The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF IVAN N. WALTERS, PETITIONER

Ivan N. Walters, who was definitely suspended from the practice of law for a period of twelve (12) months, retroactive to June 27, 2008, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Thursday, October 21, 2010, beginning at 9:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

[1] The date and time for the hearing are subject to change. Please contact the Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.

Columbia, South Carolina

September 9, 2010

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 37
September 13, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sonya L. Watson, Stacy Watson, Curtis L. Watson, and Shirley Watson Individually and as Parents of Sonya L. Watson, Stacy Watson, and Thelma Watson, Plaintiffs,

v.

Ford Motor Company, TRW, Inc., TRW Vehicle Safety Systems, Inc., and D&D Motors, Inc., Defendants.

Willie E. Carter, as Personal Representative of the Estate of Patricia Ann S. Carter, Deceased, Plaintiffs,

v.

Ford Motor Company, TRW, Inc., TRW Vehicle Safety Systems, Inc., and D&D Motors, Inc., Defendants,

of whom Sonya L. Watson, Stacy Watson, Curtis L. Watson and Shirley Watson , Individually and as Parents of Sonya L. Watson, Stacy Watson, and Thelma Watson, and Willie E. Carter, as Personal Representative of the Estate of Patricia Ann S. Carter, Deceased, are the Respondents,

and Ford Motor Company is the Appellant.

Appeal from Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 26786
Heard February 5, 2009 – Re-filed September 13, 2010

REVERSED

C. Mitchell Brown, William C. Wood, Jr., Elizabeth H. Campbell and A. Mattison Bogan, all of Nelson Mullins Riley & Scarborough, Elbert S. Dorn, and Nicholas W. Gladd, both of Turner, Padget, Graham & Laney, all of Columbia, for Appellant.

James Edward Bell III, of Georgetown, James Walter Fayssoux, Jr., of Greenville, and Kevin R. Dean, of Motley Rice, of Mt. Pleasant, for Respondents.

CHIEF JUSTICE TOAL: Following a single vehicle accident, Respondents Sonya L. Watson and the Estate of Patricia Carter filed a products liability suit against Appellants. A jury found against Appellant Ford Motor Company ("Ford") and awarded Respondents $18 million in compensatory damages. On appeal, Ford argues that the trial court erred in several respects. After issuing an initial opinion, Respondents and Ford presented this Court with Motions to Clarify. Additionally, Respondents submitted a Petition for Rehearing. We now grant the Motions to Clarify, deny Respondent's Petition for Rehearing, and substitute this opinion in place of the original opinion.

FACTUAL/PROCEDURAL BACKGROUND

On December 11, 1999, Watson was driving a 1995 Ford Explorer along with three other passengers including Patricia Carter. Shortly after entering Interstate 385, Watson lost control of the vehicle, which then veered off the left side of the interstate and rolled four times. Watson and Carter were ejected from the vehicle. Watson suffered severe injuries that rendered her quadriplegic; Carter died in the accident. Respondents filed a products liability suit against Ford, D&D Motors, Inc., and TRW Vehicle Safety Systems, Inc. alleging that the cruise control system and the seatbelts were defective and seeking actual and punitive damages.

At trial, Watson testified that when she entered the interstate, she promptly set the cruise control, but shortly thereafter, the Explorer began to suddenly accelerate. Watson testified that she reached down in an attempt to grasp the gas pedal, but was stopped by her seat belt and that she then pumped her brakes to no avail before crashing. Watson's father testified that on two occasions prior to the accident, the Explorer suddenly accelerated

while he was driving. As a result, he took the vehicle into D&D Motors, and the technicians determined that the new floor mats were upside-down and needed to be turned over.[1]

Respondents' theory of the case was that the Explorer's cruise control system was defective because it allowed electromagnetic interference (EMI) to affect the system. EMI is an unwanted disturbance caused by electromagnetic radiation that interferes with an electric circuit. To support this theory, Respondents presented Dr. Antony Anderson, an electrical engineer from Britain. Dr. Anderson testified as to his theory that EMI can interfere with the speed control component of a cruise control system and cause a vehicle to suddenly and uncontrollably accelerate. He concluded that on the day of the accident, EMI interfered with the Explorer's cruise control system, which caused it to suddenly accelerate and resulted in the accident. Dr. Anderson further opined that Ford could have employed a feasible alternative design to prevent EMI. Specifically, he testified that Ford could have used "twisted pair wiring" in order to prevent EMI from passing between the wires and had Ford used the twisted pair wiring, the accident would not have occurred.

In addition to Dr. Anderson's testimony, Respondents presented testimony from Bill Williams who was qualified as an expert on "cruise control diagnosis" as well as evidence from four witnesses who testified as to other similar incidents in which their Explorers suddenly accelerated without the driver's input.

Ford argued that Dr. Anderson's EMI theory was unreliable and lacked any scientific foundation, and to counter the theory, Ford presented their cruise control expert, Karl Passeger. Passeger testified that EMI signals have no effect on a cruise control system and that the system contains a watchdog

[1] A service invoice sheet included in the record confirms that Mr. Watson brought the Explorer into D&D Motors to "[check] gas pedal for sticking," but that D&D Motors determined that the pedal would "stick into floor mat" when it was pushed hard and the "customer needs to turn floor mats back over."

feature that automatically checks for improper signals and resets the cruise control computer if it is not operating correctly. Additionally, Ford suggested that the floor mats could have caused the sudden acceleration as they had on previous occasions.

The trial court issued a lengthy jury charge on the law of products liability. During deliberations, the jury submitted a question to the trial court asking, "Can we consider other causes of cruise control malfunction other than EMI?" The trial court responded, "You may consider any and all evidence which was properly admitted at trial and give it the weight that you think it deserves." The jury found Ford liable on the cruise control products liability claim, but found against Respondents on their defective seat belt claim and on their claim for punitive damages. The jury awarded compensatory damages of $15 million to Watson and $3 million to the Estate of Patricia Carter.

The trial court entered judgment on the jury's verdict. Ford filed post-trial motions, including a motion for judgment notwithstanding the verdict. The trial court denied Ford's motions.

We certified this case pursuant to Rule 204(b), SCACR, and Ford presents the following issues on appeal:[2]

I. Did the trial court err in qualifying Bill Williams as an expert in cruise control systems?

II. Did the trial court err in allowing Dr. Anderson's expert testimony regarding EMI and alternative feasible design?

[2] Although Ford presented several other issues on appeal, we find that these four issues are dispositive to the outcome. Therefore, we decline to address the remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that the Court need not rule on remaining issues when the disposition of prior issues is dispositive).

III. Did the trial court err in allowing evidence of other incidents of sudden acceleration in Explorers?

IV. Did the trial court err in denying Appellant's motion for judgment notwithstanding the verdict?

STANDARD OF REVIEW

In an action at law, on appeal of a case tried by a jury, this Court may only correct of errors of law. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). The factual findings of the jury will not be disturbed unless no evidence reasonably supports the jury's findings. *Id.*

LAW/ANALYSIS

This is a products liability case in which Respondents allege Appellant produced a defective vehicle. For the sake of context, there are three defects a plaintiff in a products liability lawsuit can allege: 1) a manufacturing defect, 2) a warning defect, and 3) a design defect. When a manufacturing defect claim is made, a plaintiff alleges that a particular product was defectively manufactured. When a warning defect claim is made, a plaintiff alleges that he was not adequately warned of dangers inherent to a product. When a design defect claim is made, a plaintiff alleges that the product at issue was defectively designed, thus causing an entire line of products to be unreasonably dangerous.

In this case, Respondents pursued a design defect claim against Appellant. Such claims necessarily involve sophisticated issues of engineering, technical science, and other complex concepts that are quintessentially beyond the ken of a lay person. In discussing the issue of proof in a defective design case, Professors Hubbard and Felix say, "As with other matters in varying degrees beyond the knowledge and experience of

ordinary persons, expert testimony will often be useful and may be necessary." F. PATRICK HUBBARD & ROBERT L. FELIX, THE SOUTH CAROLINA LAW OF TORTS 313 (3d ed. 2004). In most design defect cases, plaintiffs offer expert testimony as evidence to establish their claim. Often design defect claims are also supported by evidence of similar incidents used to bolster plaintiff's design defect allegations. Given the complexity of the allegations involved in this case, Respondents relied on expert testimony to explain their claims and buttressed this testimony with evidence of what were claimed to be similar incidents. It is with this context in mind that we analyze the issues presented.

