
# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 25**

**June 20, 2005**

**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Johnny Roberson and Phyllis Fredrick, Respondents,

v.

Southern Finance of South Carolina, Inc., Appellant.

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Appeal From Hampton County
R. Alexander Murdaugh, Special Referee

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Opinion No. 26001
Heard May 3, 2005 – Filed June 20, 2005

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**REVERSED**

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C. Mitchell Brown, and Elizabeth Herlong Campbell, both of Nelson, Mullins Riley & Scarborough, of Columbia, for Appellant.

Robert N. Hill, of Law Offices of Robert Hill, of Newberry; and Woodrow H. Gooding and Mark B. Tinsley, both of Gooding & Gooding, P.A., of Allendale, for Respondents.

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**JUSTICE WALLER**: The special referee denied appellant's motion to set aside a default judgment on the ground of improper service. We reverse.

## FACTS

The respondents Johnny Roberson and Phyliss Frederick filed an action against Southern Finance Company (Southern Finance) alleging negligence, intentional infliction of emotional distress, false imprisonment, and malicious prosecution. The respondents mailed the summons and complaint to Southern Finance's registered agent, Charles Brooks, by certified mail with return receipt requested. A clerical employee, Amy Jones Bair, signed the return receipt. Brooks testified he never received the summons and complaint. Accordingly, Southern Finance never answered the complaint and the respondents filed a motion for default judgment. Subsequently, the circuit court granted an entry of default against Southern Finance and referred the matter to a special referee for default judgment to be entered and a damages hearing.

After holding a damages hearing, the special referee entered a default judgment and awarded each respondent $25,000 in actual damages and $150,000 in punitive damages, for a total default judgment of $350,000. Southern Finance moved to set aside or amend the judgment or for a new trial nisi remittitur on the ground that service was improper because Bair was not authorized to receive service for Southern Finance. The special referee denied the motion and Southern Finance now appeals.

## ISSUE

> Did the special referee err in denying Southern Finance's Rule 60 motion to set aside the default judgment on the ground the summons and complaint were not properly served?

## DISCUSSION

The special referee denied Southern Finance's motion to set aside the default judgment due to the lack of proper service of the summons and complaint. The special referee found Bair was an implied agent with the

authority to accept service of process. Southern Finance contends the special referee erred. We agree.

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d 900, 902-903 (1989). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct.App. 1988). "An abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App. 1997).

Southern Finance moved to set aside the default judgment pursuant to Rules 55(c) and 60 (b), SCRCP. "The standard for granting relief from an entry of default is good cause under Rule 55(c) . . . while the standard is more rigorous for granting relief from a default judgment under Rule 60(b). . . ." Ricks v. Weinrauch, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct.App. 1987). Southern Finance did not make any motion until after the default judgment had been entered. Therefore, Rule 55(c) is inapplicable. Under Rule 60(b), a party may seek relief from a default judgment where the judgment is void.

Southern Finance contends the default judgment is void because of improper service. Rule 4(d)(3), SCRCP, provides that service upon a corporation may be made "by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . ." Further, Rule 4(d)(8) provides, in part:

> Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing the acceptance by the defendant. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the

> court that the return receipt was signed by an unauthorized person.

"[A] plaintiff need only show compliance with the rules." Roche v. Young Bros., Inc., 318 S.C. 207, 211, 456 S.E.2d 897, 900 (1995). When the rules are followed, it is presumed that service was proper. Id. It is undisputed that the respondents sent the summons and complaint via certified mail with return receipt requested to Southern Finance's registered agent, Brooks, at the address on file with the Secretary of State for Brooks. Further, it is undisputed that Bair signed the return receipt. Thus, pursuant to Rule 4(d)(8), the burden shifts to Southern Finance to demonstrate Bair was not authorized to accept service.

Southern Finance contends Bair was not its agent and thus did not have the authority to accept service on its behalf. An agent's authority is composed of his or her actual authority, whether express or implied, together with the apparent authority which the principal by his or her conduct is precluded from denying. Thus, an agent's authority must be either expressed, implied, or apparent. 2A CJS Agency § 132 (2004). While actual authority is expressly conferred upon the agent by the principal, apparent authority is when the principal knowingly permits the agent to exercise authority, or the principal holds the agent out as possessing such authority. Moore v. North Am. Van Lines, 310 S.C. 236, 239, 423 S.E.2d 116, 118 (1992).

Whether apparent authority can suffice to show authorization to accept service under Rule 4 is an unsettled question. See Schultz v. Schultz, 436 F.2d 635, 637 (7th Cir.1971) (describing as "dubious" the "assumption that such authority may be implied in some situations"); see also Chatman v. Condell Med. Ctr., 2002 WL 737051, at *3 (N.D.Ill. Apr. 22, 2002) (collecting cases).

Even if apparent authority suffices, however, it is established based upon manifestations by the principal, not the agent. See Shropshire v. Prahalis, 309 S.C. 70, 419 S.E.2d 829 (Ct.App. 1992). An apparent agency may not be established solely by the declarations and conduct of an alleged

agent. Frasier v. Palmetto Homes, 323 S.C. 240, 473 S.E.2d 865 (Ct.App. 1996). There is no evidence in the record that Southern Finance manifested Bair was its apparent agent in any way.

Neither do the circumstances support the conclusion that Bair had implied authority to accept service for Southern Finance. Again, there is no evidence Southern Finance authorized Bair to act as its registered agent. Furthermore, an agent has no implied authority unless she herself believed she had such authority. 2A CJS Agency § 136 (2004). Bair testified she has never been authorized to accept service.

The respondents also argue past behavior by Bair creates an agency relationship in this case. Bair has accepted service for Brooks on behalf of Southern Finance in several other cases in the past as outlined in the special referee's order. Southern Finance contends that these instances are irrelevant in determining whether Bair was the apparent or implied agent to accept service in this case. Certainly, past behavior could be relevant to show agency. However, it is Southern Finance's past behavior which would be relevant and not Bair's. Here, there is no evidence in the record that Southern Finance held out Bair as its agent or was even aware that Bair had ever signed for Brooks. Bair's behavior in the prior cases are not actions which a third party could rely upon to conclude that Southern Finance authorized her to accept service.

The findings of the special referee are binding on this Court unless wholly unsupported by the evidence or controlled by an error of law. Here, the special referee's determination that service was proper should be reversed as it is unsupported by the evidence. We are unable to find any evidence in the record to support a legal relationship between Bair and Southern Finance sufficient to have effectuated proper service. Because we find service was improper, we need not address the remaining issues as the default judgment is void.

**REVERSED.**

**TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Martin Engineering, Inc., Appellant,

v.

Lexington County School District One and Sharp Construction Company of Sumter, Inc., Respondents.

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Appeal From Lexington County
William P. Keesley, Circuit Court Judge

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Opinion No. 26002
Heard April 5, 2005 – Filed June 20, 2005

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**AFFIRMED**

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R. Bryan Barnes and Katherine B. Barroll, both of Rogers, Townsend & Thomas, of Columbia, for Appellant.

David T. Duff, Darryl C. Caldwell, both of Duff, Turner, White & Boykin; and Henry Pickett Wall, of Burner, Powell, Robbins, Wall & Mullins, all of Columbia, for Respondents.

C. Allen Gibson, Jr., of Buist, Moore, Smythe & McGee, of Charleston, for Amicus Curiae Carolinas Associated General Contractors.

Lawrence C. Melton and Brian A. Autry, both of Nexsen, Pruet, Adams, Kleemeier, LLC; of Columbia, for Amicus Curiae The South Carolina Chapter of the American Institute of Architects.

Scott Thomas Price, of Columbia, for Amicus Curiae The South Carolina School Boards Association.

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**JUSTICE WALLER:** We certified this case from the Court of Appeals pursuant to Rule 204(b), SCACR. At issue is whether Lexington County School District One (District) properly allowed Respondent Sharp Construction Company (Sharp), to amend its bid on the Lexington High School Additions and Renovations Project (Project). The circuit court granted District summary judgment, holding the correction was properly allowed. We affirm.

## FACTS

In August 2003, District received bids for the Project. Sharp was the low bidder with a bid of $16,300,000.00. Appellant, Martin Engineering, was the second lowest bidder with a bid of $17,375,000.00. Immediately after the bids were opened, Sharp advised District it had inadvertently neglected to include a roofing subcontractor's bid in its overall bid. It requested to be allowed to correct its bid by adding the roofing cost, $613,500.00, to its bid. Alternatively, Sharp requested to withdraw its bid. District allowed Sharp to adjust its bid, resulting in an overall bid by Sharp of $16,913,500.00, some $461,500.00 less than Martin's bid.[1] Martin filed a complaint in the circuit court seeking an injunction. The circuit court held the adjustment was properly allowed in compliance with District's Procurement Code and Regulations.

## ISSUES

1. Did the circuit court err in holding District properly allowed the upward adjustment?

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[1] These facts were stipulated by the parties.

2. Did the court err in finding Sharp would suffer a substantial loss if it were not allowed to correct its bid?

## 1. CORRECTION OF BID

District's Procurement Code, Article 2, Section 2-102 controls Competitive Sealed Bidding. In particular, section 2-102 (10), "Correction or Withdrawal of Bids: Cancellation of Awards" states:

> Corrections or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such bid mistakes may be permitted where appropriate.
>
> After bid openings, no change in bid prices or other provisions of bids prejudicial to the interest of the school district or fair competition will be permitted. A bidder must submit a written request to either correct or withdraw a bid to the school district. Each written request must document the fact that the bidder's mistake is clearly an error that will cause him substantial loss. In order to maintain the integrity of the competitive sealed bidding process, **a bidder will not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid, unless the mistake, in the judgment of the school district, is clearly evident from examining the bid document:** for example, extension of unit prices or errors in addition. All decisions to permit the correction of (sic) withdrawal of bids, or to cancel awards or contracts based on bids mistakes, will be supported by a written determination.

(emphasis supplied).[2]

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[2] District's Procurement Regulation No. 15 similarly provides:

> To maintain the integrity of the competitive sealed bidding system, a bidder will not be permitted to correct a bid mistake after a bid opening that would **cause the bidder to have the low bid** unless the mistake, in the judgment of the Procurement Officer, is clearly evident from examining bid documents, e.g., extension of unit prices or errors in addition.

Martin contends that unless an error is clearly evident by examining the bid document itself, no correction is permissible. We disagree. It is patent from the language of § 2-102 (10) that only a correction which **causes the bidder to have the low bid** requires the mistake be **clearly evident from examining the bid document**. On the other hand, where the bid correction does not **cause** the bidder to have the low bid, nothing in § 2-102 requires District to confine its review to the bid document itself.

Here, the item Sharp failed to include in its bid the bid of its roofing subcontractor, Watts. There was evidence that three different roofing contractors had utilized the identical roof bid from Watts in bidding on District's project. Moreover, Sharp had listed Watts as a sub-contactor in its bid. This evidence was in existence prior to the time the bids were opened. From this evidence, we find it was within District's discretion to determine that correction of Sharp's inadvertently erroneous bid was proper, and that the correction would not be prejudicial to the interests of the school district or fair competition.

Martin asserts the integrity of the bidding process and the need for fair competition require clear rules for post opening bid corrections. While we are not unmindful of the need to preserve the integrity of the bidding process, we find no violation of the rules in this case. Martin has not shown that the procedures followed by District render the upward correction unfair or unjust, nor has he demonstrated in what manner the correction was prejudicial to the District or to fair competition.

As noted by District's order in this case, "It is true that Sharp's omission of the price for the build-up roof was not apparent from the bid form itself. However, the mistake is clear, and the amount Sharp intended to bid for the roof is evident, by examining the roofing subcontractor's sub-bid, which was submitted to several of the bidders, including Sharp and Martin." We agree with the District that allowing the correction in this case neither jeopardized the integrity of the sealed bidding process, nor was it prejudicial to the interests of the District or fair competition. To the contrary, to accept Martin's argument that District must reject Sharp's bid and accept its bid,

some $461,500.00 higher than Sharp's corrected bid, would clearly be prejudicial to the District requiring it to expend substantially more money.

Martin cites case law from other jurisdictions as supporting its claim that post-opening bid amendments are impermissible unless an error is readily apparent on the face of the bid.[3] We find cases from other jurisdictions, addressing other state procurement codes, are simply inapplicable to District's procurement code.

## 2. SUBSTANTIAL LOSS

Martin next asserts Sharp failed to produce evidence that the bid mistake would cause him "substantial loss" as required by section 2-102(10) ("each written request must document that the bidder's mistake is clearly an error that will cause him substantial loss"). Accordingly, Martin contends the circuit court erred in finding "it patently reasonable to determine that omitting $613,000 in this Project would constitute a substantial loss." We disagree.

It is uncontroverted that Sharp neglected to include $613,000.00 for the roof build up in its bid on the project. Although it is unclear precisely the extent to which this affects Sharp's overall profit margin, we find that $613,000.00 constitutes a substantial loss.

