The Supreme Court of South Carolina

In the Matter of Tracey
Michelle Roberts, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 21, 1994 Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated April 16, 2009, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

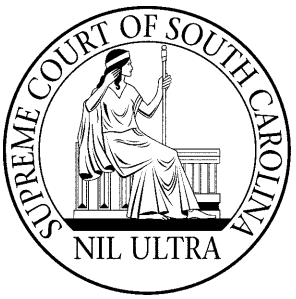
s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

May 21, 2009



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 22
May 26, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Raphael Hernandez, Honorio Guerrero and Alfredo Avila-Arjona, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Edgefield County
William P. Keesley, Circuit Court Judge

Opinion No. 26654
Heard March 4, 2009 – May 26, 2009

REVERSED

Chief Appellate Defender Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney

General Christina J. Catoe, all of Columbia, and Solicitor Donald V. Myers, of Lexington, for Respondent.

CHIEF JUSTICE TOAL: Petitioners Raphael Hernandez, Honorio Guerrero, and Alfredo Avila-Arjona were convicted of trafficking marijuana and sentenced to twenty-five years imprisonment. The court of appeals affirmed Petitioners' convictions and sentences. *State v. Hernandez*, Op. No. 2007-UP-183 (S.C. Ct. App. filed April 18, 2007). We granted a writ of certiorari to review that decision and now reverse.

FACTUAL/PROCEDURAL BACKGROUND

At a border crossing in Laredo, Texas, federal officials stopped and searched an eighteen-wheeler tractor-trailer ("tractor-trailer") entering the United States from Mexico. The officials discovered approximately 900 pounds of marijuana concealed in a shipment of wooden furniture destined for Tienda DeLeon in Trenton, South Carolina. Agents found the marijuana compressed into bricks and hidden inside twenty-three wooden chimneys. The officials seized the shipment, replaced the driver with an undercover agent, and continued transporting it to South Carolina for a controlled delivery.

When the tractor-trailer arrived at Tienda DeLeon, Fredy DeLeon,[1] the owner of the store, along with two other individuals who arrived at Tienda DeLoen in a Ford Thunderbird unloaded several pieces of furniture. The three men then directed the undercover agents to transport the rest of the shipment to Billy's Super Store, also located in Trenton.

The undercover agents drove the tractor-trailer to Billy's Super Store as directed and parked it next to the loading bay. After approximately twenty-

[1] Fredy DeLeon was tried and convicted with Petitioners but is not a party in this appeal.

five minutes, the agents witnessed the same Thunderbird they saw at Tienda DeLeon drive past Billy's Super Store and reappear a few minutes later along with a Ryder moving truck ("the Ryder truck") driven by Petitioner Guerrero and with Petitioners Avila-Arjona and Hernandez as passengers. The Thunderbird pulled beside the tractor-trailer, and the Ryder truck parked in front of the tractor-trailer. The passenger of the Thunderbird exited the car and attempted to enter the cab of the tractor-trailer, but the undercover agent indicated that he was not allowed inside the tractor-trailer. The Thunderbird passenger then directed the undercover agents to follow him, while the driver of the Thunderbird spoke with Petitioners who were still in the Ryder truck. The three vehicles formed a caravan, with the Thunderbird leading, followed by the Ryder truck, and the tractor-trailer in the rear.

The caravan drove down a dirt road for a while. Subsequently, the Ryder truck and the tractor-trailer became stuck in the mud. The undercover agents decided to call off the operation and promptly arrested Petitioners. The Thunderbird drove away and the men were never apprehended. The agents searched the Ryder truck and found the cargo portion of the truck empty. However, the agents discovered a receipt indicating that Petitioner Guerrero rented the Ryder truck the day before and a receipt from a motel for the night before the controlled delivery took place.

Petitioners were indicted for trafficking marijuana. At trial, Petitioners moved for a directed verdict claiming that the State had only proved mere presence at the scene and had failed to prove the element of knowledge. The trial court denied Petitioners' motion, and the court of appeals affirmed, holding that there was substantial circumstantial evidence to send the case to the jury.

This Court granted Petitioners' request for a writ of certiorari to review the court of appeals' decision, and Petitioners present the following issue for review:

> Did the court of appeals err in affirming the trial court's denial of Petitioners' directed verdict motion because the State only proved mere presence?

STANDARD OF REVIEW

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. *Id.* When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. *Id.* If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury. *Id*. at 292-93, 625 S.E.2d at 648.

LAW/ANALYSIS

Petitioners argue the court of appeals erred in affirming the trial court's denial of their motion for a directed verdict. We agree.

In relevant part, South Carolina's definition of trafficking marijuana includes: "Any person . . . who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession" of ten pounds or more of marijuana. S.C. Code Ann. § 44-53-370 (Supp. 2006). In drug cases, the element of knowledge is seldom established through direct evidence, but may be proven circumstantially. *State v. Attardo*, 263 S.C. 546, 550, 211 S.E.2d 868, 869 (1975). Knowledge can be proven by the evidence of acts, declarations, or conduct of the accused from which the inference may be drawn that the accused knew of the existence of the prohibited substances. *Id.*

At trial, the State presented two receipts indicating that Petitioners traveled to Trenton for the night and rented the Ryder truck. The undercover agent testified that Petitioners conversed with the driver of the Thunderbird before they caravanned down the rural dirt road. Additionally, the

undercover agent testified that in his experience, drug transactions this large are typically handled within an "inner circle" and all of the parties involved are aware of what transpires.

In our view, this evidence does not constitute substantial circumstantial evidence of knowledge. The State failed to present evidence connecting Petitioners to the tractor-trailer or to Fredy DeLeon or evidence that Petitioners had knowledge of the contents of the tractor-trailer. The State claims that it is "nonsensical" to find that the Thunderbird occupants did not know Petitioners prior to this transaction. However, the State failed to present any evidence such as acts, declarations, or specific conduct to support this inference, and thus, we find that the conclusion that Petitioners knew the Thunderbird occupants and therefore had knowledge of the drugs in the tractor trailer is mere speculation. Additionally, the State points to the testimony of the federal agents to support the inference that Petitioners had knowledge of the drugs. We find, however, that while these testimonies may support such an inference, this evidence alone does not constitute substantial circumstantial evidence that Petitioners had knowledge. *See State v. Lollis*, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001) (reversing the defendant's conviction where the State did not present substantial circumstantial evidence and where the evidence merely raised a suspicion of guilt).

Although Petitioners' actions may have been suspicious, mere suspicion is insufficient to support the verdict.[2] *State v. Arnold*, 361 S.C.

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[2] The traditional circumstantial evidence charge provides that when the State relies on circumstantial evidence to prove its case, the jury may not convict the defendant unless:

> Every circumstance relied upon by the State be proven beyond a reasonable doubt; and . . . all of the circumstances so proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

State v. Edwards, 298 S.C. 272, 275, 379 S.E.2d 888, 889 (1989). Although

386, 605 S.E.2d 529 (2004) (holding that the trial court must grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty). Accordingly, we reverse Petitioners' convictions and sentences.

CONCLUSION

For these reasons, we reverse the court of appeals' decision.

WALLER, KITTREDGE, JJ., and Acting Justices James E. Moore and James A. Spruill, concur.

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in *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004) the Court abandoned this charge and held that it may confuse a jury by leading it to believe that the standard for measuring circumstantial evidence is different from that for measuring direct evidence, it nonetheless illustrates the lack of evidence against Petitioners.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Larry M. Ferguson, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Anderson County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 26655
Heard March 17, 2009 – Filed May 26, 2009

REMANDED

Chief Appellate Defender Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Daniel E. Grigg, all of Columbia, for Respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' dismissal of this appeal.[1] The sole issue is whether mental incapacity tolls the statute of limitations in which to file for post-conviction relief (PCR).