I. Expert Testimony

The jury and the trial court each have distinct roles and separate responsibilities that they must execute during a trial. The jury serves as the fact finder and is charged with the duty of weighing the evidence admitted at trial and reaching a verdict. The trial court, on the other hand, is charged with the duty of determining issues of law. As a part of this duty, the trial court serves as the gatekeeper and must decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law. Once the trial court makes a ruling that the particular evidence is admissible, then it is exclusively within the jury's province to decide how much weight the evidence deserves. Importantly, the trial court is never permitted to second-guess the jury in their fact finding responsibilities unless compelling reasons justify invading the jury's province. *See Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 692 (1995).

The admission of expert testimony is governed by Rule 702, SCRE, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge. Stated differently, expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge. Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions. *See* Rule 703, SCRE. On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training. *See* Rules 602 and 701, SCRE.

For these reasons, expert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. *See State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that the witness was improperly qualified as a forensic interviewing expert where the nature of her testimony was based on personal observations and discussions with the child victim). Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. *See Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) (observing that to be competent to testify as an expert, a witness must have acquired by reason of study or experience such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony). Finally, the trial court must evaluate the substance of the testimony and determine whether it is

reliable. *See State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 515, 518 (evaluating whether expert testimony on DNA analysis met the reliability requirements).

Expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability. Thus, only after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate. *See State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009) (observing that the "familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence"). It is against this backdrop that we analyze whether the trial court erred in admitting the challenged expert evidence.

A. Bill Williams' Testimony

Ford argues that the trial court erred in qualifying Bill Williams as an expert on cruise control diagnosis. We agree.

A person may be qualified as an expert in a particular area based upon knowledge, skill, experience, training or education. Rule 702, SCRE. In determining a witness's qualifications as an expert, the trial court should not have a solitary focus, but rather, should make an inquiry broad in scope. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008). The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject. *Wilson v. Rivers*, 357 S.C. 447, 452, 593 S.E.2d 603, 605 (2004). The qualification of a witness as an expert is within the trial court's discretion, and this Court will not reverse that decision absent an abuse of discretion. *Fields*, 376 at 555, 658 S.E.2d at 85.

During the motion *in limine* to determine whether Williams qualified as a cruise control expert, Williams testified that he had worked in the automotive industry as a trainer, consultant, software developer, and writer since the early 1980s and was currently conducting seminars to train automobile technicians who focus on the brake systems in vehicles. On cross-examination, Williams admitted that he had no professional experience working on cruise control systems prior to this litigation. He also admitted that he had not conducted any comparison of the Explorer's cruise control system to any other system and acknowledged that he had never taught or published papers on cruise control systems. The trial court ruled that Williams qualified as an expert in "the training and operation of the cruise control and brakes" and allowed him to testify as to "cruise control diagnosis."

In our view, there is no evidence to support the trial court's qualification of Williams as an expert in cruise control systems. Williams had no knowledge, skill, experience, training or education specifically related to cruise control systems. Rather, it appears he merely studied the Explorer's system just before trial, which he indicated in his testimony to the jury: "This is how I taught myself the [Explorer's] cruise control, or speed control system." While Williams may have been qualified as an expert in other aspects of automobile components, such as the brake system, the trial court failed to properly evaluate Williams' qualifications specific to cruise control systems. *Compare Wilson*, 357 S.C. at 452, 593 S.E.2d at 605 (holding that the trial court erred in refusing to qualify a medical doctor as an expert in biomechanics where the doctor had training in biomechanics, had been qualified as a biomechanics expert in other states, and had some educational background in biomechanics); *Lee v. Suess*, 318 S.C. 283, 457 S.E.2d 344 (1995) (holding that the trial court erred in failing to qualify a plastic surgeon as an expert in the field of family practice where the plastic surgeon served as a professor who provided instruction to family practitioner residents and where family practitioners referred their patients to him for diagnosis). Accordingly, we hold that the trial court erred in qualifying Williams as a cruise control expert.

Notwithstanding this error, to warrant reversal, Ford must show that it was prejudiced by the admission of this evidence. *See Fields* 376 S.C. at 557, 658 S.E.2d at 86. Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence. *Id.* (finding that the trial court's error in failing to qualify an expert was harmless error since the testimony would have been cumulative).

In this case, we do not believe that this error alone prejudiced Ford's defense. Williams' testimony essentially consisted of a description of the system accompanied by models and diagrams of the components. Moreover, the jury heard Ford extensively question Williams' qualifications on cross-examination regarding his knowledge of cruise control systems in an attempt to impeach his credibility on the subject. Furthermore, the trial court prohibited Williams from testifying to matters outside of his scope, specifically noting he could not testify as to electrical engineering matters.

Trial courts should be cautious in conferring an expert label upon a witness because juries may accord excessive or undue weight to "expert" testimony. In this case, however, we hold that the trial court's error in qualifying Williams as an expert in cruise control diagnosis did not prejudice Ford.

B. Dr. Anderson's Testimony

Ford argues that the trial court abused its discretion in admitting Dr. Anderson's expert testimony. Specifically, Ford claims that Dr. Anderson was not qualified to testify as to alternative designs and his theory regarding EMI as the cause of the sudden acceleration failed to meet the reliability requirements. We agree.

As a primary matter, we reject Respondents' argument that because Dr. Anderson presented technical evidence, as opposed to scientific evidence, his testimony did not have to meet the reliability requirements. The trial court must examine the substance of the testimony to determine if it is reliable, regardless of whether the expert evidence is scientific, technical, or other

specialized knowledge. *See White*, 382 S.C. at 270, 676 S.E.2d at 686 (holding that all expert evidence must satisfy Rule 702, both in terms of expert qualifications and reliability of the subject matter); *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (holding that in determining the admissibility of evidence pursuant to Rule 702, FRE, the same reliability requirements apply to all types of expert evidence).

Turning to the merits of Ford's argument, in order for Dr. Anderson's expert testimony to be admissible, the trial court had to find not only that Dr. Anderson was an expert based on his knowledge, skill, experience, training, or education in the field of EMI and its affect on automobiles, but also that the substance of his testimony was reliable. With regard to the reliability requirement, in *Council*, this Court listed several factors that the trial court should consider when determining whether scientific expert evidence is reliable:[3]

> (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.

Id. at 19, 515 S.E.2d at 517 (citing *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990)).

[3] The test for reliability for expert testimony does not lend itself to a one-size-fits-all approach. *See White*, 382 S.C. at 274, 676 S.E.2d at 688 (holding that the *Council* factors provided no useful analytical framework to evaluate the reliability of expert dog tracking evidence). However, in this case, Dr. Anderson's testimony was based on scientific principles and theories, and therefore, the *Council* factors are applicable and relevant to the reliability determination in this case.

We find that the trial court erred in admitting Dr. Anderson's testimony as to both an alternative feasible design and his EMI theory.[4] With regard to alternative feasible design, Dr. Anderson failed to meet Rule 702's fundamental requirement that the witness be qualified in the particular area of expertise. Dr. Anderson's background involved working with massive generators which have entirely different electrical wiring systems and different voltage levels. He had no experience in the automobile industry, never studied a cruise control system, and never designed any component of a cruise control system. Moreover, Respondents failed to show that the substance of his testimony that twisted pair wiring would have cured the EMI defect was reliable. Dr. Anderson declared that the twisted pair wiring would have prevented EMI but did not explain how twisted pair wiring could be incorporated in to a cruise control system and did not offer any model comparison. Furthermore, Dr. Anderson concluded that this design was economically feasible, but offered no evidence to support this conclusion. Thus, his testimony on this matter lacked any scientific basis and contained no indicia of reliability. Accordingly, we hold that the trial court erred in admitting this testimony because Dr. Anderson was not qualified to testify as to alternative designs to the Explorer's cruise control system and his testimony was not reliable.