The circuit court's order granting District summary judgment is

**AFFIRMED.**

**TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.**

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[3] Martin also cites three State Procurement Review Panel decisions which hold that in order for an upward correction of a competitive sealed bid to be permissible, the error must be apparent from the face of the bid documents. None of these cases has been reviewed by this Court. Moreover, we simply do not find the State Panel decisions controlling under the facts of this case.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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In re: Estate of Charles H. Cretzmeyer, Jr.

Stacy Cretzmeyer, as Personal Representative of the Estate of Charles H. Cretzmeyer, Jr., Appellant,

v.

Anne C. Bloch, Regan Cretzmeyer, and Watts B. Stroman, Trustee, Respondents.

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Appeal from Georgetown County
James E. Lockemy, Circuit Court Judge

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Opinion No. 26003
Heard April 7, 2005 - Filed June 20, 2005

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**AFFIRMED**

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Richard M. Lovelace, Jr., of Conway, and Robert N. Hill, of Newberry, for Appellant.

Susan Taylor Wall and J.W. Nelson Chandler, both of Parker, Poe, Adams & Bernstein, of Charleston, and William S. Duncan, of Georgetown, for Respondents.

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**ACTING JUSTICE KITTREDGE:** This is an appeal from a circuit court order that dismissed Appellant's appeal from an order of the probate court. The circuit court held that Appellant failed to file her notice of appeal in the circuit court within ten days of receiving the probate court order, as required by South Carolina Code section 62-1-308(a) (Supp. 2004). We affirm.

## FACTS

Appellant received the probate court order on December 19, 2002. According to Appellant, on December 20, she mailed original notices of appeal to the probate court and the circuit court and mailed copies to Respondents' attorneys.[1] Because there was no record that a notice of appeal had been filed in the circuit court within ten days of December 19,[2] the circuit court held that Appellant failed to timely file her notice of appeal under South Carolina Code section 62-1-308. The circuit court therefore dismissed the appeal.

The sole issue is whether the notice of appeal was timely filed in the circuit court.

## ANALYSIS

South Carolina Code section 62-1-308 governs an appeal from a probate court order to the circuit court. The statute provides in pertinent part:

> A person interested in a final order, sentence, or decree of a probate court and considering himself

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[1] The evidence of mailing is an affidavit of Appellant's attorney's secretary.

[2] December 30, 2002, was the last day for filing. See Rules 6 and 74, SCRCP.

> injured by it may appeal to the circuit court in the same county. The notice of intention to appeal to the circuit court must be filed in the office of the circuit court and in the office of the probate court and a copy served on all parties within ten days after receipt of written notice of the appealed from order, sentence, or decree of the probate court.

S.C. Code Ann. § 62-1-308(a) (Supp. 2004) (emphasis added).

We decline Appellant's invitation to construe the statute in a manner inconsistent with its unambiguous terms. Our settled rules of statutory construction mandate the result we reach, for the statute is clear that the notice of appeal "must be filed" in the circuit court within the ten-day period. See Gary v. State, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001) ("When a statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer."); see also State v. Brown, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004) (noting that failure to comply with the procedural requirements for an appeal divests the court of appellate jurisdiction).

## CONCLUSION

The circuit court properly dismissed Appellant's appeal from the order of the probate court. The judgment of the circuit court is

**AFFIRMED.**

**MOORE, A.C.J., WALLER, BURNETT, JJ., and Acting Justice James R. Barber, III, concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Jack Webb, Personal Representative of the Estate of Susan Webb, Respondent/Appellant,

v.

CSX Transportation, Inc., South Carolina Department of Transportation, and Anderson County, Defendants,

of which

CSX Transportation, Inc is, Appellant/Respondent.

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Appeal From Anderson County
J. Cordell Maddox, Jr., Circuit Court Judge

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Opinion No. 26004
Heard December 1, 2004 - Filed June 20, 2005

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**AFFIRMED IN PART; REVERSED IN PART**

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Sarah P. Spruill, Manton M. Grier, and Marvin D. Infinger, all of Haynesworth Sinkler Boyd, P.A., of Columbia, for Appellant/Respondent.

J. Calhoun Pruitt, Jr., of Pruitt & Pruitt, of Anderson, and John E. Parker and Ronnie L. Crosby, both of Peters, Murdaugh, Parker, Eltzroth & Detrick, PA, of Hampton, for Respondent/Appellant.

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**JUSTICE PLEICONES:** This is a railroad crossing case. Appellant/ respondent (CSX) appeals a jury verdict awarding respondent/appellant (Plaintiff) $3 million actual damages in his wrongful death action; $250,000 actual damages in the survival action; and $875,000 punitive damages. Plaintiff appeals an order finding CSX violated S.C. Code Ann. § 58-17-3420 (1976) but declining to award him damages for this breach. We affirm the order appealed by Plaintiff, but reverse the jury verdicts, and remand those claims for a new trial.

## FACTS

In approximately 1912, a railroad line was constructed in the town of Pelzer. The line runs parallel to the Saluda River and crosses several existing roads. The railroad track effectively separates approximately twenty-one homes (the mill village) from the rest of Pelzer. The area is hilly, and while the railroad created grade crossings at Jordan and Stephens Streets, it made a cut under Green Street and built a wooden bridge to carry road traffic over the railway. The Green Street Bridge was the primary route for persons traveling to and from the mill village.

In July 1998, arsonists damaged the Green Street Bridge rendering it unusable by vehicles. The Jordan Street Crossing became the primary ingress/egress point. Jordan Street is horseshoe-shaped, and the crossing is located in the curve of the horseshoe. The crossing is at the bottom of a hill, so that vehicles approaching it from either direction are traveling downhill. The Jordan Street Crossing is "passive," that is, controlled only by a cross-buck.[1]

[1] "A Crossbuck Sign is one of the oldest warning devices. It is a white regulatory, X-shaped sign with the words "Railroad Crossing" in black lettering. . . .[it] is a passive yield sign [and]. . ..is considered the same as a 'Yield Sign.'" http://www.oli.org/ol_basics/engineering/crossbuck.html.

The railroad line crossing Jordan Street is used only to deliver coal to a Duke Power steam plant; there are approximately five trains a week, and the speed limit for the trains is twenty-five miles per hour. There was evidence that approximately 465 to 495 vehicles used the Jordan Street Crossing on a weekday, with less vehicular traffic on weekends.

On the evening of June 17, 2000, at approximately 6:00 p.m., Doris Medlin and her sister-in-law, Susan Webb (Plaintiff's decedent), were returning to their homes in the mill village after grocery shopping. As Mrs. Medlin drove her car across the tracks, the car was struck by a CSX train returning from the power plant after dropping off loaded coal cars. The train consisted of two engines hooked together, and was traveling about twenty-five miles per hour.[2] Mrs. Medlin survived the wreck; Mrs. Webb, the front seat passenger, died about two months later from injuries sustained in the accident.

We address Plaintiff's appeal first.

## PLAINTIFF'S APPEAL

> Whether the trial judge erred in finding CSX's failure to repair the Green Street Bridge was not the proximate cause of this accident?

## ANALYSIS

Plaintiff contends that S.C. Code Ann. § 58-17-3420 imposes a legal obligation on CSX to repair the Green Street Bridge, and that its failure to do so entitles Plaintiff to damages pursuant to S.C. Code Ann. § 58-17-3980 (1976). The circuit court agreed 3420 required CSX to repair the bridge, but held that damages were awardable under 3980 only if the failure to repair were a proximate cause of Plaintiff's decedent's death. Finding the bridge

[2] There is no contention on appeal that the train was exceeding the permissible speed limit.

repair issue a remote rather than efficient cause of the accident, the court declined to award damages. Plaintiff argues this was error. We disagree.

Section 58-17-3420, entitled "Construction and maintenance of bridges," is part of the General Railroad Law, and provides:

> Every railroad corporation shall, at its own expense, construct, and afterwards maintain and keep in repair, all bridges, with their approaches or abutments, which it is authorized or required to construct over or under any turnpike road, canal, highway or other way and any city or town may recover of the railroad corporation whose road crosses a highway or town way therein all damages, charges and expenses incurred by such city or town by reason of the neglect or refusal of the corporation to erect or keep in repair all structures required or necessary at such crossing. But if, after the laying out and making of a railroad, the governing body of a county has authorized a turnpike, highway or other way to be laid out across the railroad, all expenses of and incident to constructing and maintaining the turnpike or way at such crossing shall be borne by the turnpike corporation or the county, city, town or other owner of it.

In this case, CSX's alleged violation of 3420 was tried to the judge as an equity matter at the same time the jury was hearing Plaintiff's negligence claims. The theory of CSX's equitable liability to Plaintiff rests on S.C. Code Ann. §§ 58-17-3980 and 58-17-3990 (1976). Section 3980, entitled "Damages and penalty for unlawful acts where no specific penalty provided for," provides:

> If any person shall do, suffer or permit to be done any act, matter or thing in this chapter declared to be unlawful, shall omit to do any act, matter or thing in this chapter required to be done or shall be guilty of any violation of any of the provisions of this chapter, such person shall, when no

> specific penalty is herein provided for such violation, forfeit and pay to the person who may sustain damage thereby a sum equal to three times the amount of the damages so sustained, to be recovered by the person so damaged by suit in the circuit court of any county in this State in which the person causing such damage can be found or may have an agent, office or place of business. But in any such case of recovery the damage shall not be assessed at a less sum than two hundred and fifty dollars. And the person so offending shall, for each offense, forfeit and pay a penalty of not less than one thousand dollars, to be recovered by the State by action in any such circuit court to be brought by the Attorney General upon the request of the Public Service Commission.

The next statute, § 58-17-3990, provides:

> Any action brought as provided in § 58-17-3980 to recover any penalty or damages shall be regarded as a subject of equity jurisdiction and discovery and affirmative relief may be sought and obtained therein. In any such action so brought as a case of equitable cognizance, preliminary or final injunction may, without allegation or proof of damage to the complainant, be granted upon proper application, restraining, forbidding and prohibiting the commission or continuance of any act, matter or thing by this chapter prohibited or forbidden.

Although the failure to repair the Green Street Bridge issue was ostensibly being tried to the judge alone as an equity matter, the jury heard all the evidence, including evidence that CSX at one time promised to repair the bridge, but then decided not to. There was evidence from numerous mill village residents and a local politician about their efforts to have CSX replace the bridge, as well as testimony about the deleterious effects on the community resulting from CSX's refusal to repair.

After the jury returned its verdicts, the judge asked it to return an advisory interrogatory answering whether it found that CSX's failure to repair the bridge was "the proximate cause of damages in this case." The jury returned in six minutes, finding that the bridge issue was the proximate cause, and adding, "we, the jury, strongly recommend that CSX replace the Green Street Bridge."

The trial judge subsequently issued a written order holding there was no proximate causal link between CSX's failure to repair the Green Street Bridge and the fatal accident. Plaintiff contends this was incorrect. We disagree. As the Court said in 1942:

> The question always is, Was there any unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies that might arise.
>
> Pfaehler v. Ten Cent Taxi Co., 198 S.C. 476, 18 S.E.2d 331 (1942).

There was no "continuous operation" linking the destroyed bridge and the fatal accident. The finding of no proximate cause is affirmed.[3]

[3] Although not raised by the parties, we are constrained to address several issues raised by the procedures followed here. First, we question whether a violation of 3420 gives rise to an action under 3980/3990. While 3420 imposes a duty on railroads to construct bridges in a safe manner, e.g. Rembert v. South Carolina Ry. Co., 31 S.C. 309, 9 S.E. 968 (1859), and to maintain those bridges so that they may be safely traversed, e.g. Thompson v. Seaboard Air Line Ry. Co., 78 S.C. 384, 58 S.E. 1094 (1900), there is no explicit requirement in that statute that a railroad maintain a bridge in perpetuity. We therefore question whether the failure to repair the Green

## CSX'S APPEAL

CSX raises a number of issues on appeal, including claims that it was entitled to a directed verdict on both of Plaintiff's negligence theories, that a number of evidentiary errors require a new trial absolute, and that, at the very least, the punitive damages award cannot stand in light of the United States Supreme Court's intervening decision in State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed. 2d 585 (2003). We find merit in CSX's assertion of reversible error arising from Plaintiff's Green Street Bridge repair claim, and find that several other evidentiary rulings

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Street Bridge was a "wrongful act." In any case, precedent establishes that a traveler injured by a railroad's breach of a statutory duty imposed by 3420 has an ordinary negligence claim, rather than a 3980/3990 claim. Compare Rembert, *supra*; Thompson, *supra*.

