal initial investment and short term loan, refused to guarantee any loans, which would have been necessary for Timberline to purchase any property or begin its own truss business, and agreed Goss was to receive distributions through Allied to level out the benefits he received by way of the American Accent legal fees and the special discounts. Further, the evidence suggests Straight was not concerned with Timberline's profit, but only that of Eagle's Nest, and that selling "dealerships" was much more profitable to Eagle's Nest than

selling the panelized houses manufactured by Timberline. Thus, it is no surprise that the number of houses produced by Timberline for Eagle's Nest decreased dramatically over the years. This, along with Straight's constant battle with Goss over the Timberline price increases and his failure to follow the agreed upon pricing model, inevitably contributed to the severe financial problems and ultimate demise of Timberline. Additionally, the evidence is clear that Straight asserted control over Goss and Timberline by threatening to remove Eagle's Nest business. Further, the Gosses' personal venture into real estate provided Timberline with the manufacturing facility necessary for its survival when it could no longer stay on the previously leased premises nor locate another available and appropriate space and did not have the financial capability to purchase its own facility. As well, Timberline did not have the financial means to begin its own truss business, yet benefited from the arrangement with CBT, obtaining faster custom quotes and delivery, cheaper prices, and free delivery.

Reviewing the evidence in accordance with our own view of the preponderance of the evidence, we agree with the referee that there was no misappropriation of corporate opportunities of Timberline by the Gosses, and to invoke a constructive trust as requested by Straight is entirely inappropriate under the circumstances presented.

CONCLUSION

For the foregoing reasons, the special referee's order is

AFFIRMED.

WILLIAMS and KONDUROS, JJ., concur.