Turning to the testimony regarding EMI and its effect on the cruise control system, initially we question whether Dr. Anderson was qualified as an expert on this subject. Again, Dr. Anderson had no experience with automobiles and specifically no experience with cruise control systems. In fact, Dr. Anderson had not even operated an automobile with a cruise control system before this litigation. Nonetheless, assuming Dr. Anderson was

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[4] In *Branham v. Ford Motor Co.*, Op. No. 26860 (S.C. Sup. Ct. filed August 16, 2010) (Shearouse Adv. Sh. No. 32 at 52), this Court adopted the Restatement 3rd approach, which uses the risk-utility test for a design defect claim. Under the risk utility test, a plaintiff must prove an alternative feasible design. Dr. Anderson's testimony was, in part, an attempt to prove Watson's claim using a risk-utility analysis by showing an alternative feasible design. Dr. Anderson's attempt failed for the reasons fully discussed above.

properly qualified as an expert in this area, we find that his testimony was not reliable. Dr Anderson first learned of sudden acceleration occurring in automobiles in 2000 after he was contacted by a television news station that was investigating automobile accidents. Dr. Anderson admitted that his theory had not been peer reviewed, he had never published papers on his theory, and he had never tested his theory. He also admitted that he would not be able to determine exactly where the EMI which he opined caused the cruise control to malfunction originated or what part of the system it affected. He further testified that it would not be possible to replicate the alleged EMI malfunction of a cruise control system in a testing environment. To support his theory that EMI caused the Explorer to suddenly accelerate, Dr. Anderson pointed to only one document, a 1975 National Highway Safety Transportation Administration (NHSTA) report concluding that EMI can cause a cruise control system to malfunction. However, the NHTSA issued superseding report in 1989, which specifically rejected the EMI theory.

In our view, there is no evidence indicating that Dr. Anderson's testimony contained any indicia of reliability. He had never published articles on his theory nor had he tested his theory. Importantly, Dr. Anderson admitted that it was not possible to test for EMI. Furthermore, although it is not a prerequisite in South Carolina that scientific evidence attain general acceptance in the scientific community before it is admitted, we find it instructive that not only has the underlying science not been generally accepted, Dr. Anderson's theory was rejected in the scientific community. *See Council*, 335 S.C. at 21, 515 S.E.2d at 518 (recognizing and taking in to consideration the fact that the science underlying DNA analysis evidence has been generally accepted in the scientific community in determining whether such evidence was reliable). Therefore, because there is no evidence in the record to show that the substance of Dr. Anderson's testimony was reliable, we hold that the trial court erred in admitting this testimony.[5]

[5] Several courts have excluded expert testimony regarding theory that EMI may cause a cruise control system to malfunction. *See Federico v. Ford Motor Co.*, 854 N.E.2d 448 (Mass. App. Ct. 2006) (upholding the trial court's decision to exclude testimony that EMI would cause malfunction); *Turker v. Ford Motor Co.*, 2007 WL 701046 (Ohio App. 2007) (affirming the trial

In our view, the trial court's error in admitting Dr. Anderson's testimony is largely based on solely focusing on whether he was qualified as an expert in the field of electrical engineering and failing to analyze the reliability of the proposed testimony.[6] Respondents did not offer Dr. Anderson to testify generally as to the electrical wiring of a circuit system in an automobile. Rather, Respondents sought to introduce Dr. Anderson's testimony to determine a fact in issue based on a scientific hypothesis. The trial court was thus required to examine the substance of the testimony for reliability, and in failing to make this threshold determination, the trial court erred as a matter of law in admitting Dr. Anderson's testimony.

We find that Ford was prejudiced by the admission of this testimony. The only evidence Respondents presented to support their theory that the vehicle was defective was Dr. Anderson's testimony. We also note that Respondents may not rely solely on the fact that an accident occurred to prove their products liability case under a negligence theory since South Carolina does not follow the doctrine of *res ipsa loquitur*.[7] *See Snow v. City of Columbia*, 305 S.C. 544, n.7, 409 S.E.2d 79, n.7 (Ct. App. 1991) (noting that South Carolina does not recognize the rule of *res ipsa loquitur*). Thus, in

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court's decision that expert testimony on EMI was unreliable); *Jarvis v. Ford Motor Co.*, 1999 WL 461813 (1999) (S.D. N.Y. 1999) (excluding the portion of the expert's testimony regarding EMI); *Baker v. Mercedes Benz of North America*, 163 F.3d 1356 (1998) (finding the trial court did not abuse its discretion in finding that plaintiff's expert testimony regarding EMI should be excluded).

[6] This is evident from the trial court's ruling: "[Dr. Anderson] does have [requisite] education, knowledge, experience, and would be of scientific help to the jury in this case . . . but he's going to be qualified as an expert in the field of electrical engineering."

[7] *Res ipsa loquitur* is a rebuttable presumption that the defendant was negligent where an accident is one which ordinarily does not occur in the absence of negligence.

the absence of any admissible evidence in the record to support their products liability claim, the jury impermissibly speculated as to the cause of the accident.

II. Evidence of Other Incidents

Ford argues that the trial court erred in admitting evidence of similar incidents involving sudden acceleration in Explorers. We agree.

Evidence of similar accidents, transactions, or happenings is admissible in South Carolina where there is some special relation between the accidents tending to prove or disprove some fact in dispute. *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005). This rule is based on relevancy, logic, and common sense. *Id*. A plaintiff must present a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue. *Id*. In *Buckman v. Bombardier Corp.*, the District Court set forth factors that a court should consider when admitting evidence of other incidents to support a claim that the present accident was caused by the same defect: (1) the products are similar; (2) the alleged defect is similar; (3) causation related to the defect in the other incidents; and (4) exclusion of all reasonable secondary explanations for the cause of the other incidents. 893 F. Supp. 547, 552 (E.D. N.C. 1995) (citing *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1332 (8th Cir. 1985)).

Respondents introduced the deposition testimony from a separate case of a former Ford employee who investigated a number of claims of unintended acceleration of Explorers driven in Britain. The former employee read from an email where he referenced "35 incidents that have been categorized as unexplainable" in which the vehicles suddenly accelerated. Additionally, Respondents presented three witnesses, one of whom testified by video deposition, who recalled incidents in which their Explorers suddenly accelerated and their cruise control would not disengage.

In our view, Respondents failed to show that the incidents were substantially similar and failed to establish a special relation between the

other incidents and Respondents' accident. First, the products were not similar because most of the other incidents involved Explorers that were made in different years from the Watson Explorer and were completely different models with the driver's seat located on the right side of the vehicle. More importantly, Respondents failed to show a similarity of causation between the malfunction in this case and the malfunction in the other incidents and failed to exclude reasonable explanations for the cause of the other incidents. Respondents only presented the testimony of the other drivers and did not present any expert evidence to show that EMI was a factor in the malfunction in the other incidents. Accordingly, this evidence was not relevant because Respondents failed to show that evidence of these incidents made the existence of the EMI defect in this case more probable. *See* Rule 401, SCRE (defining "relevant evidence" as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence); *see also Whaley*, 362 S.C. at 483-84, 609 S.E.2d at 300 (holding that evidence of other employee complaints and injuries should not have been admitted because the plaintiff failed to show that the injuries stemmed from the same or similar circumstances as the plaintiff's injuries).

Furthermore, we find that this evidence was highly prejudicial. Courts require a plaintiff to establish a factual foundation to show substantial similarity because evidence of similar incidents may be extremely prejudicial. *See id.* at 483, 609 S.E.2d at 300 (recognizing that evidence of other accidents may be highly prejudicial). Respondents' counsel highlighted this improper evidence in closing arguments and thereby possibly induced the jury to speculate as to other causes of the accident not supported by any evidence. For these reasons, we hold that trial court erred in admitting this evidence.

III. JNOV

Ford argues the trial court erred in denying its motion for judgment notwithstanding the verdict. We agree.

"When we review a trial judge's grant or denial of a motion for directed verdict or JNOV, we reverse only when there is no evidence to support the ruling or when the ruling is governed by an error of law. *Austin v. Stokes-Craven*, 387 S.C. 22, 691 S.E.2d 135, 145 (2010) (citing *Creech v. South Carolina Wildlife & Marine Res. Dep't*, 328 S.C. 24, 29, 491 S.E.2d 571, 573 (1997)).

We find the evidence submitted at trial was insufficient to support a verdict for Respondents and the evidence shows that Ford is entitled to a judgment as a matter of law. Even if the trial court did not err in qualifying Williams as a cruise control expert, in admitting Dr. Anderson's testimony, and in admitting evidence of similar incidents, the only reasonable inference that could have been drawn from the evidence presented at trial is that Respondents failed to establish, as a matter of law, that EMI caused an unintended acceleration which resulted in Respondents' accident and resulting injuries. Nonetheless, as even the dissent concedes, neither of Respondents' experts presented admissible testimony. Without such testimony, Respondents failed to present a case for products liability.[8] Therefore, Respondents did not present admissible evidence that the cruise control system of the vehicle at issue was defective or unreasonably dangerous.

Furthermore, the only reasonable inference that can be drawn from the evidence presented at trial is that Respondents failed, as a matter of law, to prove an alternative feasible design with respect to the vehicle's cruise control system. We find that, because the mere occurrence of an accident or existence of an alleged product malfunction does not establish the liability of a product manufacturer, the trial court erred by failing to enter a judgment in favor of Ford. Therefore, we reverse and enter a judgment in Ford's favor.