FACTS

In December 1996, Petitioner, Larry Ferguson, pleaded guilty to first degree burglary, second degree burglary, grand larceny (three counts), and receiving stolen goods; he was sentenced to fifteen years, suspended on five years probation.[2] In March 2001, Ferguson pleaded guilty to numerous drug charges for which he was concurrently sentenced to two years on each offense; his probation on the 1996 charges was revoked in full.

In February 2002, Ferguson filed an application for PCR alleging ineffective assistance in connection with the 1996 guilty plea. The application was dismissed after a hearing, on the ground that it was barred by the one-year statute of limitations set forth in S.C. Code Ann. § 17-27-45(a). We granted certiorari.

ISSUE

Is the one-year statute of limitations set forth in S.C. Code Ann. § 17-27-45(a) tolled by a PCR applicant's mental incapacity?

DISCUSSION

S.C. Code Ann. § 17-27-45(a) provides:

> (A) An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court

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[1] We reinstated the appeal and granted certiorari.

[2] Ferguson was 18 years old at the time of his 1996 plea. He has a history of mental illness, bi-polar disorder, and has an IQ of 76.

> from an appeal or the filing of the final decision upon an appeal, whichever is later.

Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996).

The PCR court held the one-year statute of limitations was not tolled by an applicant's mental incompetency, citing our opinion in Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004). In Council, we addressed whether PCR proceedings of a mentally incompetent applicant should be indefinitely **stayed** until such time as the applicant regained competency. We held collateral review of the trial proceedings should not be delayed due to the applicant's incompetency. 359 S.C. at 129, 597 S.E.2d at 787. The basis for our holding was that the issues on PCR were not "extraordinarily fact intensive" and did not require Council's assistance. Accordingly, Council's incompetent state did not prevent the PCR court from proceeding on those issues. We went on to note, however, that "if, at a future date, the petitioner regains his competency and discovers that at his original PCR hearing, his incompetency prevented his ability to assist his counsel on a fact-based claim of ineffective assistance of counsel, he may then raise that claim in a subsequent proceeding." Id.[3]

The State and Ferguson fervently dispute the import of the Court's holding in Council.[4] In light of the language a PCR applicant's mental incompetency does not delay collateral proceedings, the State interprets Council to mean that the statute of limitations is not tolled during incompetency. Ferguson, on the other hand, contends the holding in Council that a mentally incompetent applicant who later regains competence **will have an opportunity** to raise fact-based issues at a later date, is an implicit holding that the statute of limitations is tolled.

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[3] We recently held a mentally incompetent capital defendant could not waive his right to pursue PCR. Hughes v. State, 367 S.C. 389, 626 S.E.2d 805 (2006).

[4] Initially, the State contends there is no evidence of incompetence subsequent to Ferguson's 1996 plea. However, that matter was not addressed at PCR and no hearing held on that claim inasmuch as the court held the statute of limitations barred his action.

Unlike Council, the issue here is not whether PCR proceedings should be **stayed** by virtue of Ferguson's alleged incompetency but, rather, whether or not the time in which to **file** an application for PCR is tolled.

There is a split of authority as to whether the statute of limitations to file a PCR action is tolled by mental incompetency. It has been held that while an ongoing mental incompetence may warrant equitable tolling, "a claim of mental incompetence does not constitute a *per se* reason to toll a statute of limitations. . . . Rather, the critical inquiry remains whether the circumstances preventing a petitioner from making a timely filing were both beyond the petitioner's control and unavoidable despite due diligence." Com. v. Carneal, ___ S.W.3d ___ (Ky. 2008), *internal citations omitted*; Nara v. Frank, 264 F.3d 310, 320 (3d Cir.2001), *overruled on other grounds by* Carey v. Saffold, 536 U .S. 214 (2002) (mental incompetence may warrant equitable tolling where alleged mental incompetence has affected petitioner's ability to timely file); State v. Nix, 40 S.W.3d 459 (Tenn. 2001) (due process requires tolling of PCR statute of limitations only if petitioner is unable to manage his affairs or understand his legal rights and liabilities); Seals v. Tennessee, 23 S.W.3d 272, 277 (Tenn. 2000) (due process considerations may toll statute of limitations if mentally incompetent petitioner was denied the opportunity to bring a claim in a "meaningful time and manner"). But see Allen v. State, ___ So.2d___ (Miss. App. 2008), *citing* House v. State, 754 So2d 1147 (Miss. 1999) (holding there is no authority to toll statute of limitations based on mental incompetence).

Although we have not specifically addressed tolling the statute of limitations in the context of mentally incompetent PCR applicants,[5] case law warrants a holding that, in circumstances in which an applicant demonstrates the failure to timely file for PCR was due to mental incompetency, the statute should be tolled.

In Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999), we held the one year statute of limitations of S.C. Code Ann. § 17-27-45(A), does not

[5] In Norris v. State, 335 S.C. 30, 515 S.E.2d 523 (1999), we found it unnecessary to address whether mental incompetency tolled the statute of limitations for PCR applications.

apply to Austin v. State[6] appeals. In Austin, counsel failed to file a timely appeal following the denial of the petitioner's PCR application. He filed a subsequent PCR application claiming ineffective assistance of counsel during his first application for PCR. We remanded for an evidentiary hearing to determine whether petitioner requested and was denied the right to appeal. We held Austin appeals need not be filed within the one year statute of limitations because they are belated appeals intended to correct unjust procedural defects. "Under the PCR rules, an applicant is entitled to a full adjudication on the merits of the original petition, or "**one bite at the apple**." Odom, 337 S.C. at 261, 523 S.E.2d at 755, *citing* Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) (emphasis added).

The rule of Odom and Austin was extended in Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002). In Wilson, we held every defendant has a right to file a direct appeal and one PCR application. There, since counsel had been ineffective in failing to file an appeal, and the statute of limitations in which to file for PCR had expired, we held "policy would be frustrated if the one year statute of limitations for PCR claims applied where the applicant was denied his direct appeal due to ineffective assistance of counsel, and then was denied his right to a PCR application because of the one year statute of limitations." Id. at 218, 559 S.E.2d at 583.

The same policy considerations are applicable here. If Ferguson was prevented from filing for PCR by reason of his mental incompetency, then he has not, and will not, receive his one full bite at the apple. Accordingly, we find the proper remedy is to remand to the PCR court for a hearing as to whether Ferguson's mental incapacity prevented such an application in the one year following his 1996 guilty plea. If the PCR court finds mental incompetence prevented his filing a PCR application, the court should determine the duration of the incompetence, and whether the application was filed within one year of Ferguson regaining competency. PCR should proceed only if Ferguson's application was timely filed within one year of the date that he regained competence.

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[6] 305 S.C. 453, 409 S.E.2d 395 (1991).

REMANDED.

TOAL, C.J., PLEICONES, BEATTY, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robin R. Jones, by and through her Guardian ad Litem, Douglas Raymond Jones, Appellant,

v.

Enterprise Leasing Company-Southeast and Enterprise Rent-A-Car Company, Respondents.

Appeal From Richland County
J. Michelle Childs, Circuit Court Judge

Opinion No. 4548
Heard March 4, 2009 – Filed May 18, 2009

AFFIRMED

Justin S. Kahn, of Charleston, and Mark Lee Simpson, of Charlotte, for Appellant.