Sections 3980 and 3990 appear to provide a remedy where a railroad's violation of a statutory duty imposed by the General Railroad Law does not result in tortious injury. See, e.g., Foggie v. CSX Transp., Inc., 313 S.C. 98, 431 S.E.2d 587 (1993) (removal of crossing connecting two parcels bisected by railroad is obstruction of way in violation of § 58-17-1330 compensable under 3980/3990); Kinsey v. Southern Ry. Co., 174 S.C. 192, 177 S.E. 149 (1934) (action for damages under 3980 for excessive fare charge in violation of § 58-17-1990); compare Medlin v. Southern Ry. Co., 143 S.C. 91, 141 S.E. 185 (1928) (3980 not applicable where passenger treated tortiously by conductor).

Further, it appears that the proper reading of 3980 and 3990 is that 3980 gives rise to an action for damages, triable to a jury, and that 3990 simply gives the circuit court authority to impose equitable remedies (i.e. injunctions) in an action for damages brought pursuant to 3980. To read the statutes as the parties here did, to require the judge to hear the suit in equity and then award money damages, would raise a constitutional question. See S.C. Const. art. I, § 14 (right to jury trial); see e.g. Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 242 (1997) (the right to a jury trial generally depends on whether an action is legal or equitable).

prejudiced CSX. Further, we hold that the United States Supreme Court's decision in Campbell requires, even in the absence of other errors, that a new punitive damages hearing be held. See Durham v. Vinson, 306 S.C. 639, 602 S.E.2d 760 (2004). We address CSX's appellate issues below.

## BRIDGE REPAIR

CSX argues that the admission before the jury of evidence relevant only to the bridge replacement issue, and Plaintiff's use of this evidence in closing argument, were so prejudicial that reversal is mandated. We agree.

We have previously referred to the bridge repair testimony from numerous witnesses, none of which was remotely relevant to the negligence issues before the jury. In addition, Plaintiff's closing argument posited the question, "Where is the beginning for [decedent's] death?" and answered it in this way:

> For Susan Webb though, the real beginning was 1998, July 12th, 1998. The date is when the bridge that provided access to their little community burned. And CSX had a legal obligation because the law required it. Code section 58-15-3420 [sic] required them, if the railroad came there and there was a street there and the railroad crossed that street and the street had to come over it; and if they built a bridge, which they did, they had the legal obligation to repair that bridge.
>
> And you know, the bridge burned July 12th and CSX -- and I'm going to get my glasses out, because I can't see that screen without it -- the bridge burned at that time. And the newspaper reported that Mr. Clark, you remember Tom Clark, the CSX bridge engineer said they had a legal obligation to repair that bridge. And the article states that July 12th -- "The bridge burned July 12th and would be rebuilt, CSX Railroad's bridge engineer said Monday. Materials to reconstruct the bridge at Lopez and Green

> Streets to original specifications have been ordered and should be available in 30 days."
>
> And you will recall that the testimony was that Mr. McClure, as it states there in the article, asked them to replace this bridge and talked with them, talked with the bridge engineer or bridge department. And they said that after you asked it, they apparently changed their mind. He said it wasn't in the budget. They weren't going to do it, even though they acknowledged their legal duty, the statute required them to do it, they decided, we're not going to do it. They even went so far as to have this material shipped to Pelzer. It was on a side track there to Pelzer to repair the bridge.
>
> Then they made a decision not to do it. They weren't going to do it. Why do you think they weren't going to do it? Because of money. They didn't want to spend the money. They took this money and put it elsewhere when they could have provided the access, the ingress and egress to that community that would not have required them to use this dangerous railroad crossing that was .2 miles away.
>
> Now, they had had a -- the railroad, the testimony was, if you will recall the testimony, wanting to get out of their obligation to maintain railroad bridges, which the law required them to do. They can get out of it by making a settlement with the county as they did with the SCDOT. They pay the money, get out of this obligation. But they didn't want to pay any money, but they didn't want the obligation….

Although the jury was not charged on 3420, its "advisory interrogatory" indicates it was profoundly and prejudicially affected by the bridge repair evidence and by Plaintiff's closing argument. The trial judge's ultimate correct conclusion that the failure to replace the bridge was not a

proximate cause of the accident renders all this evidence and argument irrelevant, to the extreme prejudice of CSX. We hold that these circumstances require a new trial absolute, but briefly address the merits of several of CSX's other appellate issues, which involve issues that may arise on retrial.

## DIRECTED VERDICT

Plaintiff alleged two different acts constituted negligence on the part of CSX: the failure to the engineer to sound the train's whistle for 1,500 feet before the crossing ("short horn"), and CSX's failure to control vegetation around the crossing, thereby obstructing motorists' views ("sight line"). CSX argues the judge erred in failing to grant a directed verdict in its favor, arguing Plaintiff produced insufficient evidence to support a liability finding on any theory. We disagree.

In ruling on directed verdict motions, the trial court must view the evidence and its reasonable inferences in the light most favorable to the non-moving party. An appellate court will reverse the trial court's ruling only when there is no evidence in the record to support it. Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281 (2003).

### A. Short Horn

South Carolina Code Ann. § 58-15-910 (1976) requires a train sound its bell and whistle beginning 1,500 feet before a crossing and continuing until the engine has crossed the intersection. CSX concedes the engineer did not sound the horn for 1,500 feet before the Jordan Street Crossing, but rather did so for only 564 feet. Mrs. Medlin, the driver, testified she did not hear the horn, and Plaintiff offered testimony from an expert that given the sound proofing in the automobile and the fact that the windows were rolled up and the air conditioning on, the whistle was inaudible to Mrs. Medlin at any distance. Finally, Plaintiff offered a witness who testified the train "tooted" only twice before entering the crossing.

If a railroad fails to give the required signals at a crossing, and this failure contributes to an injury, then the railroad is liable for all damages. S.C. Code Ann. § 58-17-1440 (1976). Here, the jury could have found, based upon Mrs. Medlin's testimony, that the engineer failed to sound the horn. Further, despite the audiologist's testimony that the car passengers could not have heard the horn, the jury could have found that had the horn been sounded, Mrs. Medlin would have heard it. See, e.g., State v. Johnson, 66 S.C. 23, 44 S.E. 58 (1903) (jury may properly disregard expert testimony).

The directed verdict was properly denied on the "short horn" theory. Jinks, *supra*.

B. Sight Line

Plaintiff presented testimony from several witnesses that overgrown vegetation at the Jordan Street Crossing obstructed drivers' views at the time of the accident. Plaintiff also introduced photos and videos taken within twenty-four hours after the accident demonstrating the conditions at the crossing. CSX claims, however, that since it was not shown that a regulatory agency had deemed the vegetation at that crossing unacceptable on the day of the accident, a directed verdict should have been granted. We disagree.

South Carolina Code Ann. § 58-17-1450 (1976) requires county supervisors to inspect railroad crossings at least once a year, and to give written notice to the railroad of any dangerous conditions. Section 58-17-1350 requires the railroad to maintain all grade level crossings located in a municipality in a safe manner and permits municipal officers to order modifications to the crossing. In Armitage v. Seaboard Air Line Ry. Co., 166 S.C. 21, 164 S.E. 169 (1932), the plaintiff alleged that the railroad had not maintained safe crossings as required by statutes, and that this failure resulted in the plaintiff's decedent's death at a crossing. The trial judge directed a verdict because there was no evidence that the condition of the crossing contributed to the accident. On appeal, the Court first noted that the plaintiff failed to specify which statute the railroad allegedly failed to observe. Speculating that it may have been the predecessor to § 58-17-1450 or § 58-17-1350, the Court noted there was no evidence that the railroad had failed to comply with any governmental order to improve the crossing. CSX contends

Armitage stands for the proposition that it is insulated from liability for crossing accidents so long as it is in compliance with all regulatory requests. We disagree.

In Crawford v. Atlantic Coast Line R. Co., 179 S.C. 264, 184 S.E. 569 (1936), decided four years after Armitage, the Court asked whether § 58-17-1350 (also cited in Armitage) merely codified the railroads' common law duty to maintain a safe crossing or whether it created a statutory duty coexisting with the common law duty. Crawford was concerned with breach of duty and negligence and not with regulatory issues. We do not read Armitage to limit railroad crossing liability to situations where a railroad was on notice of an unsafe condition by virtue of an official government report. Rather, the Armitage Court, having been left to speculate as to the plaintiff's theory, was merely highlighting the lack of evidence of breach of any duty. Pursuant to Crawford, the railroad's negligent failure to maintain a safe crossing violates a statutory duty regardless whether there has been any regulatory action.

There was evidence that CSX's failure to control the weed growth at the Jordan Street crossing rendered that intersection unsafe. The directed verdict was properly denied. Jinks, *supra*.

## EVIDENTIARY ISSUES

CSX complains of numerous evidentiary errors allegedly committed by the trial judge. CSX points out that a number of these alleged errors occurred as the result of the trial court's refusal to bifurcate liability and punitive damages. CSX failed to appeal from the bifurcation order, and therefore the propriety of that ruling is not before us. E.g., S. C.Coastal Conserv. League v. S.C. Dep't of Health and Enviro. Control, Op. No. 25944 (S.C. Sup. Ct. filed February 22, 2005)(unappealed ruling, whether correct or not, is law of the case).

### A. Subsequent Remedial Measures

In 2000, CSX initiated an aggressive program to clear cut all passive crossings. The Jordan Street Crossing was clear cut shortly before trial. At

the *in limine* hearing,[4] CSX sought to exclude evidence that this crossing had been clear cut, contending it was inadmissible as a subsequent remedial measure under Rule 407, SCRE. Plaintiff argued the clear cutting was "admissible to show that [CSX] should have done it [before the accident]," i.e., as proof of negligence. The trial judge ultimately decided to admit the evidence, relying upon in Reiland v. Southland Equip. Serv., Inc., 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998).

Rule 407, SCRE provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

This rule permits admission of subsequent remedial measures only when necessary to demonstrate such things as ownership, control, impeachment, or feasibility of precautionary measures, if contested. These were not issues in this case. In Reiland, the Court of Appeals seems to have adopted a narrow view of Rule 407 and held that only measures taken in direct response to the accident qualify for exclusion under the rule. In our view, this narrow interpretation ignores the literal language of the rule. We hold that Rule 407 bars the introduction of any change, repair, or precaution that under the plaintiff's theory would have made the accident less likely to happen, unless the evidence is offered for another purpose.

[4] It appears from other portions of the record that there was an agreement that the parties did not have to object to the admission of evidence ruled upon at the motion *in limine*.

The evidence of the clear cutting of Jordan Street was inadmissible at this trial under Rule 407. There were numerous witnesses, photos, and two videos demonstrating the condition of the crossing on the day of the accident. The evidence of the clear cutting was not necessary for the jury to understand the conditions at the time of the accident. Whether this evidence alone would require reversal is a close question. The sight line question was hotly contested, and to the extent this subsequent clear cutting evidence was used to show negligence, it prejudiced CSX. There can be no doubt, however, that the erroneous admission of the evidence coupled with the bridge repair evidence and argument requires a new trial. Whether this evidence may be admissible at a subsequent trial depends upon whether any of the exceptions in Rule 407, SCRE, applies.

B. Computer Animation

A computer animation is admissible if it is: 1) authentic under Rule 901, SCRE; 2) relevant under Rules 401 and 402, SCRE; 3) a fair and accurate representation of the evidence; and 4) more probative than prejudicial under Rule 403, SCRE. Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000). When an animation is admitted, the trial court is to give a cautionary instruction that the video represents only a recreation of one party's version of events, and may call attention to any assumptions upon which the recreation is based. Id. The trial court has broad discretion in determining whether to admit an animation, and its decision will be reversed on appeal only for an abuse of that discretion. Id.

CSX argues the trial court erred in admitting Plaintiff's computer animation of the accident because that animation did not fairly and accurately convey the accident and the accident scene. We disagree. Specifically, CSX complains because the animation shows the car stopped for only 4.8 seconds while the victim said she stopped for ten seconds, and because the vegetation is enhanced in the video. CSX has not shown an abuse of discretion. As for the vegetation, the jury heard testimony from several individuals about the vegetation at the crossing on the day of the accident and had a video from a rescue worker at the scene, and one taken by the Plaintiff the next day

presented for comparison purposes. As for the length of the stop, the discrepancy was extensively explored before the jury.

We find no abuse of discretion in the admission of this animation. Clark v. Cantrell, *supra*.

C. Other Crossings

Plaintiff was permitted to introduce a compilation of approximately 200 "notices of deficiency" received by CSX from the South Carolina Department of Transportation over the period between 1995 and 2002. It is unclear at what point or on what ground the trial court admitted this exhibit. It is the appellant's burden to present a sufficient record for appellate review. State v. 192 Coin-Operated Video Games, 338 S.C. 176, 525 S.E.2d 872 (2000). CSX has not met this burden with regard to the compilation, although we note these records would be relevant, if at all, only to punitive damages.