[8] Additionally, none of Respondents' evidence concerning similar incidents was admissible; thus, given the evidence presented at trial, liability could not have been found on any theory.

CONCLUSION

The trial court serves as the gatekeeper in the admission of all evidence presented at trial, and in making admissibility determinations, the trial court is required to make certain preliminary findings regarding admissibility requirements, such as qualification of experts, reliability of the substance of the testimony, and substantial similarity of alleged similar incidents, before a jury may hear the evidence. If these preliminary requirements are not met, as a matter of law, the trial court may not permit the jury to consider the evidence. In this case, we hold that those threshold admissibility requirements were not met, and therefore, the trial court erred in qualifying Williams as a cruise control expert, in admitting Dr. Anderson's testimony, and in admitting evidence of similar incidents. Finally, we find the evidence submitted at trial was insufficient to support a verdict for Respondents and the evidence shows that Ford is entitled to a judgment as a matter of law. Accordingly, we must reverse the jury's verdict against Ford and enter judgment in its favor.

WALLER, BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE PLEICONES: I concur in part and dissent in part. I do not agree with the majority's analysis of the expert witness issue involving Dr. Anderson, or its analysis of the admissibility of the evidence of other acceleration incidents. I nonetheless agree that Dr. Anderson should not have been qualified, and that the evidence of other incidents should not have been admitted. I respectfully dissent from that part of the majority opinion which holds that appellant was entitled to a judgment notwithstanding the verdict (JNOV).

First, the majority posits the trial judge's gatekeeper role with respect to expert testimony as consisting of these three parts:

1. Is the subject matter of the testimony beyond the knowledge of a lay person, thus requiring an expert to explain it?

2. Is the particular witness qualified as an expert in this field?

3. After evaluating the witness' testimony, is it reliable?

As explained below, I disagree with this framework when the subject of the expert testimony is scientific.[9]

I fundamentally disagree with the majority that the first gatekeeper function under Rule 702 is a determination whether the subject matter is beyond a lay person's knowledge and thus requires an expert to explain it. It is certainly true that some types of issues or evidence are *ipso facto* beyond the ken of a lay jury, and always require that the claim be supported by expert testimony. Classically, this is so where the issue is one of medical malpractice. E.g. Linog v. Yempolsky, 376 S.C. 182, 656 S.E.2d 355 (2008). There are myriad other areas, however, where both lay and expert testimony may be presented. See, e.g., State v. Pittman, 373 S.C. 527, 647 S.E.2d 144

[9] See State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) (scientific reliability factors not applicable to non-scientific experts).

(2007) (sanity); Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (Ct. App. 2007) (intoxication); Small v. Pioneer Machinery, Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997) (cause of throttle sticking). I therefore disagree with the majority to the extent it now holds that expert testimony is admissible only when it is "required" or "necessary" for the jury to understand evidence or an issue. See Rule 702 (expert witness may be called if testimony would assist the jury).

In my view, the proper gatekeeper role under Rule 702, SCRE, is that described in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999):

1. Is the underlying science reliable?

2. Is the expert witness qualified?; and

3. Would the evidence assist the trier of fact to understand the evidence or to determine a fact in issue?

Here, the underlying science involving the impact of electromagnetic interference (EMI) on electrical systems is reliable, and Dr. Anderson is qualified as an expert on that subject. I would hold, however, that his testimony fails the third prong of the Council test. In my view, Dr. Anderson's testimony did not assist the jury since he was unable to support his opinion that EMI was a probable cause of cruise control acceleration other than by reference to his own opinion. Cf. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (court not required to admit opinion evidence connected to event only by the expert's *ipse dixit*); see also Wilson v. Rivers, 357 S.C. 447, 593 S.E.2d 603 (2004) n. 5 (while witness was expert in field, question whether that science is "reliable" to determine this accident caused the plaintiff's injuries remained unaddressed by trial court).

I agree with the majority that the trial judge erred in exercising his gatekeeper function and permitting Dr. Anderson to testify since Dr. Anderson was unable to link EMI to the sudden acceleration, other than by reference to his own opinion. Wilson, *supra*; Joiner, *supra*. I do not agree,

however, with the majority's view that only an electrical engineer who was also an expert in automobile and/or cruise control systems would be competent to testify, or with its characterization of Dr. Anderson's testimony as lacking "reliability." I would confine the reliability issue to the underlying science, here, electrical engineering and the EMI phenomenon. See State v. Council, *supra* (first gatekeeper decision is whether the underlying science reliable as determined under the factors in State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990)).

I also agree with the majority's conclusion that the trial court erred in admitting the evidence of unexplained acceleration in other Ford Explorers. Unlike the majority, however, I do not see any meaningful distinction in either the year of manufacture or in the fact that the other models were right hand drive, since the relevant inquiry is whether the Explorers were equipped with identically engineered cruise control and electrical systems. Since, however, the only causal link between these accelerations and that alleged to have occurred here was that of Dr. Anderson's EMI theory, which should not have been admitted, I would hold that this evidence too was wrongfully admitted.

The majority holds the trial court erred in denying appellant's JNOV motion, holding that respondents failed to "prove[10] that the cruise control system…was defective or unreasonably dangerous." I note first this exchange between Dr. Anderson and respondents' attorney:

> Q. Do you believe that the electrical interference in the Watson accident was the cause of the sudden acceleration?
>
> A. Yes.

[10] I do not agree with the use of "prove" here, as the respondents need only have presented evidence from which the jury could find the cruise control system caused the accident, not have "proven" that it did to the exclusion of all other causes.

Q. And is that to a reasonable degree of engineering certainty?

A. Yes.

In my opinion, this is evidence in the record to support the trial court's denial of appellant's JNOV motion. See e.g., Amerson v. F.C.X. Coop. Serv., Inc., 227 S.C. 520, 88 S.E.2d 605 (1955) (in reviewing denial of directed verdict, all evidence (even that determined on appeal to have been erroneously admitted) must be considered); Gill v. Ruggles, 97 S.C. 278, 81 S.E. 519 (1914) (same).

As explained above, I agree that both witness Williams's testimony and that of Dr. Anderson should have been excluded. It was not, however, and the excerpt from Dr. Anderson's testimony alone refutes the majority's conclusion that there was no evidence in the record to support the jury's verdict. I would therefore reverse and remand.

Moreover, the following excerpt from the trial judge's written order denying appellants' JNOV reflect that the verdict was supported by more than the EMI theory alone:

> [Appellant] initially contends that the only reasonable inference to be drawn from the evidence is that the [respondents] failed to prove that electromagnetic interference (EMI) caused the sudden acceleration resulting in the subject accident and, therefore, failed to prove that the Watson Explorer was defective and unreasonably dangerous. This argument lacks merit. The [respondents] presented expert testimony that EMI could cause the Next Generation Cruise Control system installed on the Watson Explorer to make the vehicle suddenly accelerate, and that there were various sources of EMI in the Explorer, including internal sources which [appellant] failed to adequately guard against.[1]

> [1] [Respondents'] direct evidence of malfunction alone would be sufficient to support a verdict. Additionally, [respondents] presented direct expert testimony that the malfunction of the cruise control system was caused by EMI. The direct evidence of an EMI caused malfunction was also sufficient to support a verdict for [respondents].

[Respondents] further presented evidence of other similar incidents where Ford Explorer vehicles equipped with the same Next Generation Cruise Control system suddenly accelerated without any apparent cause. Finally, [respondents] presented substantial evidence from which the jury could have could have found that there was no cause for the sudden acceleration that caused the Watson accident, other than a malfunction of the Next Generation Cruise Control system. This evidence, viewed in the light most favorable to the verdict, was easily sufficient to support the jury's express finding that the Next Generation Cruise Control system was defective and unreasonably dangerous, and that it proximately caused Sonya Watson's injuries and Patricia Carter's death.[2]

> [2] [Respondents'] expert repeatedly testified that the cause of [respondents'] vehicle suddenly accelerating was EMI. This testimony was supported by the factual testimony that EMI would be corrected if the vehicle was turned off and upon restarting, the cause of the pedal depression would be corrected.

The Court rejects [appellant's] second claim that there is no evidence of a feasible alternative design. [Respondents'] expert testified that, prior to the manufacture and sale of the 1995 Explorer, the Next

Generation Cruise Control system could have been designed to reduce or eliminate its vulnerability to EMI, and that such design changes could have been made without impairing the utility of the cruise control, or unduly raising its cost. Additionally, [respondents'] experts testified as to the need for a design change that would stop the sudden acceleration once it occurred which was also supportive of the verdict. This evidence, viewed in light most favorable to the verdict, was easily sufficient to establish a feasible alternative design.