Samuel W. Outten, and James J. Pascoe, both of Greenville, for Respondents.

HEARN, C.J.: Robin Jones, by and though her father and guardian ad litem (GAL), Douglas Jones, appeals the circuit court's grant of summary

judgment in favor of Enterprise Rent-A-Car (ERAC). Jones asserts ERAC negligently, carelessly, and recklessly entrusted and/or supplied a vehicle to an incompetent, habitually reckless, and otherwise unfit driver. Alternatively, Jones maintains ERAC is the alter ego of its wholly owned subsidiary, Enterprise Leasing Company Southeast (Southeast), and should be secondarily and financially liable for any tort of Southeast. We affirm.

FACTS

Southeast rented a vehicle to Jeffrey Demary for three months in 2003. On March 1, 2003, Demary was involved in an accident while driving the rented vehicle, when he struck the rear of the vehicle driven by Robin Jones. The collision caused Jones' vehicle to be pushed to the side of the road and overturned. Jones was seriously injured, causing permanent brain damage that resulted in medical bills of approximately $1,000,000, and requiring Jones to live in a nursing home.

Jones, by and through her GAL,[1] brought an action[2] in state court against ERAC and Southeast (collectively Respondents) for actual and punitive damages, alleging Respondents negligently, carelessly, and recklessly entrusted and/or supplied a vehicle to an incompetent, habitually reckless, and otherwise unfit driver. Jones also alleged ERAC was the alter ego of Southeast and thus secondarily liable for any claim proven against its subsidiary. In support of the complaint, Jones contended Demary had: been convicted of at least nine speeding violations while operating a vehicle; been convicted of six speeding violations within the prior three years, three of which were for speeding greater than twelve miles over the speed limit; three speeding convictions while driving an Enterprise vehicle; his license

[1] Jones' original complaint was brought by and through her GAL, who was then listed as her mother, also named Robin Jones. However, at some point in the early stages of litigation Jones' GAL and accompanying caption was changed to reflect her father, Douglas Jones, as GAL.

[2] Jones initially brought an action against only Southeast in federal court asserting similar allegations. The federal court action was dismissed for lack of jurisdiction.

suspended for several years for failing to pay tickets; and otherwise demonstrated a reckless driving pattern and/or habit. Thereafter, ERAC made a motion to dismiss pursuant to Rules 12(b)(2) and (6), SCRCP. Southeast additionally made a motion for a protective order against discovery requests made by Jones.

A hearing was held on ERAC's motion to dismiss, and it was denied. Subsequently, Southeast's motion for a protective order was partially granted by the circuit court. Both Southeast and ERAC made further motions for protective orders, in response to a motion by Jones to compel discovery on certain matters she had requested. ERAC additionally made a Rule 56, SCRCP motion for summary judgment, while Respondents collectively made a motion to quash a subpoena filed by Jones against Wachovia Bank. Jones, meanwhile, made an additional motion for sanctions resulting from improper deposition conduct. A hearing was held on the above motions, and the circuit court made the following rulings: Respondents' motion to quash was granted, as was the motion for a protective order regarding certain financial information; Jones' motion for sanctions was denied;[3] and Southeast's motion for a protective order was held in abeyance. Finally, the circuit court granted summary judgment to ERAC, which rendered Jones' motion to compel and ERAC's motion to protect moot. Jones filed a Rule 59(e), SCRCP motion for reconsideration of the circuit court's grant of summary judgment in favor of ERAC, which was denied. Jones appeals this determination.

LAW/ANALYSIS

I. ERAC's Primary Liability for Negligent Entrustment

Jones first maintains the circuit court erred in circumventing her remaining discovery requests by prematurely granting ERAC summary judgment. Jones contends the motions she filed to compel the discovery

[3] Jones also filed a motion for reconsideration from the court's initial form order which denied her request for sanctions, granted Respondents' motion to quash, and granted Respondents' motion for a protective order regarding certain financial information. Jones' motion was denied.

requests she had previously served on ERAC related directly to the issues of: whether ERAC dominates and controls Southeast; whether the knowledge and actual use by ERAC and its subsidiaries of the electronic method of checking a person's driving history prior to renting a vehicle was known and used in the industry; and whether ERAC financed the purchase of the vehicle at issue. We disagree.

Summary judgment is a drastic remedy which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). "This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." Id. Once a Rule 56 motion has been made, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party. Id. at 115, 410 S.E.2d at 545. A court must then apply the standard set out in Rule 56(c), SCRCP:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Id. at 116, 420 S.E.2d at 545-46 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)).

Therefore, although an appellate court must view the evidence through the prism that is most favorable to Jones, her contention regarding the circuit court's grant of summary judgment before she had had a full and fair opportunity to complete discovery, may only be successful if the evidence she had presented, or the evidence she alleges would be introduced through discovery, would create a genuine issue of material fact as to ERAC's liability for each element of negligent entrustment.

A claim for negligent entrustment has been the subject of several cases by both this court and the supreme court; however, the elements needed to prove the claim have varied. The supreme court has held that the theory of negligent entrustment provides the owner or one in control of the vehicle and responsible for its use who is negligent in entrusting it to another can be held liable for such negligent entrustment. Am. Mut. Fire Ins. Co. v. Passmore, 275 S.C. 618, 621, 274 S.E.2d 416, 418 (1981) (citing 19 A.L.R.3d 1175, superseded by 91 A.L.R.5th 1). Citing Passmore, this court has extended the elements of negligent entrustment to include:

> (1) knowledge of or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking, (2) that the owner knew or had imputable knowledge that the driver was likely to drive while intoxicated and (3) under these circumstances, the entrustment of a vehicle by the owner to such a driver.

McAllister v. Graham, 287 S.C. 455, 458, 339 S.E.2d 154, 156 (Ct. App. 1986) (inserting an element of knowledge of alcohol consumption into the test for negligent entrustment).

The test administered in McAllister was further cited by this court in Jackson v. Price, 288 S.C. 377, 381-82, 342 S.E.2d 628, 631 (Ct. App. 1986), and was affirmed by the supreme court in Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc., 374 S.C. 171, 176-77, 648 S.E.2d 585, 588 (2007) (declining to adopt sections 308 and 390 Restatement (Second) Torts (1965),

instead expressly analyzing the facts of the case under the elements of negligent entrustment set forth in Jackson).

While case law in our state has tended towards the tort of negligent entrustment that comprises an element of drinking, sections 308 and 390 of the Restatement (Second) of Torts (1965), involve the application of negligent entrustment to situations that do not involve the presence of alcohol. Section 308 provides:

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Section 390 provides:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

In Lydia v. Horton, this court adopted sections 308 and 390, as the appropriate standard for negligent entrustment. 343 S.C. 376, 383-85, 540 S.E.2d 102, 106-07 (Ct. App. 2000), reversed, 355 S.C. 36, 583 S.E.2d 750 (2003). In addition, this court sanctioned a first party cause of action for negligent entrustment against the entrustor of a vehicle or chattel; however, the supreme court granted certiorari and reversed this court, expressly declining to adopt sections 308 and 390. Lydia v. Horton, 355 S.C. 36, 43, 583 S.E.2d 750, 754 (2003). In Gadson ex rel. Gadson v. ECO Services of

South Carolina Incorporated, this court again considered section 308, stating "[w]e do not find the supreme court's ruling in Lydia would prevent application of section 308 of the Restatement under the facts of the present case as the question addressed in Lydia was whether South Carolina recognizes a first party negligent entrustment claim." Op. No.2005-UP-130, n.4 (S.C. Ct. App. filed February 18, 2005), reversed, 374 S.C. 171, 648 S.E.2d 585 (2007). In reversing this court, the supreme court again declined to adopt sections 308 and 390. Gadson, 374 S.C. at 176-77, 648 S.E.2d at 588. In a concurring opinion, Justice Pleicones wrote in favor of adopting sections 308 and 390 as alternative methods of proving negligent entrustment, because he found a loophole exists whereby an entrustor could avoid liability if there was no evidence the entrustor knew the entrustee was a habitual drinker or addicted to alcohol. Id. at 179, 648 S.E.2d at 589-90 (Pleicones, J., concurring).