CSX also complains that Plaintiff's traffic engineering expert was erroneously permitted to testify in detail to two other lawsuits involving accidents at CSX crossings in South Carolina where the allegations were that sight lines were obstructed. CSX argued at trial these accident settings were too dissimilar to be probative. Plaintiff countered that evidence of the other crossing accidents was admissible on the issue of punitive damages. It appears from the record that extensive evidence of these accidents was admitted without any instruction limiting the jury to considering them in the context of punitive damages.

The trial judge erred in admitting evidence of other accidents at other crossings to prove this accident occurred as the result of CSX's negligence. The evidence may be admissible at a subsequent trial in aid of Plaintiff's punitive damages claim.

D. NTSB Safety Recommendation

CSX objected to the admission of a National Transportation Safety Board report made to the Federal Railroad Administration (FRA) on the grounds of

relevance. Prior to that objection, CSX had permitted Plaintiff's expert to testify using the report for several pages without objection. Further, there was no contemporaneous objection to Plaintiff's reference to the report in its opening statement. CSX, by its untimely objection, waived its right to complain about this issue in this appeal. Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (1996).

### E. FRA Report

CSX also argues the court erred in admitting a FRA report dated February 1998 because this report, while directed to CSX, did not address crossing maintenance. We agree with CSX that this evidence was not relevant to liability. We express no opinion on the extent it may be relevant to punitive damages under the standards announced in Campbell.

## PUNITIVE DAMAGES

CSX argues that the punitive damage award should be reversed because 1) it was unconstitutionally based on conduct unrelated to the Jordan Street Crossing accident; 2) the jury instructions were erroneous; 3) CSX's net worth was improperly used as a basis for the award; and 4) there was no evidence of unlawful, wanton, or reckless activity with regard to the Jordan Street Crossing.

### A. Directed Verdict

Taking the last issue first, CSX complains that the punitive damages issue should have been resolved by directed verdict or judgment notwithstanding the verdict because there was no clear and convincing evidence of recklessness or willfulness with respect to this accident and this crossing. We disagree.

There was no question but that the engineer failed to sound his horn for the statutorily prescribed distance, and there was evidence that the vegetation at the Jordan Street Crossing was so overgrown that a traveler had to pull onto the tracks to see whether a train was approaching. From this evidence

alone, a jury could find that CSX was reckless in maintaining the crossing. The issue of punitive damages was properly submitted to the jury at this trial.

## B. Evidence

In State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), decided after the trial in this case, the United States Supreme Court discussed the constitutional limitations on the use of punitive damages to punish defendants for conduct not related to the harm suffered by the plaintiffs. Further, the Court cautioned against punishing a defendant for conduct in another jurisdiction, even where that conduct was unlawful. In Durham v. Vinson, *supra*, this Court applied Campbell to a case tried prior to that decision and found the improper admission of a single piece of unrelated evidence required reversal.

It is clear that much of the evidence of acts in other jurisdictions, including CSX and other railroads, and of acts unrelated to crossing safety in South Carolina admitted in this trial is not constitutionally permissible under Campbell. We reverse the punitive damage award and instruct that on retrial, evidence sought to be admitted on the issue of punitive damages should be closely scrutinized for its relationship to the particular harm suffered by the Plaintiff.

## C. Net Worth

CSX complains the jury was erroneously allowed to focus on its net worth, citing to Plaintiff's closing argument. Since there was no contemporaneous objection, this issue is not preserved for appellate review. Dial v. Niggel Assoc., Inc., 333 S.C. 253, 509 S.E.2d 269 (1998) (subject to very limited exceptions, a contemporaneous objection is required to preserve closing argument issue for appeal).

## CONCLUSION

The order denying Plaintiff relief on the § 58-17-3420 claim is affirmed. The jury verdicts are reversed, and the matter is remanded for a new trial.

AFFIRMED IN PART; REVERSED IN PART.

**TOAL, C.J., MOORE, WALLER and BURNETT, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Alan D. Anderson, Robert and Diane Ressler, William Todt, Thomas A. Brooks, Juliana S. Calhoun, Robin and Keith Lee, Donald J. and Michele B. Hatcher, Philip D. and Jean F. Landfried, Appellants/Respondents,

v.

Hank and Linda Buonforte, Respondents/Appellants.

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Appeal From Sumter County
W. C. Coffey, Jr., Circuit Court Judge

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Opinion No. 3998
Heard April 4, 2005 – Filed June 13, 2005

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**AFFIRMED IN PART and REVERSED IN PART**

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John S. Keffer, of Sumter, for Appellants-Respondents.

Michael E. Kozlarek, of Columbia, for Respondents-Appellants.

**HEARN, C.J.**: Alan D. Anderson, Robert Ressler, Diane Ressler, William Todt, Thomas A. Brooks, Juliana S. Calhoun, Robin Lee, Keith Lee, Donald J. Hatcher, Michele B. Hatcher, Philip D. Lanfried, and Jean F. Landfried (collectively "the Neighbors"), sued Hank and Linda Buonforte (collectively "the Buonfortes"), seeking to enforce the restrictive covenants of the Indian Hills Subdivision in Sumter, South Carolina. The special referee ordered the Buonfortes to remove a two-car garage from their property and modify a recently built extension to their home. Both parties appeal. We affirm in part and reverse in part.

## FACTUAL/PROCEDURAL BACKGROUND

The Buonfortes began construction of a house in the Indian Hills Subdivision in Sumter, South Carolina. Hank Buonforte convinced his parents to move into his home, promising to build an extension to the main house ("the mother-in-law wing"). Thereafter, he approached the City Planning Director's Office for a variance to his permit and applied to the Sumter City-County Board of Appeals ("the Board") for a variance to the city's setback requirements to build a garage. However, at the Buonfortes' hearing before the Board, several neighbors appeared in opposition to the request.

The Buonfortes applied for a variance with the subdivision's designated representative for enforcement of the restrictive covenants. However, eighteen days later, before the Buonfortes received a response from the representative, the Neighbors sued the Buonfortes, alleging the Buonfortes' mother-in-law wing and garage violated the community's restrictive covenants because: 1) the main structure was no longer a single-family dwelling; and 2) the house no longer complied with the setback lines. Additionally, the Neighbors sought a temporary restraining order prohibiting any further construction on the lot.

After a full hearing on the merits, the special referee ruled the home was a single-family dwelling within the meaning of the term in the restrictive covenants. Furthermore, the special referee determined the house violated

"the general scheme of development" and ordered the garage removed and the "mother-in-law wing" altered to better conform to surrounding houses. The special referee also ordered the Buonfortes to pay all court costs and special referee fees. Both parties appeal.

## STANDARD OF REVIEW

An action to enforce a restrictive covenant is in equity. South Carolina Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001). As such, this court may view the facts in accordance with our preponderance of the evidence. However, we should not disregard the findings of the special referee, who was in a better position to weigh the credibility of witnesses. Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989).

## LAW / ANALYSIS

### I. The Neighbors' Appeal

### A. "Single-Family Dwelling"

Initially, the Neighbors argue the special referee erred by failing to rule on whether the Buonfortes' house was a single-family dwelling or a duplex. We disagree.

An appellate court must view the trial court's statements as a whole to determine its reasoning. State v. Evans, 354 S.C. 579, 584, 582 S.E.2d 407, 410 (2003). Furthermore, "[a]n order should be construed within the context of the proceeding in which it is rendered." Dibble v. Sumter Ice & Fuel Co., 283 S.C. 278, 282, 322 S.E.2d 674, 677 (Ct. App. 1984); see also Eddins v. Eddins, 304 S.C. 133, 135, 403 S.E.2d 164, 166 (Ct. App. 1991) (holding judgments are to be construed as other instruments, and the determinative factor is the intention of the court, considering the judgment in its entirety).

The special referee's order specifically found the Buonfortes' house, "constitutes a single family unit as defined by the restrictive covenants." Thus, the Neighbors' claim is without merit.

Next, the Neighbors assert the contrary argument that the special referee erred by ruling on whether the Buonfortes' structure constituted a single-family dwelling or a duplex. They contend this issue was neither raised by the pleadings nor argued at trial. We disagree.

"A judgment must conform to the pleadings and be in accordance with the theory of action upon which the case was tried." Chandler v. Merrel, 291 S.C. 227, 228, 353 S.E.2d 135, 136 (1987). However, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Rule 15(b), SCRCP.

In pertinent part, the Neighbors' complaint alleges, "the . . . [Buonfortes'] construction . . . violate[s] the restrictive covenants in the following particulars: . . . The . . . [Buonfortes] are developing and/or constructing a residence and attached apartment/duplex which is in clear violation of the limit to a single family residence . . . ." Furthermore, during the trial, both the Neighbors and the Buonfortes presented extensive testimony about whether the structure was a single-family dwelling or a duplex. Neither party objected to the admission of the testimony. Thus, this issue was both raised in the pleadings and tried by consent during the trial. Consequently, this issue is without merit.

Next, the Neighbors argue the special referee erred by considering the testimony of two of the Buonfortes' witnesses. Specifically, the Neighbors claim the testimony was irrelevant. We disagree.

"Any evidence that assists in getting at the truth of the issue is relevant and admissible, unless because of some legal rule it is incompetent." Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967). Furthermore,

> [i]n determining a dispute concerning the relevancy of . . . evidence, the question to be resolved is as to

> whether there is a logical or rational connection between the fact which is sought to be presented and a matter of fact which has been made an issue in the case. Relevancy is that quality of evidence which renders it properly applicable in determining the truth and falsity of matters in issue between the parties to a suit. All that is required to render evidence admissible is that the fact shown thereby legally tends to prove, or make more or less probable, some matter in issue, and bear directly or indirectly thereon.

Id. (internal citations omitted).

When a term is not defined within a contract, evidence of its usual and customary meaning is competent to aid in determining its meaning. S.C. Farm Bureau Mut. Ins. Co. v. Oates, 356 S.C. 378, 382-83, 588 S.E.2d 643, 645 (Ct. App. 2003).

The restrictive covenant states only single-family dwellings are permitted on the Buonfortes' property. Furthermore, the covenant expressly prohibits the construction of duplexes. However, neither "single-family dwelling" nor "duplex" is defined within the restrictive covenants.

Thus, attempting to demonstrate the house was a single-family dwelling, the Buonfortes presented the testimony of William Henry Hoge, the Planning Director for the Sumter Planning Commission, and John Humphries, the Building Official for the City of Sumter, who testified that pursuant to the applicable Sumter zoning ordinances, the Buonfortes' house was a single-family dwelling. The Neighbors objected, arguing only the testimony of Robert Ross Dinkins, the person responsible for enforcing the restrictive covenants, was relevant on the issue.

We conclude the admitted testimony was relevant to determine the meaning of the term "single-family dwelling" within the restrictive

covenants, as the zoning ordinances were evidence of its usual and customary meaning. Thus, the special referee did not err by admitting the testimony.

Lastly, the Neighbors argue the special referee abused his discretion by ruling the Buonfortes' structure was a single-family dwelling. We disagree.

Dinkins testified he was responsible for enforcing the restrictive covenants, and, in his opinion, the structure was a duplex. The Neighbors also admitted the testimony of Charles R. McCreight, an architect, who opined the structure was a duplex.

In response, the Buonfortes presented the testimony of Hoge and Humphries. Hoge testified it was his duty to enforce the zoning ordinances of the City of Sumter. Additionally, he testified the Indians Hills Subdivision is within the City of Sumter, zoned in an area where duplexes are prohibited. In his opinion, the structure constituted a single-family residence under the applicable Sumter zoning ordinances. Humphries, who is responsible for enforcing the City of Sumter building regulations, testified the structure was a single-family dwelling and did not meet the definition of a duplex within the building code definition.

Viewing the entirety of the record, we agree with the special referee that the weight of the evidence indicates the Buonfortes' structure was a single-family dwelling for purposes of the restrictive covenants.

**B. Notice of Restrictive Covenants**

The Neighbors argue the special referee erred by finding the Buonfortes were not on notice of the restrictive covenants. The Neighbors misunderstand the special referee's ruling.

An appellate court must view the trial court's statements as a whole to determine its reasoning. Evans, 354 S.C. at 584, 582 S.E.2d at 410. Furthermore, "[a]n order should be construed within the context of the proceeding in which it is rendered." Dibble, 283 S.C. at 282, 322 S.E.2d at 677; see also Eddins, 304 S.C. at 135, 403 S.E.2d at 166 (holding judgments

are to be construed as other instruments, and the determinative factor is the intention of the court, considering the judgment in its entirety).

Constructive notice and actual notice are not one and the same. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 64, 504 S.E.2d 117, 122 (1998). Rather, a person has actual notice "where the person . . . either knows of the existence of the particular facts in question or is conscious of having the means of knowing it, even though such means may not be employed by him." Id. at 64 n. 6, 504 S.E.2d at 122 n. 6. In contrast, "constructive notice is a legal inference which substitutes for actual notice. It is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts." Id. "A homeowner is charged with constructive notice of any restriction properly recorded within the chain of title." Harbison Comm. Ass'n, Inc., v. Mueller, 319 S.C. 99, 103, 459 S.E.2d 860, 863 (Ct. App. 1995).