[Appellant's] third contention is that the evidence that the Next Generation Cruise Control system was defective and unreasonably dangerous was all inadmissible, irrelevant, and highly prejudicial. The admission of both lay and expert evidence, however, is left to the discretion of the trial judge. The Court carefully considered each item of evidence to which Ford raised objections and determined that the evidence was admissible. [Appellant] has raised no argument that persuades the Court that any error was made in the admission of evidence. Assuming arguendo that some of the similar accident evidence should have been excluded, however, the Court notes that the expert evidence alone was sufficient to sustain the jury verdict and, therefore, the admission of such evidence would not have been prejudicial to [appellant].

[Appellant's] fourth and fifth grounds for judgment nov fail as a matter of law. Viewed in the light most favorable to [respondents], the evidence presented was sufficient to eliminate all causes of the sudden acceleration other than an unreasonably dangerous design defect.[3]

[3] Ms. Watson expressly testified that she did not cause the sudden acceleration by keeping her foot on

> the accelerator and [respondents] presented expert and other evidence that the floor mat did not cause the sudden acceleration. The only remaining explanation for the sudden acceleration was a defect in the cruise control and the jury properly concluded that this must have been the cause of the sudden acceleration.

Accordingly, even if the jury rejected the expert's testimony, the circumstantial evidence was sufficient to support the verdict. [Respondents] were not required to prove a specific defect in the vehicle and could properly prove that the vehicle was defective and unreasonably dangerous using circumstantial evidence. St. Paul Fire and Marine Ins. Co. v. American Ins. Co., 251 S.C. 56, 59-60, 159 S.E.2d 921, 923 (1968) ("[a]ny fact in issue may be proved by circumstantial evidence as well as direct evidence, and circumstantial evidence is just as good as direct evidence if it is equally as convincing to the trier of the facts"); McQuillen v. Dobbs, 262 S.C. 386, 391-92, 204 S.E.2d 732 (1974) ("negligence may be proved by circumstantial evidence as well as direct evidence"); Restatement (Third) of Torts: Product Liability § 3 Comment c (1998) ("*No requirement that plaintiff prove what aspect of the product was defective*. The inference of defect may be drawn under this Section without proof of the specific defect").[4]

> [4] The Court emphasizes that this is an alternative ruling. The Court finds that [respondents] did in fact present evidence sufficient for the jury to find that a specific defect in the Explorer – the EMI interference which caused the acceleration – proximately caused the accident. With respect to the alternative ruling, however, the Court notes that [appellant's] reliance

> on cases recognizing that *a malfunction alone* is insufficient to send the case to the jury is misplaced. This case involved evidence of a malfunction *plus detailed evidence negating any cause of the sudden acceleration but a product defect.*

For the reasons given above, I would reverse and remand.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Anonymous Member of the South Carolina Bar, Respondent.

Opinion No. 26879
Heard August 4, 2010 – Filed September 13, 2010

ADMONITION

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

Elizabeth Van Doren Gray, and Amy L. B. Hill, both of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, Respondent was accused under Rule 7(a), RLDE, Rule 413 SCACR of having sexual relations with the wife of one of his clients, during the period of time in which he was representing the husband. The Office of Disciplinary Counsel (ODC) alleged, in formal charges, that this extramarital relationship created an impermissible conflict of interest between Respondent and his client under

1.7, SCRPC, Rule 407, SCACR.[1] Following a hearing, the Hearing Panel of the Commission of Lawyer Conduct (Panel) dismissed the Rule 1.7 charge. We disagree with the Panel's determination, and hereby admonish Respondent for his conduct. Additionally, for the benefit of the bar, we take this opportunity to address what we see as a treacherous area for attorneys.

FACTUAL/PROCEDURAL BACKGROUND

Respondent has been an upstanding member of this bar for thirty-seven years, and before this action was filed, had never run afoul of the Rules of Professional Conduct. Nevertheless, the Commission on Lawyer Conduct received a letter from an individual (Client) alleging an inappropriate sexual relationship between his wife, (Wife), and Respondent, whom he claimed was representing Client in three on-going legal matters at the time. As required by Rule 413, SCACR, ODC notified Respondent of the complaint and requested a written response to the allegations contained in Client's letter. Respondent admitted to having a social relationship with Wife, and also informed ODC that upon learning of Client's suspicions, Respondent had sent a letter to Client informing him of his intent to withdraw as counsel and enclosing three consent orders relieving him of further representation.

Thereafter, ODC replied to Respondent's response by requesting additional information, including the following: "Your letter states that you have socialized with Client's estranged wife beginning after your attorney-client relationship with her ended. Please provide this date." In answer, and upon the advice of counsel, Respondent stated that he had socialized with Wife sometime earlier that year. Subsequently, ODC sent a further letter, asking the more direct question: "Have you had sexual relations with

[1] ODC also formally charged a violation of Rule 8.1, SCRPC, Rule 407, SCACR, and the Hearing panel recommended an Admonition as to Rule 8.1(b). In light of our Admonishment on the Rule 1.7 charge, we decline to address the specifics of the alleged 8.1 violation. Similarly, we decline to address the appeal from ODC's motion to produce the entire attorney-client file kept by Respondent's initial counsel, as well as ODC's exceptions to the Panel's hearsay rulings.

[Client]'s wife." In reply, Respondent submitted a signed affidavit attesting that he engaged in sexual relations with Wife on one occasion, but had informed Client two days later that he could no longer represent him and had terminated all further communication with Wife. One week later, ODC gave Respondent notice that it had been authorized to conduct a full investigation into Client's allegations, specifically finding Rules 1.7, 1.8, and 8.4, SCRPC, Rule 407, SCACR relevant to its investigation.

In March of the following year, Respondent received notice from ODC of the filing of formal charges against him based on Client's complaint, as well as an allegation under Rule 8.1, SCRPC, Rule 407, SCACR that Respondent had been less than truthful initially with ODC's requests. Respondent replied by denying the allegations that he had violated the Rules of Professional Conduct. Additionally, in light of the new 8.1 charge, Respondent's attorney anticipated needing to perform the function of a fact witness at the hearing; therefore, Respondent retained new counsel in this matter.

Following a hearing, the Panel issued a report dismissing the Rule 1.7 charge, and recommending an Admonition for a Rule 8.1(b) violation. Both the ODC and Respondent appeal from the Panel's decision.

STANDARD OF REVIEW

"This Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record." *In re Thompson*, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000). "Although this Court is not bound by the findings of the Panel and Committee, these findings are entitled to great weight, particularly when the inferences to be drawn from the testimony depend on the credibility of the witnesses." *In re Marshall*, 331 S.C. 514, 519, 498 S.E.2d 869, 871 (1998). "However, this Court may make its own findings of fact and conclusions of law." *Id.*

LAW/ANALYSIS

ODC first objects to the Panel's dismissal of the Rule 1.7 charge on the grounds that a primary duty of loyalty and trust to a client is compromised by a sexual relationship with the spouse of the client. We agree.

Rule 1.7(a) provides:

> Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
> (1) the representation of one client will be directly adverse to another client; or
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

The Panel specifically stated it did not condone Respondent's conduct in this case, noting: "we find it morally inappropriate and ill-advised at best." However, the Panel found that sleeping with the spouse of a client did not constitute a *per se* violation of the Rules of Professional Conduct, and that in viewing the totality of this case, it did not believe Respondent's conduct rose to the level of a Rule 1.7 violation. We disagree.

The circumstances and facts of this case come dangerously close to an outright conflict of interest under Rule 1.7(a)(1). ODC maintains the Panel erred because it found Respondent's conduct to be morally inappropriate and ill-advised, yet still found the conduct did not rise to the level of a Rule 1.7 violation. We feel Respondent's actions, at the very least, created a "significant risk" that his representation of Client could be compromised due to his personal interest and interaction with Wife. Indeed, that significant

risk was realized in this case when Client objected to the relationship between Wife and Respondent, and Respondent ended the attorney/client relationship.

The practice of law is a laudable profession that should be held to the highest of standards; practicing law is a privilege. Respondent admits to a serious lapse in judgment in these circumstances, and rightly so. Sexual involvement with the spouse of a current client, while not expressly proscribed by the language of our Rules of Professional Conduct, unquestionably has the propensity to compromise the most sacred of professional relationships: that between an attorney and his or her client. Attorneys who engage in a sexual relationship with their client's spouse do so at their professional peril. Consequently, this Court alerts the bar, in addition to admonishing Respondent, that a sexual relationship with the spouse of a current client is a *per se* violation of Rule 1.7, as it creates the significant risk that the representation of the client will be limited by the personal interests of the attorney.