Here, unlike in Lydia or Gadson, where a negligent entrustment claim could be decided under the elements established in McAllister, there is no suggestion that alcohol played any role in this accident. However, neither party has expressly requested this court to once again adopt sections 308 and 390, and because the only issue before us is ERAC's liability, we find it is unnecessary to adopt those sections for the purposes of this appeal, as Jones cannot prove the compulsory element of ownership or control under either rubric.

The circuit court found there was no genuine issue of material fact that ERAC owned or controlled the vehicle rented to Demary. The circuit court relied on Jones' own complaint, which stated the vehicle was titled to Southeast. "A certificate of title constitutes prima facie evidence of vehicle ownership for purposes of insurance coverage, but can be rebutted by evidence showing that someone other than the titleholder was the real owner." Unisun Ins. Co. v. First So. Ins. Co., 319 S.C. 419, 423, 462 S.E.2d 260, 262 (1995). In addition, section 56-1-10(3) of the South Carolina Code (Supp. 2008) states an "[o]wner means a person, other than a lienholder, having the property or title to a vehicle. The term includes a person entitled to the use and possession of a vehicle subject to a security interest in another person, but excludes a lessee under a lease not intended as security."

Moreover, the rental agreement was between only Southeast and Demary, and the vehicle was picked up from a Southeast location. ERAC presented affidavits indicating it exercised no control over any of its subsidiaries' use or entrustment of their vehicles, which was uncontroverted by Jones. As a result, the circuit court was correct in finding Jones failed to prove the essential element of the negligent entrustment, ownership and control, and that further discovery on the issue would be unnecessary and unavailing.

II. ERAC Exists As An Alter Ego of Southeast

Jones next contends the circuit court erred in granting summary judgment to ERAC because it so exercises dominance and control over Southeast that it is the subsidiary's alter ego.[4] We disagree.

Alter ego describes a theory of procedural relief. Drury Dev. Corp. v. Found. Ins. Co., 380 S.C. 97, 101 n.1, 668 S.E.2d 798, 800 n.1 (2008). "[T]he alter ego doctrine is merely a means of piercing the corporate veil." Id. (citing 18 C.J.S. Corporations § 23 (2008)); see also Mid-South Mgt. Co. Inc. v. Sherwood Dev. Corp., 374 S.C. 588, 603-04, 649 S.E.2d 135, 143-44 (Ct. App. 2007) (affirming the alter ego theory of recovery's application to parent and subsidiary situations). Under this theory, when a parent company controls the business decisions and actions of its subsidiary, the subsidiary becomes an instrument or alter ego of the parent. Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 148, 425 S.E.2d 764, 774 (Ct. App. 1992). Control required for liability under an alter ego doctrine amounts to total domination of the subsidiary to the extent the

[4] Jones also advanced at oral argument the contention that ERAC could separately be liable under a master-servant theory irrespective of an alter ego analysis; however, Jones neither plead master-servant liability, nor argued it in her brief, so we decline to address the issue. In re: Bruce O., 311 S.C. 514, 515 n.1, 429 S.E.2d 858, 859 n.1 (Ct. App. 1993) (explaining an appellant may not use oral argument as a vehicle to argue issues not argued in his brief).

subsidiary manifested no separate corporate interests and functioned solely to achieve the purpose of the dominant corporation. Id. (citing Krivo Indus. Supply Co. v. Nat'l Distillers & Chem. Corp., 483 F.2d 1098, 1106 (5th Cir. 1973). Moreover, "[c]ommon officers and/or directors and public identification of one corporation as the other's subsidiary do not, without more, support the conclusion the subsidiary is its parent's alter ego or agent for the transaction of its business." Yarborough & Co. v. Schoolfield Furniture Indus., Inc., 275 S.C. 151, 153-54, 268 S.E.2d 42, 44 (1980) (citations omitted).

However, merely establishing the level of control or dominance a parent must have over a subsidiary, in order to prove it is the alter ego of the subservient corporation, is not sufficient to maintain an alter ago action. Mid-South Mgt., 374 S.C. at 603, 649 S.E.2d at 143 (citing Colleton County Taxpayers v. School Dist. of Colleton County, 371 S.C. 224, 638 S.E.2d 685 (2006); Baker v. Equitable Leasing Corp., 275 S.C. 359, 271 S.E.2d 596 (1980)). Instead "one must [also] show that the retention of separate corporate personalities would promote fraud, wrong or injustice, or would contravene public policy." Mid-South Mgt., 374 S.C. at 603, 649 S.E.2d at 143. "Furthermore, when a motion for summary judgment is made and properly supported, an adverse party may not rest solely upon the allegations or denials in his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Colleton County Taxpayers v. School Dist. of Colleton County, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006) (citing Rule 56(e), SCRCP).

In addition, several factors should be considered before a parent corporation may be held liable for the torts of its subsidiaries. These include: stock ownership by parent; common officers and directors; financing of subsidiary by parent; payment of salaries and other expenses of subsidiary by parent; failure of subsidiary to maintain formalities of separate corporate existence; identity of logo; and plaintiff's knowledge of subsidiary's separate corporate existence. 16 Am. Jur. Proof of Facts 2d 679 (2006). The circuit court stated it considered these factors, although Jones alleges the court failed to consider them all. We agree with the circuit court, and find there to be no factual basis that ERAC exhibited control over Southeast sufficient to justify

piercing the corporate veil. There is no evidence of undercapitalization, fraud in the Southeast's corporate operations or structure, or that Southeast is not financially viable on its own.

Moreover, evidence indicates ERAC executed no day-to-day control over Southeast. As the circuit court found, the boards of directors for ERAC and Southeast hold separate meetings, and Southeast pays its own employees from its own banking accounts. Finally, and most convincingly, Jones has failed to show how the retention of ERAC's and Southeast's corporate formalities would promote wrong or injustice, or would contravene public policy. As evidenced by Southeast's own responses to Jones' first discovery requests, Southeast is a self-insured entity in the amount of $15,000 per person and $30,000 per accident for bodily injury, but maintains excess insurance with various companies totaling $245 million.[5] Given this information, we find Southeast to be adequately prepared and funded in the event of a verdict against it; therefore, in the absence of any clear dominance or control, no wrong, injustice or contravention of public policy would occur in failing to find ERAC the alter ego of Southeast.

[5] We note that generally, evidence as to whether a person was or was not insured against liability is not admissible upon the issue of the person's alleged negligence; however, this general rule does not require the exclusion of evidence of insurance when offered for another purpose such as proof of ownership or control. Rule 411, SCRE. We find Southeast's maintenance of excess insurance speaks directly to its independence and viability as a separate corporation.