The Buonfortes bought a piece of property in the Indian Hills Subdivision with restrictive covenants in the chain of title. The Buonfortes denied actual notice of the restrictive covenants. The Neighbors did not present any evidence within the record indicating the Buonfortes were on actual notice of the restrictive covenants.

In the findings of fact, the special referee's final order states that the Buonfortes' deed did not put the Buonfortes on "adequate" notice of the restrictive covenants. Subsequently, as a conclusion of law, the special referee held the Buonfortes were unaware of the restrictive covenants when they began building the garage and mother-in-law wing.

We conclude a reasonable reading of the special referee's order, in light of the proceedings in which it was rendered, indicates the special referee found the Buonfortes were not on actual notice, as opposed to constructive notice, of the restrictive covenants. Furthermore, this finding is supported by the weight of the evidence within the record. Thus, we hold the special referee did not err.

## C. Balancing of the Equities

The Neighbors argue the special referee erred by balancing the equities in an arbitrary and unfair manner. Specifically, the Neighbors contend the Buonfortes came to the hearing with "unclean hands," and thus, both the mother-in-law wing and the garage should be removed. 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. See Foreman v. Foreman, 280 S.C. 461, 464-65, 313 S.E.2d 312, 314 (Ct. App. 1984). However, if a party has unclean hands, the party is precluded from recovering in equity. A party will have unclean hands where the party behaves "unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." Ingram v. Kasey's Assocs., 340 S.C. 98, 107, 531 S.E.2d 287, 292 (2000).

The Neighbors sued the Buonfortes, seeking to enforce the restrictive covenants of the Indian Hills Subdivision. Specifically, the Neighbors argued the additions to the Buonfortes' house created a duplex; the mother-in-wing and garage violated the setback lines; and the mother-in-law wing and garage did not conform with the aesthetics of the neighborhood.

While the litigation was pending, the parties signed a consent order providing the following:

> ORDERED, that the . . . [Buonfortes] immediately cease any further construction regarding the "mother-in-law wing" on the property . . . . The . . . [Buonfortes] will be permitted to install the front window units of said wing along with the door, and can also complete the sides and rear of said wing, however, the . . . [Buonfortes] may not continue to build or improve the front of the structure. Further, the . . . [Buonfortes] may not destruct or improve the wall separating the "mother-in-law" wing from the main structure . . . . ORDERED, that the . . .

> [Buonfortes] be allowed to complete the main structure of said building . . . Further, the . . . [Buonfortes] will be allowed to complete the interior of the balance of the structure . . . and the exterior of the entire structure . . . ORDERED, that if the . . . [Buonfortes] do continue to build or improve said property beyond the parameters of this Order, that the . . . [Buonfortes] do so at their own risk[.]

(Emphasis added.)

Subsequently, the Buonfortes completed construction of the garage and interior of the mother-in-law wing. Following a final hearing, the special referee ruled the Buonfortes must remove the garage. Furthermore, the special referee ruled the Buonfortes must remove the front door entrance of the mother-in-law wing, such that the house now only has one front entrance. Moreover, the special referee ordered the Buonfortes to remove the gabled entrance roof.

The Neighbors now contend the special referee erred by balancing the equities to allow the mother-in-law wing to remain because the Buonfortes are seeking equity with unclean hands. Specifically, the Neighbors allege the following particulars weigh against the Buonfortes: 1) the Buonfortes misrepresented information on their original building permit because they did not request a permit for the additions to the house, although they knew they planned to construct additions; 2) the Buonfortes had constructive knowledge of the restrictive covenants before they began to build the additions to their house; and 3) the Buonfortes continued to build after they had actual knowledge of the restrictive covenants.

We do not view the evidence in the same light as the Neighbors. Rather, our view of the evidence indicates the Buonfortes applied for a building permit to construct their original residence. Although the Buonfortes may have intended to construct additions to their residence when they applied for the original building permit, they did not intend to do so without acquiring an additional permit. In fact, prior to construction of the

additional structures, the Buonfortes applied for permits to build the additional structures, leading to this lawsuit.

The evidence also indicates the Buonfortes were not on actual notice of the restrictive covenants, as no evidence exists within the record indicating they actually knew the restrictive covenants existed. Rather, the evidence indicates that prior to buying the piece of property, the Buonfortes hired an attorney to conduct a title search. The attorney's report does not indicate the existence of restrictive covenants. Thus, although the Buonfortes were on constructive notice of the restrictive covenants, they were not on actual notice, mitigating any allegation of unclean hands.

Pursuant to the above quoted agreement, the Buonfortes continued to build the additions to their home after commencement of this lawsuit. With the exception of the garage, which the special referee ordered the Buonfortes to remove, the continued building was permitted under the agreement.

We conclude the Buonfortes did not have unclean hands such that they are precluded from the aid of equity, as they have not acted unfairly to the prejudice of the Neighbors. Moreover, we conclude the special referee appropriately weighed the equities of the situation. Thus, we hold the special referee did not err.

## II. The Buonfortes' Appeal

### A. General Scheme of Development

The Buonfortes argue the special referee erred by ordering them to remove the garage and alter the mother-in-law wing. They contend Dinkins implicitly approved their construction plans pursuant to an automatic approval provision in the restrictive covenants. We agree.

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). Thus, "[i]f the contract's language is clear and

unambiguous, the language alone determines the contract's force and effect." Id. Where a restriction on land is capable of two different constructions, the construction which least restricts the property is favored. See Hamilton v. C.M., Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) ("A restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.").

The restrictive covenants provide, in pertinent part:

> No building, fence, or other structure of any kind shall be begun, erected, or placed on any of the lots [in the neighborhood] until the building plans, specifications, design and plat plan showing the location of such building, fence, or structure on the lot in question has first been approved by Robert Ross Dinkins . . . . In the event Robert Ross Dinkins, or his designated representative, fails to approve or disapprove within thirty days after plans and specifications have been submitted to him, or in the event no suits to enjoin the construction have been commenced prior to the completion thereof, approval will not be required and the related covenants shall be deemed to have been fully complied with.

(Emphasis added.) The Buonfortes argue that because they submitted their building plans to Dinkins and those plans were not approved or disapproved within thirty days, they were free to begin building their home despite the lawsuit filed by the Neighbors. The Neighbors argue that Dinkins' approval became immaterial once they filed their action for an injunction before the Buonfortes completed construction.

To interpret the covenant as the Buonfortes urge, we would have to construe the above language as providing two separate and distinct exceptions to the general rule requiring prior approval: (1) when homeowners submit plans to Dinkins and he fails to approve or disapprove of the plans

within thirty days; or (2) when homeowners do not submit plans to Dinkins, but they finish building before any lawsuit to enjoin construction is filed. Based on that interpretation, the Buonfortes would not be bound by the restrictive covenants because they submitted their plans to Dinkins, and he failed to approve or disapprove of those plans within thirty days.[1] Although this is a logical interpretation, the covenant, as written, does not explicitly state that the second exception only applies when homeowners choose not to submit plans to Dinkins.

The Neighbors, on the other hand, urge us to find that the Buonfortes are bound by the covenants because a lawsuit to enjoin the construction was filed before the Buonfortes' home was completed.[2] To construe the covenant as the Neighbors urge, we would have to interpret the above excerpted language to provide only one exception to the prior-approval rule: when homeowners submit plans to Dinkins, he fails to approve or disapprove of those plans within thirty days, and no lawsuit to enjoin the construction is filed prior to the completion of construction. However, the covenant, as written, uses the disjunction "or" rather than the conjunction "and" between the phrases, indicating there are two separate exceptions to the rule requiring prior approval.

Although both the Buonfortes' and the Neighbors' interpretations of the covenant are logical, both interpretations require us to read words into the covenant that simply are not there. Because two logical interpretations of the same language are possible, we adopt the Buonfortes' construction because it

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[1] The Neighbors argue that Dinkins disapproved of the Buonfortes' plans in a letter dated April 4, 2001. In that letter, Dinkins explained that the request for variance and the size of the Buonfortes' home was "above and beyond the normal for the area"; however, rather than deny the plans as submitted, Dinkins wrote that he did not have "the ability to pass judgment." We do not interpret this letter as a denial of the Buonfortes' plans.

[2] In fact, the Neighbors' lawsuit was filed only eighteen days after the Buonfortes submitted their plans to Dinkins. Although they believe that the swiftness with which they filed suit strengthens their case, they do not believe filing during Dinkins' thirty-day response period was critical to their lawsuit.

is the less restrictive of the two. See Hamilton, 274 S.C. at 157, 263 S.E.2d at 380 ("A restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.").

We therefore find the Buonfortes were free to build the garage and mother-in-law wing pursuant to the plans they submitted to Dinkins because Dinkins failed to approve or disapprove of those plans within thirty days. Accordingly, we reverse the portion of the special referee's order requiring the Buonfortes to remove the garage and alter the mother-in-law wing.

## B. Fees and Costs

The Buonfortes argue the special referee erred by ordering them to pay all of the fees and costs of the litigation. We agree.

"In every civil action commenced or prosecuted in the courts of record in this State . . . the attorneys for the plaintiff or defendant shall be entitled to recover costs and disbursements of the adverse party." S.C. Code Ann. § 15-37-10 (1977); see Rule 54(d), SCRCP ("[C]osts shall be allowed as of course to the prevailing party unless the court otherwise directs."). However, "[n]o costs will be allowed to any party unless he succeed, in whole or in part, in his claim or defense, unless otherwise directed by the judge hearing the cause." S.C. Code Ann. § 15-37-20 (1977).

Because we reverse the portion of the special referee's order requiring the Buonfortes to tear down their garage and to alter the façade of the mother-in-law wing, the Neighbors no longer succeeded on any issue they brought before the special referee. Thus, they are not entitled to recover any attorney's fees or costs from the Buonfortes. See S.C. Code Ann. § 15-37-20.

## CONCLUSION

For the foregoing reasons, the order of the special referee is

**AFFIRMED IN PART and REVERSED IN PART.**

**WILLIAMS, J., concurs and KITTREDGE, J., dissents in a separate opinion.**

**KITTREDGE, J.:** I respectfully dissent from that portion of the majority opinion which reverses the order of the special referee. I would affirm the order of the special referee in its entirety.

As an initial matter, I would adhere to this court's prior opinion in Anderson v. Buonforte, Op. No. 2004-UP-270 (S.C. Ct. App. filed April 19, 2004) and dismiss the petition for rehearing as improvidently granted.

In this equitable action to enforce restrictive covenants, as noted by the majority, we may find the facts in accordance with our view of the preponderance of the evidence. We do, however, recognize that the special referee was in a better position to weigh the credibility of the witnesses.

The Buonfortes began construction with no regard for the restrictive covenants. Hank Buonforte comes to this equitable litigation with unclean hands. Mr. Buonforte engaged in a pattern of deceit throughout the process. To facilitate approval of the construction loan from the bank, Mr. Buonforte signed the name of Terry Osteen, a licensed contractor who had nothing to do with the construction. Mr. Buonforte also altered the survey prepared by Joseph Edwards to give the false impression that the proposed construction would be completed within the set-back requirements. Mr. Buonforte further submitted a permit for a 3,500-square-foot home, although he planned all along to build a structure in excess of 5,000 square feet.

In March of 2001, the Buonfortes were formally notified of their violation of the restrictive covenants. The Buonfortes were required to submit "plans and specifications" for review, but Mr. Buonforte only

submitted a purposefully vague description of the construction plans, described in the record as a "footprint." Robert Ross Dinkins, pursuant to the restrictive covenants, reviewed the incomplete plans and specifications and responded by letter dated April 4, 2001. The critical portion of Mr. Dinkins' response to Mr. Buonforte reads:

> You are aware that submission of plans, specs [sic], and plot plan is a requirement and their approval before construction begins, according to recorded documents, i.e., restrictive covenants.

I construe this language as disapproving of further construction, pending receipt of further and more specific information.[3] Mr. Buonforte ignored the April 4 letter of Mr. Dinkins and continued construction. In light of these circumstances, numerous landowners in the Indian Hills subdivision promptly filed suit seeking to enforce the restrictive covenants.

The special referee considered the evidence and, in my judgment, reached a fair and equitable result in this difficult case. I would affirm the order of the special referee, including the award of fees and costs and the requirement that the Buonfortes remove the garage and alter the mother-in-law wing.

[3] Mr. Dinkins testified similarly at the hearing: "I've never approved [the plans]. I don't intend to approve them. They do not meet the requirements of the restrictive covenants[,] . . . esthetically or harmoniously." When asked about Mr. Buonforte's intentions, Mr. Dinkins responded, "I could not know what he plans to do. He's never supplied the plans and specifications."