CONCLUSION/RECOMMENDATION

It is clear that Respondent understands and acknowledges the damage his conduct caused the attorney-client relationship in this case. Accordingly, we admonish Respondent for this conduct and the conflict of interest it caused, which is clearly a violation of Rule 1.7, SCRPC. In imposing this sanction, the Court is acutely mindful of Respondent's longstanding and untarnished professional record. Additionally, we caution the bar that henceforth, this type of conduct with the spouse of a current client will be considered a violation of our Rules of Professional Conduct.

TOAL, C.J., BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice R. Knox McMahon, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Transportation Insurance Company and Flagstar Corporation,
Carrier/Respondent,

v.

South Carolina Second Injury Fund, Appellant.

Travelers Insurance Company and Barclays American, Carrier/Respondent,

v.

South Carolina Second Injury Fund, Appellant.

Travelers Insurance Company and It's Fashion, Carrier/Respondent,

v.

South Carolina Second Injury Fund, Appellant.

Great American Insurance Co. and Yuasa Exide, Inc., Carrier/Respondent,

v.

South Carolina Second Injury Fund, Appellant.

Travelers Insurance Company
and Marc Knapp DBA, Carrier/Respondent,

v.

South Carolina Second Injury
Fund, Appellant.

Travelers Insurance Company
and All American Termite &
Pest, Carrier/Respondent,

v.

South Carolina Second Injury
Fund, Appellant.

Opinion No. 26880
Heard May 12, 2010 – Filed September 13, 2010

REVERSED

Latonya Dilligard Edwards, of Columbia, for Appellant.

Deborah Casey Brown and Kyle A. Hougham, both of Gallivan, White & Boyd, Jason Alexander Griggs, of Wilson, Jones, Carter & Baxley, and Vernon F. Dunbar, of Turner, Padget, Graham & Laney, all of Greenville; Stephen L. Brown, William L. Howard, and Russell G. Hines, all of Young, Clement & Rivers, of Charleston, for Respondents.

CHIEF JUSTICE TOAL: We granted South Carolina Second Injury Fund's (Fund) motion to transfer several appeals from the circuit court to this Court. We reverse the decisions of the South Carolina Workers' Compensation Commission.

FACTS/PROCEDURAL HISTORY

On June 20, 2007, the South Carolina General Assembly passed the Workers' Compensation Reform Act (Reform Act), which provides for the winding down of the Fund by June 30, 2013. *See* S.C. Code Ann. § 42-7-320(A) (Supp. 2009). Subsequent to the passage of the Reform Act, several carriers requested reimbursement for claims in which more than ten years had passed since the claimant was injured. The Fund denied reimbursement in those cases based on the general ten-year statute of limitations, which provides "[a]n action for relief not provided for in this chapter must be commenced within ten years after the cause of action shall have accrued." S.C. Code Ann. § 15-3-600 (2005). Carriers in the present action pursued reimbursement in cases in which more than ten years passed since claimant's date of injury.

Travelers Insurance Company (Travelers) insured four of the six employers involved in this action. The four employers insured by Travelers are Barclay's American, It's Fashions, All American Termite & Pest, and Marc Knapp.[1] Travelers is requesting reimbursement for claimants with the following dates of injury: December 19, 1989; July 18, 1994; August 19, 1996; and August 8, 1997. Travelers provided timely and proper notice to the Fund pursuant to South Carolina Code Ann. § 42-9-400 (Supp. 2009) in all four of these claims.

[1] The Fund believes Marc Knapp, It's Fashions, and All American Termite & Pest are no longer in business because no information was discovered on the Secretary of State's database for these businesses.

Transportation Insurance Company (Transportation) insures Flagstar Corporation and is seeking reimbursement for a claimant with a March 19, 1993 date of injury. Transportation provided proper notice of a possible claim to the Fund pursuant to section 42-9-400.

Great American Insurance Company (Great American) insures Yuasa Exide, Inc., which is now known as EnerSys Corporation. Great American is seeking reimbursement for a January 1, 1996 date of injury.[2] Great American provided proper notice of a possible claim to the Fund pursuant to section 42-9-400.

The cases referenced above have been adjudicated by the Workers' Compensation Commission, which ultimately determined the statute of limitations found in section 15-3-600 did not apply to reimbursement cases. The Fund appealed these cases to the circuit court. However, while the appeals were pending, the Fund sought review by this Court and we transferred the appeals from the circuit court to this Court.

ISSUES

I. Does the statute of limitations provision in section 15-3-600 apply to reimbursement cases pursued against the Fund?

II. When does time begin to accrue for claims brought under section 42-9-400?

III. Does laches apply such that the carriers outlined above are not entitled to reimbursement?

IV. Under section 42-9-400 is Yuasa Exide entitled to reimbursement?

[2] The commission found the date of injury to be January 24, 2001. January 1, 1996 is the Fund's position for the date of injury.

STANDARD OF REVIEW

Statutory interpretation is a question of law subject to de novo review. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) (citation omitted). "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Dunton v. S.C. Bd. of Exam'rs In Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) (citations omitted). The Administrative Procedures Act governs judicial review of the Workers' Compensation Commission's decisions. *See Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). This Court can modify the commission's decision in this case only if the Fund'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. *See* S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2009); *see also Shealy v. Aiken County*, 341 S.C. 448, 454-55, 535 S.E.2d 438, 442 (2000). "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 (citation omitted).

LAW/ANALYSIS

I. Statute of Limitations

The Fund argues the ten-year statute of limitations period outlined in section 15-3-600 applies to reimbursement cases brought pursuant to section 42-9-400. We agree.

"Statutes of limitations are not simply technicalities." *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). "Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Id.* (citation omitted). Statutes of limitations

relieve courts of the burden of trying stale claims of those who have slept on their rights. *See McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct. App. 1989). "The purpose of statutes of limitation is to ensure litigation is 'brought within a reasonable time in order that evidence be reasonably available and there be some end to litigation.'" *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 377 S.C. 217, 227, 659 S.E.2d 213, 218 (Ct. App. 2008) (quoting *City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 231, 599 S.E.2d 462, 464 (Ct. App. 2004)).

Section 15-3-600 is found in chapter 3 of title 15 which addresses "Limitations of Civil Actions." Section 15-3-600 states, "An action for relief not provided for in this chapter must be commenced within ten years after the cause of action shall have accrued." So that other unnamed civil actions were not excluded from having a limitations period, the legislature created this ten-year default statute of limitations provision for other causes of action not specifically enumerated in title 15. South Carolina Code Ann. § 15-3-20(A) (2005) provides, "Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute."

When reading a workers' compensation statute this Court will strictly construe its terms, leaving it to the legislature to amend and define any ambiguities. *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citation omitted). The text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will. *See id.* "If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning." *Strickland v. Strickland*, 375 S.C. 76, 88, 650 S.E.2d 465, 472 (2007) (citation omitted). "The Court will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation." *Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009) (citation omitted).

Section 42-9-400 is plain and unambiguous. Section 42-9-400(f) states in pertinent part:

> An employer or his carrier must notify the Workers' Compensation Commission and the Director of the Second Injury Fund in writing of any possible claim against the fund as soon as practicable but in no event later than after the payment of the first seventy-eight weeks of compensation. . . . Failure to comply with the provisions of this subsection shall bar an employer or his carrier from recovery from the fund.

This is not a statute of limitations, but a notice requirement. Moreover, there is no statute of limitations in title 42 that applies to claims for reimbursement. Reimbursement actions are actions "for relief not provided for in this chapter." S.C. Code Ann. § 15-3-600 (2005). Hence, sections 15-3-20(A) and 15-3-600 mandate that reimbursement actions must commence within ten years after the cause of action shall have accrued. If this were not so, then so long as the notice requirement of 42-9-400(f) was met, these actions could theoretically extend endlessly into the future, thwarting the intent of the legislature's passing of section 15-3-600.