CONCLUSION[6]

Based on the foregoing, the circuit court neither erred in granting summary judgment to ERAC for primary liability on Jones' claim for negligent entrustment, nor in finding ERAC is not the alter ego of Southeast.[7] Accordingly, the decision of the circuit court is

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[6] Jones additionally appears to assert the circuit court's grant of summary judgment erroneously overruled the prior circuit court ruling, by a different judge, which denied ERAC's Rule 12(b)(6), SCRCP motion. Jones maintains the prior 12(b)(6) motion was converted into a motion for summary judgment because matters outside of the pleadings were considered; therefore, the subsequent grant of summary judgment, which is the subject of this appeal, reversed the ruling of another circuit court judge. Although Jones made this argument to the circuit court in her Rule 59(e) motion for reconsideration, she did not make this argument in her initial brief to this court, instead reviving this argument in her reply brief. As a result, this issue is not preserved for our review, because no new issues may be raised to this court by the appellant in the reply brief. See Hunter v. Staples, 335 S.C. 93, 103, 515 S.E.2d 261, 267 (Ct. App. 1999) (finding appellant was precluded from asserting an argument for the first time in its reply brief); Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (acknowledging an appellant may not use the reply brief to argue issues not argued in its brief in chief).

[7] ERAC also asserts two additional sustaining grounds, including: (1) whether a defendant may be liable for negligent entrustment when the plaintiff does not allege knowledge by the defendant that the driver was addicted to intoxicants or had the habit of drinking; and (2) whether South Carolina imposes a duty on a rental car company to investigate the driving history of a customer who presents a valid driver's license. In light of our disposition above, we decline to address these additional contentions. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Larry Lee Fesmire, Jr., and
Teresa M. Fesmire, Respondents,

v.

George B. Digh, Appellant.

Appeal From Horry County
J. Stanton Cross, Jr., Master-in-Equity

Opinion No. 4549
Heard February 19, 2009 – Filed May 20, 2009

REVERSED AND REMANDED

J. Dwight Hudson and Mary Anne Graham, both of Myrtle Beach, for Appellant.

Otis Allen Jeffcoat, III, of Myrtle Beach, Ezizze Davis Foxworth, of Loris, and James B. Richardson, Jr., of Columbia, for Respondents.

GEATHERS, J.: This is an appeal from an order granting specific performance of an alleged oral contract for the sale of Appellant George Digh's interest in a condominium to Respondents Larry Fesmire, Jr., and Teresa Fesmire. We reverse the master's order and remand the case for an accounting and partition by sale.

FACTS/PROCEDURAL HISTORY

In 1990, the parties to this action, along with Shelley Digh, jointly purchased a Myrtle Beach condominium from Shelley's employer, B.W. Miller. Shelley, who is now deceased, was the wife of George Digh. The two couples were longtime friends who took trips together. They executed a promissory note to Miller in the amount of $85,000 and a mortgage on the property to secure the note. They also entered into a written agreement among themselves setting forth their understanding of their respective ownership interests in the property, the division of the property's income and expenses, and the disposition of their respective interests in the property in the event of a future sale. They intended to use the condominium as rental property and also for their occasional personal use.

Shelley, who was an accountant, kept the financial records on the property. From July 1990 through April 1996, she sent mortgage payments to Miller. On a quarterly basis, she determined the amount of income collected and total expenses for the property and notified Larry Fesmire if any funds were due from him at that time.

In February 1994, Shelley was diagnosed with acute myeloblastic leukemia. From that point forward, the Dighs' personal use of the condominium significantly diminished. The leukemia went into remission, and Shelley had a bone marrow transplant; but in January 1996, the Dighs learned that the leukemia had returned. When they were about to exhaust health insurance coverage for Shelley's medical expenses, the Dighs learned that they would have to raise $250,000 for a second bone marrow transplant.

Among their options for fund-raising was a proposal for the Fesmires to purchase the Dighs' interest in the Myrtle Beach condominium. George Digh's understanding of the proposal was that both couples would agree on a value of $140,000 for the condominium, with $70,000 attributable to each couple's interest in the property, provided that the sale closed within thirty days. According to George, the Dighs wanted to impose a thirty-day deadline because time was of the essence in raising funds for the bone marrow transplant. George understood that the amount due, after subtracting the Fesmires' share of the existing debt on the property, was approximately $37,000. However, no formal closing ever occurred.

According to Larry Fesmire, the proposal that Shelley submitted to him was for a net amount due of $20,000 for the Dighs' interest in the property. Larry Fesmire's account of events includes his payment of $20,000 in cash to Shelley during a visit to the Dighs' home in April 1996. He allegedly used a cigar box to carry the $20,000 in $100 denominations to Shelley's bedroom where she was lying ill, and he allegedly placed the box on Shelley's dresser.

Shelley's last mortgage payment was the April 1996 payment. In May 1996, the Fesmires took over the mortgage payments and started paying for all of the other expenses associated with the property. In July 1996, Shelley died.

In April 1998, George Digh wrote a letter to Larry Fesmire indicating his impression that Fesmire had never completed the purchase of Digh's interest in the Myrtle Beach condominium. Digh expressed his desire for Fesmire to complete the purchase of his interest or for the condominium to be placed on the market for sale. A few days later, Fesmire responded to the letter with two alternative proposals: (1) complete the "original agreement of March 1996" by paying what Fesmire considered to be the balance due on the net purchase price - $70,000 less the $20,000 "down payment paid in March of 1996," less Fesmire's share of the debt on the property as of March 1996 ($33,000), for a net amount due of $17,000; or (2) place the condominium on the market. Fesmire indicated his preference for the option of buying out

Digh's interest. Digh responded with confusion over Fesmire's mention of a $20,000 payment.

The parties engaged in several unsuccessful efforts to resolve the matter, and the Fesmires eventually stopped making the mortgage payments on the Myrtle Beach condominium; therefore, Digh had to take up payments on the mortgage to prevent foreclosure.[1] The Fesmires later filed an action against Digh seeking specific performance of an alleged oral contract for the sale of the Dighs' interest in the condominium for $20,000. The Fesmires alleged that before Shelley's death, they had entered into an oral contract with George and Shelley Digh for the sale of the Dighs' interest in the condominium. The complaint also requested the alternative remedies of a partition and sale of the property and an accounting. Digh filed a counterclaim seeking damages for conversion and seeking an accounting. The matter was referred to the master-in-equity, who conducted a bench trial and later issued an order granting specific performance of the alleged oral contract. Digh filed a motion for reconsideration, but the master denied the motion. This appeal followed.

ISSUES ON APPEAL

I. Did the master err in admitting into evidence redacted versions of two letters authored by counsel for the purpose of settlement negotiations?

II. Did the master err in granting specific performance of the alleged oral contract in violation of the Statute of Frauds, S.C. Code Ann. § 32-3-10(4) (2007)?

III. Did the master err in failing to grant the parties' requests for a partition and an accounting?

[1] Larry Fesmire testified that he abandoned the mortgage payments so that the property would go into foreclosure and he could then buy the property at a foreclosure sale.

STANDARD OF REVIEW

This Court reviews all questions of law de novo. E.g., Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008). Review of the trial court's factual findings, however, depends on the whether the underlying action is an action at law or an action in equity. See Townes Assoc.s, Ltd. v. City of Greenville, 266 S.C. 81, 85-86, 221 S.E.2d 773, 775-76 (1976) (setting forth standards of review to apply in actions at law and actions in equity).