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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Carol Roberts, Appellant,

v.

McNair Law Firm and
Companion Commercial Ins.
Co., Respondents.

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Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

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Opinion No. 3999
Submitted May 1, 2005 – Filed June 13, 2005

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**AFFIRMED**

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Thomas R. Goldstein, of Charleston, for Appellant.

J. Hubert Wood, III, James R. Porter, Jr., and J. Alexandra van Staveren, all of Charleston, for Respondents.

**STILWELL, J.:** Carol Roberts appeals the circuit court's order affirming the workers' compensation commission's decision to calculate her compensation rate without considering merit raises she received after her

injury. Additionally, Roberts appeals the decision to count "half weeks" of work against the allocated recovery period. We affirm.[1]

## FACTS

Roberts was employed at the McNair Law Firm as a paralegal. On October 1, 1998, she tripped over a box of files and suffered a herniated disk. After an initial period of treatment, she was admitted to the hospital where a surgeon performed a laminectomy and fusion procedure. She returned to work part-time on May 31, 2000, and was paid temporary partial disability compensation. After her injury, Roberts received three merit raises. Due to her injury, Roberts stopped working on June 19, 2001.

Roberts filed for total permanent workers' compensation benefits. After a hearing on May 14, 2002, the single commissioner found Roberts totally and permanently disabled. In an order dated March 10, 2003, the single commissioner made the following pertinent findings: (1) McNair paid all the temporary disability compensation for which they were liable; (2) Roberts sustained a greater than 50% permanent loss of the use of her back as a result of the injury; (3) there were no exceptional circumstances to warrant departure from the method of average weekly wage calculations under section 42-1-40 of the Workers' Compensation Act; and (4) Roberts was entitled to 500 weeks of compensation less the number of weeks of temporary disability compensation already received.

Roberts appealed to the full commission arguing entitlement to a compensation rate that included the merit raises she received during her part-time employment. Additionally, Roberts alleged the single commissioner erred by counting "half weeks," when she worked part-time, as full weeks against the statutory 500-week recovery period.

The full commission adopted the commissioner's order and affirmed. The circuit court likewise affirmed.

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

## STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). In an appeal from the commission, this court may not substitute its judgment for that of the full commission as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(A)(6) (2005). The appellate court may reverse or modify the full commission's decision only if the claimant'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. Id.

## LAW/ANALYSIS

### A. Calculation of compensation rate

Roberts contends the commission erred by failing to include her post-injury merit increases in calculating her compensation rate. We disagree.

Section 42-1-40 states:

> 'Average weekly wages' means the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury . . . . 'Average weekly wage' must be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred . . . divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less.
>
> . . .

> When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

S.C. Code Ann. § 42-1-40 (Supp. 2004).

At the time of Roberts' injury, she earned $533.95 a week. Roberts returned to work on a part-time basis until June 19, 2001, when she was unable to continue working. After her injury, Roberts received three merit increases, raising her weekly salary to an alleged $594.27, an increase of $60.32 a week.

The question before this court is whether the raises Roberts received constituted extraordinary circumstances entitling her to a compensation rate based on her new salary. The single commissioner found that "salary increases subsequent to an injury by accident do not provide exceptional reasons to justify departure from the method of average weekly wage calculation prescribed under section 42-1-40 as such an argument could be made in almost every worker's compensation case." Roberts argues the commissioner erred, relying on Sellers v. Pinedale Residential Center, 350 S.C. 183, 564 S.E.2d 694 (Ct. App. 2002), in support of her argument. We find Sellers distinguishable.

In Sellers, the claimant was a sixteen-year-old high school student working part-time when he sustained a spinal cord injury that rendered him a paraplegic. Sellers, 350 S.C. at 185, 564 S.E.2d at 696. His compensation rate from his part-time employment was less than $100. Id. The commission considered the extent of the injury and the claimant's age constituted exceptional circumstances requiring a departure from the method of average weekly wage calculation set forth in section 42-1-40. The commission therefore considered the claimant's probable future earning capacity in determining the claimant's compensation award. In affirming the commission, this court stated: "As the commission found '[b]ut for the

severe injury, [Sellers] clearly demonstrated the interest, aptitude, and ability to become an electrician.' . . . [Sellers] stated his goal was to become a master electrician." Sellers, 350 S.C. at 191-92, 564 S.E.2d at 699.

In this case, Roberts was fully employed and earned a full-time salary at the time of her accident. The extraordinary circumstances present in Sellers are not present in this case.

We likewise conclude the extraordinary circumstances found in Elliott v. South Carolina Department of Transportation, 362 S.C. 234, 607 S.E.2d 90 (Ct. App. 2004), do not apply here. In Elliott, the claimant received a pre-injury salary increase. Elliott, 362 S.C. at 236, 607 S.E.2d at 91. Roberts' merit increases were post-injury. Mindful of our standard of review, we find evidence to support the commission's finding that Roberts' post-injury increases do not justify deviating from the statutory method of average weekly wage calculation.

**B. Calculation of the number of weeks awarded**

Roberts argues the weeks she worked part-time and received temporary partial compensation should not be counted as full weeks in determining the number of weeks paid in her permanent award. We disagree.

Roberts was paid temporary partial disability as compensation for her reduced earnings during the weeks she returned to work after her initial recovery from surgery in accordance with section 42-9-20 of the South Carolina Code (1985).

Section 42-9-20 states:

> [W[hen the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as provided in this chapter, to the injured employee during such disability a weekly compensation equal to sixty-six and two-thirds percent of the difference between his average weekly

> wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than the average weekly wage in this State for the preceding fiscal year.

S.C. Code Ann. § 42-9-20 (1985).

Roberts argues she should be paid total compensation for the entire 500 weeks allocated for permanent recovery, disregarding the weeks she was compensated for partial disability. We disagree. Section 42-9-10 of the Workers' Compensation Act provides that, except under circumstances not applicable in this case, the period for compensation may not exceed 500 weeks. S.C. Code Ann. § 42-9-10 (Supp. 2004).

Roberts attempts to characterize the weeks she received partial disability compensation as "half weeks." We find she was not paid "half weeks" as she alleges but was paid temporary partial disability benefits pursuant to section 42-9-20 to compensate for her reduced earnings during the period she worked part-time. We accordingly hold the commission did not err in finding Roberts entitled to the sum of 500 weeks of compensation less the number of weeks she received temporary partial compensation.

## CONCLUSION

For the reasons set forth herein, the decision of the circuit court affirming the full commission is

**AFFIRMED.**

**ANDERSON and WILLIAMS, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Luther Alexander, Respondent,

v.

Forklifts Unlimited, Employer, Zurich American Insurance Company, Carrier, Appellants.

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Appeal From York County
S. Jackson Kimball, III, Special Circuit Court Judge

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Opinion No. 4000
Heard May 11, 2005 – Filed June 20, 2005

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**REVERSED**

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Stephen L. Brown, Robert Gruber and Matthew K. Mahoney, all of Charleston, for Appellants.

Steven D. Haymond, of Columbia, for Respondent.

**WILLIAMS, J.:** Forklifts Unlimited and Zurich American Insurance Company ("Appellants") appeal a circuit court order awarding benefits under the South Carolina Workers' Compensation Act. We reverse.

## FACTS / PROCEDURAL BACKGROUND

Luther Alexander was a forklift mechanic for Forklifts Unlimited. On March 8, 2002, he visited a client's plant to repair a large forklift. The repair required installing a forklift starter, which weighed approximately fifty pounds. This task required him to lift the heavy item in an awkward position.

While lifting the starter, Alexander felt a crack in his neck and heard a sound "like a rubber band snap[ping]." After finishing the job, he drove home, but began experiencing a headache. When Alexander awoke the next morning, he was suffering from a terrible headache and severe dizziness. He also noticed that one side of his face was numb and drooping. Alexander promptly phoned his father, who drove him to a nearby hospital.

The hospital staff referred Alexander to neurologist Dr. Allen Ryder-Cook, who determined that Alexander suffered a stroke inducing dissection of his right vertebral artery. Dr. Ryder-Cook also concluded that the arterial dissection was caused by the physical exertion of installing the forklift starter. Appellants sent Alexander to Dr. James L. Bumgarter for an independent medical examination. Dr. Bumgarter agreed that Alexander suffered a stroke caused by an arterial tear. He concluded that it was quite plausible the tear was caused by Alexander's work activity on March 8.

Alexander filed a workers' compensation claim with the South Carolina Workers' Compensation Commission. The matter was first heard by the single commissioner, who found the arterial tear and resulting stroke were compensable under Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000), and South Carolina Code section 42-1-160 (1976). The ruling was then appealed to the Full Workers' Compensation Commission. The Full Commission found that Alexander's arterial dissection was, in fact, "an injury by accident arising out of and in the course and scope of the claimant's employment" and therefore compensable, but reversed the single commissioner on one important point. The Full Commission concluded that Alexander's stroke, although a direct result of the arterial tear, "was not caused by unusual or extraordinary conditions of employment or sudden and unexpected exertion or strain." This conclusion was supported, in the

commission's view, by evidence that Alexander was familiar with the process of changing a forklift starter, knew that this forklift model had a particularly heavy starter, and commonly lifted items weighing between fifty and eighty pounds in the course of his employment. The Full Commission determined, therefore, that the stroke, viewed as a separate injury from the arterial tear, was not a compensable injury.

Both Alexander and his employer appealed the Full Commission's decision to the circuit court. The circuit court determined there was substantial evidence to support the commission's finding that Alexander's stroke was not the result of unexpected strain or overexertion in the performance of his duties or unusual and extraordinary conditions of employment. The court concluded, however, that because the stroke, according to the findings of the commission and the undisputed medical evidence in the record, was the direct result of an "accident" as contemplated by the Workers' Compensation Act, it was a compensable injury. This appeal followed.

## STANDARD OF REVIEW

The Administrative Procedures Act establishes our standard of review for decisions by the South Carolina Workers' Compensation Commission as the "substantial evidence" standard. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Pursuant to this standard, the factual findings of the Workers' Compensation Commission are presumed correct and will be set aside only if unsupported by substantial evidence. Kearse v. State Health & Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." Shealy, 341 S.C. at 455, 535 S.E.2d at 442. Accordingly, "[w]e can reverse or modify the Full Commission's decision in this case only if [Appellants'] 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." Id. at

454-55, 535 S.E.2d at 442 (citing S.C. Code Ann. § 1-23-380(A)(6)(d), (e) (Supp. 1997)).

## LAW / ANALYSIS

Appellants contend the circuit court erred in reversing the Full Commission on the compensability of Alexander's stroke because the stroke was not brought on by sudden or unexpected strain or unusual and extraordinary conditions of employment. On the same grounds, they argue the court erred in affirming the Full Commission's ruling that Alexander's arterial tear was compensable. We reluctantly agree.

As an initial matter, we discuss the prudence of the Full Commission's factual determinations. The Full Commission perspicuously concluded that Alexander's employment conditions at the time of the stroke were not unusual or extraordinary and, at the time of the injury, his physical strain was neither sudden nor unexpected. The circuit court affirmed this factual determination as supported by substantial evidence in the record. Pursuant to our standard of review, we likewise affirm this finding. The Full Commission outlined the evidence it relied upon in reaching this conclusion, citing both Alexander's testimony and that of his co-worker that he had replaced starters before, was familiar with the weight of this particular starter, and would routinely perform this kind of physical exertion in the course of a normal working day. While it may be possible to draw differing conclusions from the evidence in this case, the view of the Full Commission was certainly reachable by reasonable minds and supported by substantial evidence; thus, it must be affirmed. See O'Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 30, 459 S.E.2d 324, 327-28 (Ct. App. 1995) ("The possibility of drawing two inconsistent conclusions from the evidence does not prevent the commission's findings from being supported by substantial evidence."); Fair v. Fluor Daniel, 309 S.C. 520, 521, 424 S.E.2d 541, 542 (Ct. App. 1992) ("When evidence is in conflict, someone has to determine the true facts. That chore is assigned to the Worker's Compensation Commission.").

The affirmation of this finding leaves this court with the following legal query: under South Carolina law, may a stroke, heart attack, or vascular

injury be found compensable in certain circumstances when it is not induced by sudden and unexpected strain or extraordinary conditions of employment? After a thorough review of South Carolina case law applying the special "heart attack standard" for compensability, we must answer this question in the negative.