In *Greenwood Mills, Inc. v. Second Injury Fund*, 315 S.C. 256, 433 S.E.2d 846 (1993), this Court rejected the contention that the two-year statute of limitations for employees' workers' compensation claims contained in S.C. Code Ann. § 42-15-40 (Supp. 2009) also governed claims for reimbursement. *Greenwood Mills*, 315 S.C. at 259, 433 S.E.2d at 848. The question presented in this case was not before the Court in *Greenwood Mills*. *Greenwood Mills* merely addressed whether section 42-15-40 applied to claims for reimbursement. We found that, on its face, section 42-15-40 was inapplicable to claims for reimbursement. *Id.* at 259, 433 S.E.2d at 847. The Court noted that section 42-15-40 "applies to claims for *compensation*, not *reimbursement*; it governs claims addressed to the *Commission* as opposed to those addressed to the *Fund*; it speaks to an *employee's* injury, not to an *employer's* notice of injury." *Id.* (emphasis in original). Like this Court did

in *Greenwood Mills*, we must apply the default statute of limitations according to its express terms. Because a reimbursement action is an "action for relief not provided for in this chapter" and there is no statute of limitations in title 42 that applies to claims for reimbursement, section 15-3-600 applies to claims for reimbursement. For these reasons, section 15-3-600 applies to claims for reimbursement, and the decisions of the Workers' Compensation Commission are reversed.

II. Accrual of Time

The Fund argues a cause of action for reimbursement accrues on the date of claimant's injury. We disagree.

The Fund contends there are three possible dates on which time starts to accrue: (1) date of claimant's injury; (2) date carrier provides notice to the Fund; and (3) when the underlying claims conclude. The date the claimant is injured is not the proper time because at that time, in most instances, carriers would not be aware of a possible claim to the Fund. We find the proper time for accrual to begin is the date notice is given to the Fund. By the time notice is given, carriers are aware of a possible claim and have up to 78 weeks after paying benefits to notify the Fund of a claim. Hence, a cause of action for reimbursement begins to accrue on the date a carrier provides notice to the Fund.[3]

III. Laches

The Fund argues that if the ten-year statute of limitation does not apply, the equitable doctrine of laches bars reimbursement in this case. We disagree.

"Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Elam v. S.C. Dep't of*

[3] The result in this case of accrual beginning when notice is provided is that Great American's claim is the only one that is not precluded by the running of the ten-year statute of limitations.

Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) (citations omitted). An unappealed ruling is the law of the case and requires affirmance. *See Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (citations omitted).

The Fund's laches claim against Flagstar is not preserved because it failed to plead laches and the full commission did not rule on it. The Fund's laches arguments against Barclay's American, Marc Knapp, and It's Fashions are not preserved because it did not raise laches in the courts below. The Fund's laches argument regarding Yuasa Exide is not preserved because the issue was not pled below and neither the single commissioner nor the full commission ruled on laches. The single commissioner made the following finding of fact in All American Termite & Pest's case, "The SIF waived any defense based on the equitable doctrine of laches by failing to assert the affirmative defense on their Form 55 or Form 58." The Fund failed to appeal the single commissioner's finding to the full commission; thus, it is the law of the case. In summary, the Fund's laches arguments are not properly before this Court either because the issue is not preserved or the issue was unappealed and is now the law of the case.[4]

IV. Yuasa Exide

The Fund contends Great American is not entitled to reimbursement because claimant's hypertension and liver failure did not preexist claimant's occupational exposure. We disagree.

The Fund failed to cite any authority for its position. Moreover, the half-page argument made by the Fund falls far short of overcoming the substantial evidence standard of review. Hence, the fund has abandoned this issue. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (issue deemed abandoned where appellant failed to provide arguments or supporting authority for his assertion); *Eaddy v. Smurfit-Stone*

[4] At oral argument there was much discussion regarding laches. While laches does not apply to any of the cases in this appeal, laches could certainly be applicable to cases where carriers seek reimbursement from the Fund.

Container Corp., 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.").

CONCLUSION

For the foregoing reasons, the decisions of the Workers' Compensation Commission are reversed.

KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion in which Acting Justice James E. Moore, concurs.

JUSTICE PLEICONES: I dissent in part and concur in part, and would affirm the decisions of the Workers' Compensation Commission (Commission) holding that S.C. Code Ann. § 15-3-600 (2005) is inapplicable to these reimbursement requests.

Chapter 3 of Title 15, entitled "Limitation of Civil Actions, "is concerned with the time periods, i.e. statutes of limitation, within which a 'civil action' can be commenced. A "civil action" within the meaning of Title 15 is brought in a court, and is "commenced when the summons and complaint are filed with the clerk of court…" S.C. Code Ann. § 15-3-20(B) (2005). See also Rule 2, SCRCP: "There shall be one form of action to be known as civil action"; compare McDowell v. S.C. Dep't of Soc. Serv., 304 S.C. 539, 405 S.E.2d 830 (1991) (administrative proceeding is a civil action for purposes of the attorney's fees statute once it reaches circuit court, but not while before agency). On the other hand, a claim for reimbursement from the Fund is made by written notice to the Commission and to the Director of the Fund. S.C. Code Ann. § 42-9-400(f) (Supp. 2009). I agree with the Commission that S.C. Code Ann. § 15-3-600, the default statute of limitations provision for civil actions, is irrelevant to the question whether carriers timely pursued their reimbursement claims from the Fund.

The majority also holds that it is following Greenwood Mills, Inc. v. Second Injury Fund, 315 S.C. 256, 433 S.E.2d 846 (1993) by applying "the default statute of limitations [i.e. § 15-3-600] according to its express terms." As I read Greenwood Mills, it holds that the statute of limitations found in S.C. Code Ann. § 42-15-40 did not apply to Fund reimbursement claims, but that those claims were timely so long as they are made within the period provided by S.C. Code Ann. § 42-9-400(f) (Supp. 2009).[5] Here, all the carriers gave proper and timely notice as required by § 42-9-400. In my opinion, Greenwood Mills does not support the majority's conclusion that a Fund reimbursement request is a "civil action" within the meaning of Title 15.

In light of my view that the Commission correctly found § 15-3-600 inapplicable, I would not reach the accrual issue. Moreover, I agree with the majority that neither the laches question nor the Yuasa Exide issue is preserved for our appellate review.

I concur in part and dissent in part.

Acting Justice James E. Moore, concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jean Holst, Individually and as Personal Representative of the Estate of William Edward Holst, Jr., Appellant,

v.

KCI Konecranes International Corporation a/k/a Konecranes Inc., KCI Special Cranes Corporation f/k/a KCI Konecranes VLC, and South Carolina State Port Authority a/k/a SCSPA, Defendants

Of Whom KCI Konecranes International Corporation a/k/a Konecranes Inc. and KCI Special Cranes Corporation f/k/a KCI Konecranes VLC are the Respondents.

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

Opinion No. 4736
Heard April 14, 2010 Filed September 8, 2010

AFFIRMED

Anne McGuinness Kearse, Kevin R. Dean, and T. David Hoyle, all of Mount Pleasant, for Appellant.

Stephen E. Darling, of Charleston, for Respondents.

LOCKEMY, J.: Jean Holst argues the circuit court erred in granting KCI Konecranes International Corporation a/k/a Konecranes, Inc. and KCI Special Cranes Corporation f/k/a KCI Konecranes VLC's (collectively, KCI) motion for summary judgment. Specifically, she maintains the circuit court erred in (1) improperly weighing evidence; (2) applying the improper legal standard regarding the role of industry custom; (3) applying legal standards from Sexton By & Through Sexton v. Bell Helmets, Inc., 926 F.2d 331 (4th Cir. 1991), Marchant v. Mitchell Distributing Co., 270 S.C. 29, 240 S.E.2d 511 (1997), and Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 464 S.E.2d 321 (Ct. App. 1995); and (4) granting summary judgment on her strict liability, negligence, and failure to warn causes of action. We affirm.

FACTS

William Holst was a checker at the Wando Welch Terminal of the South Carolina State Ports Authority (SCSPA) in Charleston. As a checker, Holst was responsible for identifying the containers needed for transport between the container yard and the ships. After identifying the correct containers for transport, Holst would instruct the crane operators to move and load the containers in the proper sequence. On July 5, 2004, Holst was working with Chad Swan, an employee of the SCSPA, who operated a KCI rubber-tired gantry crane (the crane). Swan was transferring containers from

a container pad onto trucks for transport.[1] Holst instructed Swan to move all of the containers in stacks two, three, and four of the pad. After Swan moved all of the containers out of stack two, he picked up the four containers from stack one and lowered them into stack two. Holst was standing in stack two and was crushed to death by the containers.

Swan testified he was unaware Holst was in the second stack when he grounded the containers from stack one. He further testified he did not have visibility of the ground in stack two from the operator's cab of the crane. Swan stated that while Holst did not instruct him to move the containers from stack one into stack two, it was protocol and a safety procedure to move the four containers out of stack one.