In an action at law, the trial court's factual findings will not be disturbed upon appeal unless found to be without evidence which reasonably supports the trial court's findings. Townes, 266 S.C. at 86, 221 S.E.2d at 775. In an action in equity, the appellate court may resolve questions of fact in accordance with its own view of the preponderance of the evidence. See Wilder Corp. v. Wilke, 324 S.C. 570, 577, 479 S.E.2d 510, 513 (Ct. App. 1996) (citing Townes, 266 S.C. at 86, 221 S.E.2d at 775) (holding that because the master-in-equity heard the action, which was equitable in nature, without appeal to the circuit court, the appellate court could find the facts on appeal in accordance with its own view of the preponderance of the evidence)). However, this broad scope of review does not require this Court to disregard the findings at trial or to ignore the fact that the master was in a better position to assess the credibility of the witnesses. Laughon v. O'Braitis, 360 S.C. 520, 524-25, 602 S.E.2d 108, 111 (Ct. App. 2004).

To determine whether an action is legal or equitable, this Court must look to the action's main purpose as reflected by the nature of the pleadings, evidence, and character of the relief sought. Ex parte Wheeler v. Estate of Green, 381 S.C. 548, 673 S.E.2d 836, 839 (Ct. App. 2009). Here, the Fesmires have asserted causes of action for specific performance of an alleged oral contract, a partition, and an accounting.[2] Our appellate courts

[2] Digh has asserted counterclaims for conversion, breach of contract, and an accounting. However, there are no issues on appeal involving Digh's

have traditionally viewed the main purpose of each of these causes of action as the pursuit of equitable relief and thus have found these causes of action to be equitable in nature. See Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 290-91 (2000) (applying the equitable standard of review to the trial court's findings of fact in a specific performance action); Lowcountry Open Land Trust v. Charleston S. Univ., 376 S.C. 399, 406, 656 S.E.2d 775, 779 (Ct. App. 2008) (holding that an action for specific performance lies in equity); Laughon, 360 S.C. at 524, 602 S.E.2d at 110 (holding that a partition action as well as an action for accounting is an action in equity); Settlemeyer v. McCluney, 359 S.C. 317, 320, 596 S.E.2d 514, 516 (Ct. App. 2004) (applying equitable standard of review to action for specific performance of an alleged oral contract for the conveyance of land); Parker v. Shecut, 340 S.C. 460, 478, 531 S.E.2d 546, 556 (Ct. App. 2000), rev'd on other grounds, 349 S.C. 226, 562 S.E.2d 620 (2002), (holding that an action for specific performance lies in equity). Therefore, this Court may review the factual findings in the instant case in accordance with its own view of the preponderance of the evidence.

This case is distinguishable from McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571 (2009), in which our Supreme Court applied the legal standard of review to the trial court's findings of fact in an action for specific performance of three written contracts for the sale of land. Because the contracts were in writing, their existence was not in dispute and the statute of frauds was not raised as a defense. Rather, before determining the suitability of specific performance as a remedy, the Court was required to **interpret** the **written provisions** of the contracts. Therefore, the Court determined that the action was an **action to construe a contract** and that such an action was an action at law. Id. at 185, 672 S.E.2d at 574. Here, Digh disputed the very existence of a contract with the specific terms asserted by the Fesmires, and he raised the statute of frauds as a defense. Therefore, the instant action cannot be construed as an action to construe a contract.

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conversion and breach of contract claims.

Rather, the circumstances of the instant action are virtually identical to those in Settlemeyer, which involved an action for specific performance of an alleged oral contract for the conveyance of land. In its opinion in Settlemeyer, this Court set forth the standard of review as follows: "In an action in equity, tried by the judge alone[] . . . this Court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence." Settlemeyer, 359 S.C. at 320, 596 S.E.2d at 516.

As in the instant case, the plaintiff in Settlemeyer alleged that his part performance of the alleged oral contract removed it from the statute of frauds. The Court treated the existence of the alleged oral contract as a question of fact rather than a question of law and stated, "Based on **our review of the evidence** contained in the record, we hold Settlemeyer did not present clear evidence of an oral agreement between the parties." Id. at 321, 596 S.E.2d at 516 (emphasis added). The Court cited Gibson v. Hrysikos, 293 S.C. 8, 13-14, 358 S.E.2d 173, 176 (Ct. App. 1987) for the proposition that a court must find, among other things, clear evidence of the existence of an oral agreement for part performance to remove the contract from the statute of frauds. Id. Likewise, in the instant case, this Court's review of the master's factual findings on the existence of a contract, with the terms asserted by the Fesmires, is governed by this Court's own view of the evidence.[3]

LAW/ANALYSIS

I. Redacted Letters

At trial, Fesmire introduced into evidence redacted versions of two letters written by the parties' attorneys during settlement negotiations. Digh argues that the master erred in admitting these letters into evidence because their introduction violates Rule 408, SCRE, which prohibits the introduction of statements made in compromise negotiations. Digh also argues that the

[3] During oral arguments, counsel for the parties agreed that an equitable standard of review is proper.

master exacerbated the prejudice to him by allowing Fesmire to redact most of the contents of the letters because the redaction resulted in a false interpretation of statements taken out of context. We agree.

Plaintiff's Exhibit # 16 is a redacted version of a letter dated June 18, 2001, authored by Digh's former counsel and addressed to Larry Fesmire. The redacted version presented to the master reads as follows:

> Dear Mr. Fesmire:
>
> . . .
>
> $20,000.00 previously given to Digh from Fesmire.

However, the unredacted version of the letter clearly indicates that the isolated phrase presented in the redacted version was an assumption made for the purpose of negotiating a settlement of the terms of a buyout and that it was inextricably linked to the offer of settlement. Notably, the following words appeared at the top of the letter: "**FOR SETTLEMENT PURPOSES ONLY**." Further, the isolated phrase in the redacted version was prefaced by the following language:

> [W]e would offer the following settlement:
>
> . . .
>
> OUT of Dighs [sic] $92,000.00 we will subtract the following reimbursements to Fesmire:

Moreover, the letter also states the following:

> Please note that I have used the numbers you gave me as to the expenses being deducted from Mr. Digh. If this matter can not [sic] be settled as stated, I will need proof of payments, mortgage history, tax returns for 1996 – 2000 and Homeowner Association invoices etc.

Plaintiff's Exhibit # 17 is the redacted version of a second letter dated August 23, 2001, also authored by Digh's former counsel and addressed to Larry Fesmire. The redacted version presented to the master reads as follows:

> Dear Mr. Fesmire:
>
> Please be advised that Forquer & Green does indeed represent the interest of Mr. George Digh in the above-referenced matter.
>
> . . .
>
> $20,000.00 previously given to Digh from Fesmire.
>
> Please note that if this matter is not settled, Digh will contest that the $20,000.00 was to be applied to this transaction.

However, the unredacted version of the letter indicates that the isolated phrases presented in the redacted version were assumptions made for the purpose of negotiating a settlement and that they were inextricably linked to the offer of settlement. The isolated phrases in the redacted version were prefaced by the following language:

> I have reviewed the information you sent me in response to the initial proposal and have incorporated your numbers into my calculations.
>
> . . .
>
> Following the June 18th letter format out of Dighs [sic] $86,500.00 we will subtract the following reimbursements to Fesmire:

Once again, the settlement letter also states the following:

> [P]lease note this is Mr. Digh's final attempt to settle this matter. If this should fail, I will have no choice but to follow Mr. Digh's instructions and file a Partition Action at which time I will be requesting many financial documents from you . . . .

Clearly, in both letters, the request of Digh's attorney for documentary proof of Fesmire's financial contributions to the property, including the alleged $20,000 payment for the Dighs' interest in the property, indicated that the statements made in the letters were assumptions for settlement purposes only.