Simply put, a heart attack constitutes a compensable accident within the meaning of the Workers' Compensation Act if it is induced by unexpected strain or over-exertion in the performance of employment, or by unusual and extraordinary employment conditions. Bridges v. Housing Auth., City of Charleston, 278 S.C. 342, 344, 295 S.E.2d 872, 873-74 (1982). This special standard for determining compensability also applies to cerebral hemorrhages, apoplexy, or other injuries to the blood vessels. Kearse v. South Carolina Wildlife Res. Dep't, 236 S.C. 540, 546, 115 S.E.2d 183, 186-187 (1960); Jennings v. Chambers Dev. Company, 335 S.C. 249, 255, 516 S.E.2d 453, 456 (Ct. App. 1999). Because we find no authority clearly expressing an exception to this general rule, we must reverse the circuit court's ruling that Alexander's stroke is compensable. Similarly, because the rule is applicable to vascular injuries as well as strokes and heart attacks, we reverse the Full Commission's ruling that Alexander's underlying arterial dissection, viewed separately from the stroke, was a compensable injury. See id.

The circuit court based its finding of compensability on the fact that Alexander suffered a definite traumatic injury in the course of his employment. In short, the court found that since the medical evidence so clearly reflected a specific injury, which occurred as a result of his job and unmistakably caused his stroke, application of the heart attack standard would be imprudent.

The rationale of the circuit court is notably persuasive. The heart attack standard was established on the sound presumption that illness, injury, or death resulting from certain vascular calamities is "ordinarily the result of natural physiological causes rather than trauma or particular effort." Price v. B.F. Shaw Co., 224 S.C. 89, 97, 77 S.E.2d 491, 494 (1953). Accordingly, it would be patently unfair to hold an employer liable for such injuries through

our workers' compensation system based solely on the fact that the employee was at work when the stroke or heart attack occurred. However, when medical causation is so clearly established as a specific traumatic work-related injury, the purposes underlying the application of the heart attack standard are largely absent. The denial of compensation in these rare cases seems to us rather severe, perhaps leading to outcomes not anticipated by the proponents of the standard. This rationale is vaguely referenced in some early case law on the subject. See, e.g., id. at 98, 77 S.E.2d at 495 ("In every case decided by this Court, involving benefits under the [Workers'] Compensation Act resulting from heart conditions or other physiological bodily conditions in which award of benefits were adjudged, there was some unusual or extraordinary condition attached to the work environment, or unusual exertion and strain in the performance of the work, **or of course, a definite traumatic injury**. . . .)(emphasis added).

Nevertheless, the requirement that a claimant show he was exposed to unusual and extraordinary conditions of employment or unexpected strain or overexertion to receive benefits for a heart attack, stroke, or vascular injury has been reiterated by our supreme court as recently as 2000. See Shealy, 341 S.C. at 457, 535 S.E.2d at 443. Because South Carolina law does not currently clearly recognize an exception to the general heart attack standard when there is a definite traumatic injury arising in the course of one's employment and because our powers, as an intermediate appellate court, do not permit us to create one,[1] we reluctantly conclude the circuit court and Full Commission erred in finding any of Alexander's injuries compensable.

For the foregoing reasons, the circuit court's order is

**REVERSED.**

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

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[1] See Lusk v. Callaham, 287 S.C. 459, 462, 339 S.E.2d 156, 158 (Ct. App. 1986) (citing Bain v. Self Mem'l Hosp., 281 S.C. 138, 314 S.E.2d 603 (Ct. App. 1984).

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Heyward O. Keith, Plaintiff,

v.

River Consulting, Inc., A.J. Concrete Pumping, LLC, Edward Helman and Schwing America, Inc., Defendants.

and A.J. Concrete Pumping, LLC, Appellant,

v.

Hightower Construction Company, Inc., Respondent.

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Appeal From Georgetown County
John L. Breeden, Circuit Court Judge

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Opinion No. 4001
Heard April 5, 2005 – Filed June 20, 2005

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**REVERSED AND REMANDED**

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Timothy Alan Domin, of Charleston, for Appellant.

Michael S. Fahnestock, of Charleston, for Respondent.

**WILLIAMS, J.:** A.J. Concrete Pumping, LLC (A.J. Concrete), appeals the grant of summary judgment to Hightower Construction Company, Inc. (Hightower Construction), arguing the circuit court erred in finding the case presented no factual issue for determination by a jury. A.J. Concrete also contends the circuit court erred in its alternative conclusion that the indemnification clause at issue was void as against public policy. We reverse and remand.

## FACTS / PROCEDURAL HISTORY

Hightower Construction was hired to erect a building foundation in Georgetown, South Carolina. A portion of the construction project required the pouring of concrete into a large mold. To complete this task, Daniel Premo, the job superintendent and foreman, entered into an oral contract with A.J. Concrete on behalf of Hightower Construction for the lease of a concrete truck and boom pump operator to pump concrete into the foundation mold. Although this was the first time Hightower Construction contracted with A.J. Concrete, it previously leased a concrete pump truck from A.J. Concrete II, A.J. Concrete's sister company. Premo, while employed elsewhere, contracted with A.J. Concrete under similar circumstances on as many as thirty prior occasions.

On December 17, 1998, A.J. Concrete's truck and boom operator, Eddy Helman, arrived at the site. According to Helman, he and Premo discussed the presence of overhead electrical power lines before the pour began. Helman believed the safest way to conduct the job was to situate the boom pump in the closest safe position to the power lines and proceed with the pour by gradually moving away from the lines. After Helman situated the boom pump accordingly and poured about a yard of concrete, Premo motioned

angrily at him to move the boom into the position farthest from the lines. This required that Helman move the boom pump closer and closer to the power lines during the course of the pour. Helman stated at his deposition that, although troubled by the change, he did not vocally object because Premo had previously stated that he and his workers would "keep an eye on the lines." He also stated that he understood his duty to be to "perform the concrete pump job to the requirements of my customer."

Premo initially stood inside the mold and guided the nozzle of the concrete pump while Helman guided the supporting boom with a radio control device. Premo later left to see to other business, assigning his task to Heyward Keith, another employee of Hightower Construction. Shortly thereafter, Keith directed Helman to move the boom. The boom came in contact with the nearby power lines, resulting in Keith being seriously injured from an electrical shock.

After Keith received the requisite medical attention, Helman and other Hightower Construction employees completed the job. Helman then presented Premo with a "job ticket," which listed the work performed, the applicable rate, and the amount owed for the job. The back of the ticket contained various contractual terms including terms of payment, limitation of warranties, and the following clause:

> INDEMNIFICATION AND RISK OF LOSS: Lessor and Lessee agree that the leased equipment and all persons operating such equipment, including Lessor's employees, will be under Lessee's exclusive jurisdiction, supervision, and control during the time such equipment and operators are on Lessee's job site, the Lessee agrees to indemnify Lessor against all claims, actions, proceedings, costs, damages, and liabilities arising in any manner out of, connected with, or resulting from the operation or handling of the leased equipment on Lessee's job site, including without limitation, any injury, disability or death of workmen or other persons and any loss or damage to property, whether the liability, loss or damage is caused by or arises out of the negligence of Lessor's employees or otherwise.

Nothing on the front of the job ticket directs the reader to the back of the ticket. Premo signed the job ticket and later presented a copy to Hightower Construction's office staff. Hightower Construction paid the full amount A.J. Concrete charged for the job.

After successfully pursuing a workers' compensation claim against Hightower Construction, Keith commenced a civil lawsuit against several defendants, including A.J. Concrete, alleging that their negligence caused his injuries. A.J. Concrete filed a third-party complaint against Hightower Construction, asserting contractual indemnity as reflected by the terms listed on the back of the job ticket. Both parties to the third-party claim filed motions for summary judgment. Following a hearing on the motions, the circuit court granted Hightower Construction's motion, concluding that, as a matter of law, the indemnification clause was not part of the contract and, alternatively, was unenforceable because it was overly broad and violated public policy. This appeal followed.

## STANDARD OF REVIEW

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

In determining whether a triable issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in a light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). Even if there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). Summary judgment is not appropriate when further

inquiry into the facts of the case is desirable to clarify the application of law. Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

## LAW / ANALYSIS

### I. The Indemnification Clause as Part of the Contract

The circuit court found, as a matter of law, that the indemnification clause was not part of the contract because 1) the undisputed facts fail to reflect a meeting of the minds between the parties and 2) the terms on the back of the job ticket are unenforceable due to lack of consideration. We address each finding in turn.

#### Meeting of the Minds

The circuit court's approval of Hightower Construction's motion for summary judgment was based largely on its finding that A.J. Concrete presented no evidence that the presence of the indemnification clause was "made known or . . . from all the circumstances, should [have been] known" by the parties to the contract. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989). We disagree and find that A.J. Concrete presented a question of fact for determination by a jury.

This case concerns an oral contract to provide concrete pumping services. Although the disputed term of the contract was presented on the back of a job ticket and signed by Hightower Construction after completion of the pour, A.J. Concrete argues that the lessee's supervisory control and accompanying lessor indemnification are so common in the trade that they were understood by the parties upon entry into the contractual relationship.

The main concern of the court, when interpreting an oral contract, is to give effect to the intention of the parties. Columbia East Assoc. v. Bi-Lo, Inc., 299 S.C. 515, 519, 386 S.E.2d 259, 261 (1989). "The courts, in attempting to ascertain this intention, will endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered."

Id. When a contract is silent as to a particular matter, parol evidence is admissible to reveal the parties' true intent. Id. To this end, "it is necessary for enforceability that the essentials of the contract be agreed upon but all need not be expressed. They may be implied from custom and usual forms [trade usage] and former course of dealing." Carolina Aviation, Inc. v. Glens Falls Ins. Co., 214 S.C. 222, 230, 51 S.E.2d 757, 761 (1949) (emphasis added). While the use of uniform trade practices to reflect contractual intention has been statutorily codified in the U.C.C. and further refined as it applies to the sale of goods, a review of South Carolina case law reveals that the contractual efficacy of trade custom and usage is also applicable to other types of contracts. See id. at 230-31, 51 S.E.2d at 761; Burden v. Woodside Cotton Mills, 104 S.C. 435, 439, 89 S.E. 474, 475 (1916).

"Trade usage" has been generally defined as "a uniform course of conduct in some particular business or calling" or "a practice or method observed with regularity with respect to the transaction being performed" that is "so well established, general, and uniform that [the parties] must be presumed to have acted with reference thereto." 21A Am. Jur. 2d Customs and Usages § 1 (1998). "A usage or custom to be recognized by law must be long standing, general in its operation, known to, and acquiesced in, by all whose rights are affected by it, and be just and reasonable in its operation." Love v. Gamble, 316 S.C. 203, 209-10, 448 S.E.2d 876, 880 (Ct. App. 1994). If evidence is presented to support a specific trade usage that may resolve an ambiguity or matter on which the contract is silent, "[w]hether the existence of a particular custom or usage has been satisfactorily shown by the evidence is ordinarily a question of fact, which . . . is to be determined, like other factual questions, by the jury." 21A Am. Jur. 2d Customs and Usages § 53 (1998). "The jury determines under all the circumstances of the case the weight to be given to evidence of a custom or usage of business." Id.; see also Gold Kist, Inc. v. Citizens and S. Nat'l Bank of South Carolina, 286 S.C. 272, 279, 333 S.E.2d 67, 71 (Ct. App. 1985) (finding, under a different factual and procedural scenario, that "the question of whether [a disputed term] was a part of the agreement between the parties was a jury question."); RentCo., a Div. of Fruehauf Corp. v. Tamway Corp., 283 S.C. 265, 268, 321 S.E.2d 199, 201 (Ct. App. 1984) (finding an issue relating to the intent of the

parties, when the contract was silent to a certain term, was one that should have been presented to the jury).

In the present case, A.J. Concrete presented the affidavit of Jim Duffy, the manager of A.J. Concrete, as evidence that indemnification, as reflected by the job ticket, was A.J. Concrete's "habit and custom, as well as the general standard in the industry." A.J. Concrete also offered the affidavit of Jeff Moll, the president of several concrete companies, a member of the American Concrete Pumping Association, and a past member of its board of directors, who stated that he was "familiar with the industry standards and customs in the construction industry" and indemnification was "typical in the industry."[1] Furthermore, it can certainly be inferred from the conduct of the parties' employees, when viewing the evidence in a light most favorable to A.J. Concrete, that all involved were at least cognizant of the customs regarding Hightower Construction's supervisory control of the boom pump truck and its operator, notwithstanding the fact that the job ticket containing the written terms had yet to be presented or signed.

Considering the above evidence, we conclude the circuit erred in granting Hightower Construction's motion for summary judgment. However slight it may appear in the eyes of the court, A.J. Concrete supported its position that the parties understood the conditions of indemnification at the time the contract was entered into with competent evidence; hence, a jury issue arose as to a material fact of the case and summary judgment was not proper.

## Lack of Consideration

The circuit court also concluded that the disputed indemnification clause was not part of the contract due to the fact that the job ticket was signed after the performance of A.J. Concrete's contractual duties; thus, there

[1] Moll's deposition distinguishes this case from the facts of Love, 316 S.C. at 209-210, 448 S.E.2d at 880, in which the circuit court's grant of summary judgment was affirmed because no evidence of trade custom or usage was offered.

was no consideration for its terms. In light of our previous discussion, this conclusion was also made in error. There is no doubt that adequate consideration existed to form a contract at the time the contract was entered. A.J. Concrete does not contend that indemnification was an additional term added to the contract after performance, but that the parties understood the indemnification term when the contract was entered into due to commonly accepted trade practices. Accordingly, the circuit court's finding that the term fails as a matter of law due to lack of consideration was erroneous.