The master concluded that the redacted versions of these letters were admissible because they were admissions of fact and therefore were not privileged as statements made in connection with settlement negotiations. The master also set forth the following additional grounds for the admissibility of the redacted letters: (1) the material did not constitute hearsay because it was not offered for the truth of the matter asserted; (2) the material was not hearsay because it qualified as an admission of a party-opponent; and (3) the material qualified as a prior inconsistent statement of a witness under Rule 613(b), SCRE. The master then concluded that the letters

could be used to (1) impeach Digh's testimony that he did not know about Fesmire's alleged payment of $20,000; and (2) satisfy the writing requirement of the Statute of Frauds.

Rule 408, SCRE provides as follows:

> **Evidence** of (1) furnishing or offering or promising to furnish, or (2) accepting or **offering or promising** to accept, a valuable **consideration** in compromising or attempting **to compromise** a claim which was disputed as to either validity or amount, **is not admissible to prove liability** for or invalidity of the claim or its amount. **Evidence of conduct or statements made in compromise negotiations is likewise not admissible.** This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

(emphasis added).

This rule contemplates that the parties need to feel free to make certain assumptions for the purpose of settlement negotiations and that those statements are assumed by the author to be true only for the purpose of compromise negotiations. The rule codifies the longstanding principle that evidence of conduct or statements made in compromise negotiations is not admissible. See QHG of Lake City, Inc. v. McCutcheon, 360 S.C. 196, 209, 600 S.E.2d 105, 111 (Ct. App. 2004) ("Because the law favors compromises, our appellate courts have long held that testimony as to negotiations and offers to compromise are inadmissible for proving liability."); Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc., 347 S.C. 545,

558, 556 S.E.2d 718, 725 (Ct. App. 2001) ("The courts favor compromise; accordingly, evidence relating to settlements is generally not admissible to prove liability."); Hunter v. Hyder, 236 S.C. 378, 387, 114 S.E.2d 493, 497 (1960) ("[C]ompromises are favored and evidence of an offer or attempt to compromise or settle a matter in dispute cannot be given in evidence against the party by whom such offer or attempt was made. ").

The statements highlighted in the redacted versions of the settlement letters admitted into evidence in this case were undoubtedly "statements made in compromise negotiations." When these respective statements are viewed in the context of the unredacted version of the letters, it is clear that the references to the alleged $20,000 payment were assumptions made for purposes of negotiating a compromise settlement. The references were inextricably linked to the offer of settlement.

Further, the master's citation to McCormick on Evidence in Conclusion of Law # 6 is incomplete. In this conclusion, the master cites the treatise for the proposition that an admission of fact in the course of negotiations is not privileged. However, the McCormick treatise significantly qualifies that proposition. 2 McCormick on Evidence § 266 (6th ed. 2006) (discussing the trend to extend the protection to all statements made in compromise negotiations and discouraging the use of inconsistent statements made in compromise negotiations for general impeachment of the testimony). Therefore, the master's reliance on this treatise excerpt to support the admission of the redacted settlement letters into evidence is misplaced.

In fact, the master's use of the redacted letters exhibits the very danger highlighted in the McCormick treatise because it constitutes a misuse of allegedly "prior inconsistent statements" to prove liability.[4] The master's

[4] Notably, the federal rule's prohibition against using evidence of settlement negotiations for impeachment through a prior inconsistent statement is explicit. Rule 408, FRE, provides as follows:

(a) Prohibited uses.—Evidence of the following is not

order uses the material from the redacted letters under the guise of impeachment of Digh's credibility to bolster Fesmire's version of the parties' contract. Therefore, the admission of these letters into evidence violated Rule 408, SCRE, as they were offered in compromise negotiations.

Additionally, regardless of whether the master used the redacted letters for impeachment purposes or to satisfy the writing requirement of the Statute of Frauds, the statements in the letters were undoubtedly offered for the truth of the matter asserted because they were offered to show that Larry Fesmire paid $20,000 to the Dighs for their interest in the condominium. Further, the statements in the settlement letters were not admissions of a party-opponent because they were assumptions made for the purpose of negotiating a compromise settlement. Therefore, contrary to the master's conclusion, the disputed material constituted inadmissible hearsay. See Rule 802, SCRE.

Moreover, the admission of the redacted letters into evidence clearly prejudiced Digh because the master used this evidence to support his

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> **admissible** on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, **or to impeach through a prior inconsistent statement or contradiction**:
>
> (1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(emphasis added).

conclusion that the alleged oral contract asserted by the Fesmires satisfied the Statute of Frauds. This undoubtedly affected the outcome of the case.

Based on the foregoing, the master committed prejudicial error in admitting the redacted settlement letters into evidence.

II. Specific Performance

Digh argues that the master erred in granting specific performance of the alleged oral contract because the Fesmires' action is barred by the Statute of Frauds, S.C. Code Ann. § 32-3-10(4) (2007). We agree.

Specific performance should be granted only if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties. Ingram, 340 S.C. at 105-06, 531 S.E.2d at 291. Here, the master concluded that the settlement correspondence of Digh's counsel was sufficient to satisfy the writing requirement of the Statute of Frauds. In the alternative, the master concluded that even if there was not a writing that was sufficient to satisfy the Statute of Frauds, the Fesmires' part performance of the contract took it out of the purview of the Statute of Frauds. Digh argues that the master erred in making these conclusions. We agree.

The Statute of Frauds provides, in pertinent part, as follows:

> No action shall be brought whereby:
>
> . . .
>
> (4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them . . .

> Unless the agreement upon which such action shall be brought or some **memorandum** or **note** thereof **shall be in writing** and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

S.C. Code Ann. § 32-3-10(4) (2007) (emphasis added).

A. Settlement correspondence

The settlement correspondence of Digh's counsel could not satisfy the writing requirement of the Statute of Frauds because the very admission of those letters into evidence violated Rule 408, SCRE, which prohibits the admission of statements made in compromise negotiations, and violated Rule 802, SCRE, which generally prohibits the admission of hearsay evidence.

B. Part Performance

Further, when there is no writing, but part performance is alleged to remove an oral contract from the Statute of Frauds, a court of equity must find the following factors before it may compel specific performance of the oral contract: 1) clear evidence of an oral contract; 2) the contract had been partially executed; and 3) the party who requested performance had completed or was willing to complete his part of the oral contract. Settlemeyer, 359 S.C. at 320, 596 S.E.2d at 516. In Scurry v. Edwards, 232 S.C. 53, 61, 100 S.E.2d 812, 816-17 (1957), the Court explained the nature of the part performance exception to the Statute of Frauds:

> [T]he courts [will] require specific performance of an oral contract for the conveyance of land, where the terms of the contract are clear, definite and certain and are established by competent and satisfactory proof, and where the party seeking to rescue it from the statute shows such acts of performance or part performance on his part, **clearly and unequivocally referable to**

> **such agreement**, as would render application of the statute unconscionable. **Payment of the purchase price in whole or part is not of itself regarded as such part performance** as will take the contract out of the statute and the fact that no part of the purchase price has been paid does not necessarily require application of the statute. **Mere change of possession is not necessarily sufficient to avoid the consequences of the statute**; like payment of the purchase price, it is a fact to be considered in connection with the other facts and circumstances of the transaction in determining whether or not there has been such performance or part performance as warrants relief from the statute. Likewise, the fact that improvements have been made on the property after possession, while strong evidence of part performance, is neither conclusive of that issue nor indispensable proof of it.

Scurry, 232 S.C. at 61, 100 S.E.2d at 816-17 (internal citations omitted) (emphasis added).

1. No clear evidence

Initially, there is no clear evidence of a contract with the specific terms asserted by the Fesmires. Therefore, specific performance is not an appropriate remedy because the Fesmires have not satisfied the first prong of the part performance exception to the Statute of Frauds. See Settlemeyer, 359 S.C. at 320, 596 S.E.2d at 516 (holding that to compel specific performance of an oral agreement where part performance is alleged to remove the contract from the Statute of Frauds, a court of equity must find: 1) clear evidence of an oral agreement; 2) the agreement had been partially executed; and 3) the party who requested performance had completed or was willing to complete his part of the oral agreement).

The testimony concerning the terms of the alleged oral contract was very contradictory, and the Fesmires' evidence of the existence of a contract

with the specific terms asserted by them rested on the following questionable evidence: (1) improperly admitted statements taken out of the context of settlement negotiations; and (2) the self-serving testimony of Larry Fesmire regarding alleged statements of Shelley Digh, a woman who died before the Fesmires brought this action. Assuming, without deciding, that the Dead Man's Statute, S.C. Code Ann. § 19-11-20 (1985), did not render Fesmire incompetent to testify as to any transaction with Shelley Digh, this statute addresses merely the competency of the witness and not the weight that should be given to such testimony in any particular case. Here, we view the testimony as suspect and do not accord it much weight.

In sum, the Fesmires have not satisfied the first prong of the standard for compelling specific performance where part performance is alleged to remove an oral agreement from the Statute of Frauds because they have not presented clear evidence of an oral agreement.

2. No partial execution

As to the second prong of the standard for compelling specific performance where part performance is alleged to remove an oral agreement from the Statute of Frauds, the evidence does not indicate that the Fesmires partially executed the alleged agreement. There is no clear evidence that the Fesmires paid $20,000 to the Dighs.[5] Further, the Fesmires' mortgage payments, possession of the condominium, and any alleged improvements to

[5] The only evidence of the Fesmires' payment is Larry Fesmire's testimony that he took $20,000 in cash to Shelley Digh. Larry Fesmire's wife, who accompanied him on that visit, could not even corroborate this testimony. This testimony hardly rises to the level justifying specific performance. See Pennington v. Pennington, 89 S.C. 277, 279, 71 S.E. 825, 825 (1911) (holding that in an action of specific performance of an alleged oral contract for the conveyance of land, the burden was on the plaintiffs to prove payment of the purchase money in full before they could ask that the defendant be required to convey).

the condominium were not necessarily indicators of part performance because their existing partial ownership interest in the condominium already provided them with a reason to take those actions. See Scurry, 232 S.C. at 61, 100 S.E.2d at 816-17 (requiring that the party seeking to rescue an alleged oral contract from the Statute of Frauds show such acts of performance or part performance that are "clearly and unequivocally referable to such agreement" and that would render application of the statute unconscionable).

Moreover, these actions could have been consistent with Digh's version of the parties' contract and subsequent events, despite the expiration of the thirty-day deadline for closing the sale.[6] Therefore, these actions are not probative of the specific contract terms alleged by the Fesmires.

3. No evidence of willingness to complete

The Fesmires also failed to satisfy the third prong of the standard for compelling specific performance where part performance is alleged to remove an oral agreement from the Statute of Frauds because the evidence does not indicate that Larry Fesmire was willing to complete his part of the alleged agreement. He stopped making mortgage payments in July 2002, forcing Digh to take over the mortgage payments and to pay off the balance of the debt secured by the mortgage. In fact, Larry Fesmire admitted that he abandoned the mortgage payments so that he could purchase the property at a foreclosure sale. We find that Larry Fesmire's behavior is inconsistent with a good faith intent to complete his part of the alleged agreement.

[6] Digh understood that the Fesmires were to pay the Dighs $37,000 to purchase their interest and that the closing was to take place within 30 days. Digh indicated in later correspondence that he was not aware of a $20,000 payment, and he testified that no closing ever took place. He also indicated that he continued to allow the Fesmires to make the mortgage payments because of their existing interest in the condominium.

Based on the foregoing, the master erred in granting specific performance of the alleged oral contract.

III. Partition and Accounting

Digh argues that the master should have granted the parties' requests for a partition and accounting.[7] We agree.

The remedy of partition is provided in S.C. Code Ann. § 15-61-10 (2005):

> All joint tenants and tenants in common who hold, jointly or in common, for a term of life or years or of whom one has an estate for a term of life or years with the other that has an estate of inheritance or freehold in any lands, tenements or hereditaments shall be compellable to make severance and partition of all such lands, tenements and hereditaments.

Further, section 15-61-50 of the South Carolina Code (2005) provides for partition by sale when partition in kind is not practical:

> The court of common pleas has jurisdiction in all cases of real and personal estates held in joint tenancy or in common to make partition in kind or by allotment to one or more of the parties upon their accounting to the other parties in interest for their respective shares or, in case partition in kind or by allotment

[7] In their complaint, the Fesmires requested partition as an alternative remedy. Digh's answer stated that he agreed that the property should be partitioned but that the proceeds should not be distributed as suggested by the Fesmires. Digh also interposed a counterclaim for an accounting. Digh's motion to alter or amend the master's order included the argument that the master erred in failing to rule on the alternative remedy of a partition and that partition should be granted.

> cannot be fairly and impartially made and without injury to any of the parties in interest, by the sale of the property and the division of the proceeds according to the rights of the parties.

"Ordinarily, partition is compellable among co-tenants as a matter of right . . . and is not suspended by an interest in or a right to use the property." Thompson v. Brunson, 283 S.C. 221, 225, 321 S.E.2d 622, 624 (Ct. App. 1984) (internal citations & quotations omitted).[8]

Here, the Fesmires did not clearly establish the specific terms of their alleged contract for the purchase of the Dighs' interest in the condominium. Because they did not satisfy the Statute of Frauds, specific performance was not an appropriate remedy. Further, the Fesmires requested partition as an alternative remedy and Digh also requested partition, a remedy to which the parties are entitled under sections 15-61-10 and -50.[9] Therefore, the master erred in failing to grant a partition and accounting.

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[8] In Smith v. Cutler, 366 S.C. 546, 550, 623 S.E.2d 644, 647 (2005), our Supreme Court held that the deed in that case created a tenancy in common with a right of survivorship and that the survivorship rights between the tenants created true future interests in the entire estate that could not be destroyed by the unilateral act of one tenant through an act such as partition. Here, however, the language in the deed to the Dighs and the Fesmires does not indicate any special right of survivorship. The grantor conveyed the condominium to "George B. Digh, Shelley K. Digh, Larry L. Fesmire, Jr. and Teresa Fesmire, their heirs and assigns, forever . . . ."

[9] The parties' agreement as to their respective rights in the property does not conflict with the statutory remedy of partition. The agreement includes a right of first refusal provision: "In the event that one couple wishes to get out of this venture the other couple has the first right of refusal [sic] to purchase the other's interest for whatever the cash basis is in the property." The agreement also provides, "In the event of death of any of the four people, the remaining spouse can continue to own the ½ share unless she/he wishes to sell, where the remaining couple will have the first right of refusal [sic] and can purchase said interest for the cash basis in the property."

CONCLUSION

Accordingly, the master's order granting specific performance is **REVERSED** and the case is **REMANDED** to the master for an accounting and partition by sale.[10]

WILLIAMS and PIEPER, JJ., concur.

[10] In view of our disposition of the foregoing issues, we decline to address Digh's remaining issues. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that the appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).