**II. Public Policy**

As an alternative basis for granting Hightower Construction's motion for summary judgment, the circuit court found that the disputed indemnification clause was overly broad and thus void as against public policy. We disagree.

The circuit court based its finding on this court's recent decision in Fisher v. Stevens, 355 S.C. 290, 584 S.E.2d 149 (Ct. App. 2003). In Fisher, we held that an exculpatory clause, once determined overly broad, was void as against public policy. The exculpatory clause at issue in Fisher relieved "any persons in any restricted area" from all liability. Id. at 296, 584 S.E.2d at 152. Because the clause relieved all potential defendants from any and all liability, no matter the circumstances giving rise to the injury, we concluded the clause was overly broad as a matter of law. Id. at 297, 584 S.E.2d at 153 (citing a Wisconsin Supreme Court case interpreting a exculpatory clause which likewise barred an injured party from any legal recourse for damages arising from his injuries).

In the present case, the clause at issue merely calls for the indemnification of a potential defendant by another potential defendant for liability arising from a plaintiff's injuries. Furthermore, the contractual indemnification is limited to those injuries arising from the use and operation of the leased equipment while it is under the lessee's "exclusive jurisdiction, supervision, and control." Recognizing the freedom of sophisticated parties to contract as they choose, we conclude the clause, though wide in scope, is not so overly broad as to render the clause void as against public policy.

## CONCLUSION

Because we conclude that A.J. Concrete presented a limited question of fact for determination by a jury and that the indemnification clause at issue is not void as against public policy, the decision of the circuit court is hereby

**REVERSED AND REMANDED.**

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

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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The State, Appellant,

v.

Sergio Lopez Cuevas, Respondent.

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Appeal From Cherokee County
J. Derham Cole, Circuit Court Judge

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Opinion No. 4002
Heard May 11, 2005- Filed June 20, 2005

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**REVERSED AND REMANDED**

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Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General David A. Spencer, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Appellant.

Andrew J. Johnston, of Spartanburg, for Respondent.

**CURETON, A.J.:** The State appeals the trial court's suppression of Sergio Cuevas's breath test results. We reverse and remand for trial.

## FACTS

On August 18, 2001, Cuevas was the driver of a vehicle involved in a two-car accident, which left his victim with a broken leg. Officers gave Cuevas the implied consent warnings for felony DUI, as required by section 56-5-2945 of the South Carolina Code (Supp. 2004). However, the officers did not advise Cuevas of his right to refuse the breath test.

Cuevas was indicted for driving under the influence resulting in great bodily injury and leaving the scene of an accident in which injury resulted. Cuevas made a pre-trial motion to suppress the results of his breath test. The trial court granted the motion because Cuevas was not afforded the right to refuse the breath test. This appeal followed.

## STANDARD OF REVIEW

In criminal cases, an appellate court sits to review errors of law only and is bound by factual findings of the trial court unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). A trial court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant. State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003). The appellate court should examine the record to determine whether there is any evidence to support the trial court's ruling. If there is any evidence in the record, the appellate court should affirm. Wilson, 345 S.C. at 6, 545 S.E.2d at 829.

## LAW/ANALYSIS

### I.

The State claims the trial court erred in suppressing Cuevas's breath test results because, under section 56-5-2946 of the South Carolina Code (Supp. 2004), Cuevas does not have a right to refuse a breath test when charged with felony DUI. We agree.

Section 56-5-2950 (a) of the South Carolina Code (Supp. 2004), originally enacted in 1993, but rewritten by Act No. 434, 1998 S.C. Acts § 7 and amended most recently in August 2003, provides a person suspected of driving under the influence with the right to refuse "chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs." Also, the arresting officer must first offer a breath test in writing before administering any other tests. Id. Additionally, Section 56-5-2953(A)(2)(b) of the South Carolina Code (Supp. 2004) provides that a person who violates section 56-5-2945[1] must have his conduct at the breath test site videotaped, including being informed of the right to refuse the test.

In June 1998, in conjunction with Act 434, the legislature enacted section 56-5-2946 of the South Carolina Code (Supp. 2004), which states the following in regard to felony DUI:

> Notwithstanding any other provision of law, a person must submit to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if there is probable cause to believe that the person violated or is under arrest for violation of Section 56-5-2945.

(emphasis added).

The trial court found a conflict between sections 56-5-2953 and 29-5-2946. The trial court concluded section 56-5-2953 specifically states a suspect must be advised of his right to refuse the breath test, and section 56-5-2953 should not be read to give a suspect a right, while 56-5-2946 takes that right away. Finally, the court reasoned section 56-5-2946 could be

[1] Section 56-5-2945 of the South Carolina Code (Supp. 2004) provides that any person while under the influence of alcohol or drugs that drives a vehicle and engages in any act forbidden by law and the act results in great bodily injury or death to another person is guilty of a felony.

reconciled with 56-5-2953 by concluding that if Cuevas refused the breath test, the arresting officer could have required him to submit to one of the other tests.

At oral argument, Cuevas conceded that the arresting officer, not the suspect, has the right to select the test to be administered to the suspect. Section 56-5-2946 clearly states, "a person must submit to either one or a combination of chemical tests of his breath, blood, or urine. . . ." We therefore conclude pursuant to the plain language of section 56-5-2946, an arresting officer may require a suspect to submit to all three tests without affording the suspect the right to refuse any of them.

In State v. Long, Op. No. 25955 (S.C. Sup. Ct. filed Mar. 21, 2005) (Shearouse Adv. Sh. No. 13 at 68), our Supreme Court held although the "technical testing requirements" of section 56-5-2950 are incorporated into section 56-5-2946, section 56-5-2946 "essentially alter[ed] the procedural prerequisites which must be met under section 56-5-2950. . . ." The court concluded 56-5-2950 afforded Long no legal right to refuse a breath test before requiring him to submit to a blood test. Id. Moreover, according to Long, "the officer need no longer offer a breath test as the first option" for persons who are under arrest for violation of felony DUI. Id. at 71. Likewise, we hold section 56-5-2953's technical procedural videotaping requirements are incorporated into 56-5-2946, but 56-5-2953 does not afford a suspect the right to refuse a breath test, inasmuch as such right is not afforded under section 56-5-2946.

Because the legislature is presumed to intend its statutes accomplish something, the trial court erred in reasoning the right of refusal remains applicable in felony DUI cases despite the enactment of section 56-5-2946. See Long, Op. No. 25955 at 68 (citing, South Carolina Coastal Conserv. League v. South Carolina Dep't of Health & Envtl. Control, 354 S.C. 585, 589, 582 S.E.2d 410, 413 (2003)). Therefore, the trial court erred in suppressing the results of Cuevas's breath test.

II.

Cuevas also argues this court should uphold the trial court's suppression of the breath test results because probable cause to arrest him for felony DUI did not exist. Specifically, Cuevas argues there was insufficient evidence that he was under the influence of alcohol at the time of his arrest. We disagree.

The dispostive question in determining whether a warrantless arrest is lawful is whether there was probable cause to make the arrest. Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992). Probable cause to arrest without a warrant generally exists when facts and circumstances within an arresting officer's knowledge are sufficient for a reasonable person to believe that a crime has been or is being committed by the person to be arrested. State v. Moultrie, 316 S.C. 547, 552, 451 S.E. 2d 34, 37 (Ct. App. 1994). In determining whether probable cause exists, "all the evidence within the arresting officer's knowledge may be considered, including the details observed while responding to information received." State v. Roper, 274 S.C. 14, 17, 260 S.E.2d 705, 706 (1979). In other words, "[a] police officer has probable cause to arrest without a warrant where he in good faith believes that a person is guilty of a felony, and his belief rests on such grounds as would induce an ordinary prudent and cautious man, under the circumstances to believe likewise. . . ." Id.

We hold the evidence within the arresting officer's knowledge was sufficient to arrest Cuevas. The evidence included the facts that Cuevas left the scene of the accident, he had a strong smell of alcohol on his breath, he had an open beer container in his vehicle, and he had a bruise on his chest, apparently resulting from the inflation of the air bag in his vehicle. Finally, Cuevas conceded at oral argument that the accident resulted in great bodily injury to another person.

For the reasons stated herein, the trial court's decision is hereby

**REVERSED AND REMANDED.**

**STILWELL and WILLIAMS, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Respondent,

v.

Michael Patrick Munyon, Appellant.

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Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

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Opinion No. 4003
Submitted May 1, 2005 – Filed June 20, 2005

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**AFFIRMED**

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James Arthur Brown, Jr., of Beaufort, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General W. Rutledge Martin, all of Columbia; and Solicitor Ralph E. Hoisington, of Charleston, for Respondent.

**WILLIAMS, J.:** Michael Munyon appeals the enhancement of his sentence for conspiracy to traffic marijuana based on a prior drug-related offense. We affirm.

## FACTS

On April 8, 2003, the South Carolina State Grand Jury indicted Michael Munyon for conspiracy to traffic one hundred pounds or more of marijuana. On October 7, 2003, Munyon appeared before the circuit court and pled guilty to the lesser included offense of conspiracy to traffic between ten and one hundred pounds of marijuana. The trial court treated the charge as his second offense.

Munyon's prior conviction arose from a June 16, 2001, search of his Charleston home. Munyon and four others were charged with possession with intent to distribute marijuana and possession with intent to distribute within one-half mile of a school. In March 2002, Munyon pled guilty to simple possession and received a one hundred dollar fine.

The charge for which Munyon was indicted on April 8, 2003, concerns Munyon's involvement, beginning in 2002, in a conspiracy to receive and sell large amounts of marijuana. The indictment mentions that the conspiracy began in November, 1999 and continued until the time the indictment was issued. Munyon argued the prior conviction should not be treated as such for sentencing purposes because the simple possession conviction was the result of a larger pattern of behavior which ultimately resulted in the 2003 conspiracy charge. The trial court disagreed and sentenced Munyon to a mandatory minimum of five years and imposed a fifteen thousand dollar fine.

## LAW AND DISCUSSION

Munyon argues that because the 2002 and 2003 convictions are related and arise from a single incident, the 2002 conviction should not be treated as a prior conviction for sentencing purposes. We disagree.

Munyon pled guilty to conspiracy to traffic between ten and one hundred pounds of marijuana. Section 44-53-370(e)(1)(a) of the South Carolina Code (2002) discusses the penalty for this offense. An individual convicted of a first offense must be sentenced to at least one

year, but not more than ten years and fined ten thousand dollars. Id. If it is a second offense, the individual must be sentenced to at least five years, but no more than twenty years and fined fifteen thousand dollars. Id.

Section 44-53-470 of the South Carolina Code (2002) explains when a crime is considered a second or subsequent offense. It provides, "[a]n offense is considered a second or subsequent offense, if, prior to his conviction of the offense, the offender has at any time been convicted under this article or under any State or Federal statute relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs."

Because Munyon has a prior simple possession of marijuana conviction from 2002, the plain terms of section 44-53-470 suggest the penalty for his current offense should be enhanced. Nevertheless, in State v. Boyd, 288 S.C. 206, 341 S.E.2d 144 (Ct. App. 1986), we explained that a court is restricted from using a prior conviction for enhancement if the prior offense arose "out of simultaneous acts committed in the course of a single incident." Id. at 209-10, 341 S.E.2d at 146. In Boyd, the defendant was convicted of a drug charge and sentenced as a third time offender. Id. at 207, 341 S.E.2d at 145. His sentence was enhanced based on earlier convictions for possession of marijuana, hashish, and prescription pills. Id. However, the earlier convictions arose from the same arrest. Id. The court found Boyd should have been sentenced as a second time offender because multiple convictions will be considered as one for sentencing purposes if they "aris[e] out of simultaneous acts committed in the course of a single incident." Id. at 209-10, 341 S.E.2d at 146. See also State v. Woody, 345 S.C. 34, 545 S.E.2d 521 (Ct. App. 2001) (finding armed robberies of a convenience store and the convenience store clerk were committed within one incident and should only be treated as one conviction for sentencing purposes).

Munyon argues the 2002 and 2003 convictions should be treated as one for sentencing purposes because they took place in the same general location (Charleston), involved the same people, took place

during overlapping time frames, and involved similar crimes (dealing marijuana). However, Munyon's prior charge was based on possession with intent to distribute on June 17, 2001. By Munyon's own admission, he did not enter the conspiracy that began in 1999 until 2002. Therefore, the charges did not arise out of simultaneous acts committed in the course of a single incident.

**AFFIRMED.**[1]

**ANDERSON and STILWELL, JJ., concur.**

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