The crane was designed and manufactured by KCI Konecranes VLC Corporation, a Finnish company, and was purchased by the SCSPA in 1997. The crane was built according to the SCSPA's specifications and shipped to Charleston for erection. The SCSPA maintained the crane, and it was inspected by an independent consulting firm during its operation. The crane's operator's cab was designed to have as much glass as possible to increase visibility for the crane operator.

On February 18, 2005, Jean Holst, individually and as personal representative of the Estate of William Edward Holst, Jr., filed suit alleging negligence, breach of warranty, and strict liability for defective design against KCI.[2] On May 8, 2008, KCI filed a motion for summary judgment. KCI asserted there were no genuine issues of material fact as to the claimed defective and unreasonably dangerous condition of the crane. KCI also asserted additional grounds for summary judgment including comparative negligence and assumption of the risk. Holst maintained the crane was defectively designed because of visibility limitations from the operator's cab.

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[1] A container pad contains a truck lane and six stacks of containers, each with the potential of having four containers stacked on top of each other.

[2] Holst filed suit against Konecranes International Corporation a/k/a Konecranes, Inc. and the SCSPA. In November 2005, Holst amended her complaint to add KCI Special Cranes Corporation f/k/a KCI Konecranes VLC as a defendant.

Furthermore, Holst proposed mounting a closed-circuit video camera on the edge of the crane's trolley as a feasible design alternative to increase the operator's visibility. Holst also argued KCI failed to warn crane users about the crane's sight limitations.

The circuit court granted summary judgment, and determined Holst's defective design and failure to warn claims failed as a matter of law. The circuit court found there was no competent evidence the crane was negligently designed or that the crane's design did not meet consumer expectation or social utility tests. Furthermore, the circuit court concluded that Holst failed to present competent evidence that the warnings supplied by KCI were inadequate. The circuit court also noted Holst's proposed alternative design was not mandated, was not used on any rubber-tired gantry (RTG) crane operating in the world, and its absence did not make the crane unreasonably dangerous for its intended use. The circuit court did not address KCI's additional grounds for summary judgment. This appeal followed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard of review as the trial court under Rule 56(c), SCRCP. Companion Prop. & Cas. Ins. Co. v. Airborne Exp., Inc., 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App. 2006). "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Wilson v. Moseley, 327 S.C. 144, 146, 488 S.E.2d 862, 865 (1997). In ruling on a motion for summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. Id.

LAW/ANALYSIS

I. Weighing the Evidence

Holst argues the circuit court erred in weighing the evidence instead of finding that material questions of fact existed. Specifically, Holst maintains the circuit court improperly weighed conflicting testimony (1) as to whether

the crane was defective and unreasonably dangerous, (2) as to whether the crane complied with applicable standards, and (3) comparing the crane to other cranes on the market. We disagree.

A. Expert Testimony

In a product liability action under both negligence and strict liability theories, the plaintiff must establish "(1) that he was injured by the product; (2) that the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant; and (3) that the injury occurred because the product was in a defective condition unreasonably dangerous to the user." Allen v. Long Mfg. NC, Inc., 332 S.C. 422, 426, 505 S.E.2d 354, 356 (Ct. App. 1998). Furthermore, "to survive summary judgment, it is crucial that a plaintiff also demonstrate that a feasible, or workable, design alternative exists under the circumstances." Disher v. Synthes (U.S.A.), 371 F. Supp. 2d 764, 771 (D.S.C. 2005). "In determining whether an alternative design is practical or feasible, courts will look to see whether a risk-utility analysis has been conducted to weigh the benefits of any new design against the costs and potentially adverse consequences of the design." Id. at 771-72.

In support of her allegation that the crane was defectively designed, Holst relied on the opinions of two engineering experts. Dr. George Pearsall testified the crane was "unreasonably dangerous because the operator did not have an obstruction free visibility to see if anyone was below the load block even shortly before he dropped the load." Richard Leonard testified crane operators should have sight of the areas they are working over, and that it was feasible to mount a closed-circuit video camera on the crane's trolley to improve visibility. Furthermore, Pearsall concluded that if the crane had been equipped with a camera it would have been "much more likely that the operator would have seen Mr. Holst there and certainly would not have dropped the container on him." While Pearsall and Leonard both concluded that video cameras would increase visibility from the operator's cab, they conceded cameras would not eliminate the crane's blind spot. Pearsall and Leonard also admitted they knew of no other manufacturers that installed cameras on RTG crane trolleys, and they agreed the crane met industry

standards and regulations. Leonard also testified he had never seen an RTG crane operator's cab with greater visibility than the crane's cab.

We find the testimony offered by Holst's experts was not sufficient to prove the crane was defective and unreasonably dangerous. Neither Pearsall nor Leonard conducted a risk-utility analysis regarding their proposed design alternative. Not only did Pearsall and Leonard testify the proposed camera design would not eliminate the blind spot, they also failed to weigh the benefits of installing cameras against the costs and potentially adverse consequences. Moreover, Arun Bhimani and Allen Palmer, KCI's engineering experts, concluded the presence of video camera monitors in the crane operator's cab could distract operators and create a hazard. Because Holst failed to produce evidence of a feasible design alternative or that a risk-utility analysis was conducted, she cannot establish the crane was defective and unreasonably dangerous as a matter of law.

B. Applicable Standards

Holst contends the circuit court improperly weighed evidence when it determined KCI complied with the American Society of Mechanical Engineers (ASME) B30.2-1.5.1(b) standard. ASME B30.2-1.5.1(b) provides:

> The arrangement of the cab should allow the operator a full view of the load block in all positions. This is an important and desirable condition, but it is recognized that there are physical arrangements that may make this impossible, and, when the load block is in these positions, the operator shall be aided by other means such as, but not limited to, closed-circuit TV, mirrors, radio, telephone or a signalperson.

The circuit court determined KCI complied with this standard, and noted the crane's operator's cab was surrounded in glass and positioned below steel structures to give the operator an enhanced view. Furthermore, the circuit court found the operator had a full view of the load block in all

positions.[3] The circuit court noted that even assuming the load block was not visible, at least three other means were provided to aid the operator. Swan had access to a telephone, an intercom with a loudspeaker, and a two-way radio.

Holst also argues the crane did not comply with International Organization for Standardization (ISO) standards. Section 8566-1 of the ISO requires that crane operator cabs have "maximum visibility consistent with structural requirements and operational safety." Additionally, the ISO standards require cabs be "placed and the size and the location of the window openings so chosen as to allow the driver supervision of loading and of loads transfer operations from his seat. For some cranes this may necessitate provisions for moving or rotating the cab or other means." Here, while a blind spot prevented the crane operator from seeing the ground while lowering the containers, the operator had "other means" which allowed him to supervise the loading and transfer. The crane was equipped with a two-way radio, telephone, and intercom which allowed Swan to communicate with Holst. Thus, the circuit court did not err in finding KCI complied with applicable safety standards.

C. Other Cranes on the Market

Finally, Holst maintains the circuit court erred in improperly weighing the testimony comparing the crane to other cranes on the market. The circuit court determined "the uncontradicted testimony is that no crane on the market had better visibility from the operator's cab" than KCI's crane. Holst maintains Mi-Jack, another RTG crane manufacturer, produces a crane with a "variable elevating cabin" that moves up and down along the side of the crane instead of left and right on the trolley at the top of the crane. Holst notes Palmer testified that "in limited conditions" an operator in a cab that could move up and down "may have better visibility" than the operator of a cab that is fixed at the top of the trolley.

[3] The "load block" is the wires, hook, and spreader bar which attach to the top of the containers.

Leonard testified he had never seen an RTG operator's cab with greater visibility than the crane's cab. Furthermore, Holst failed to present evidence of how the Mi-Jack design would prove the design of the crane was defective. While Palmer testified the Mi-Jack crane "may have better visibility" in certain circumstances, the record does not contain any evidence that the Mi-Jack design eliminated the crane's blind spot. Moreover, Holst failed to provide evidence the Mi-Jack crane was similar enough to the crane to warrant a comparison. Accordingly, we find the circuit court did not improperly weigh testimony in determining the evidence in the record was insufficient to sustain Holst's claim that the crane was defective and unreasonably dangerous.

II. Industry Custom

Holst argues the circuit court erred in applying the wrong legal standard regarding industry custom in negligence and strict liability tort cases. Specifically, Holst alleges the circuit court based its grant of summary judgment on the crane's conformity with industry custom. We disagree.

The circuit court found a determination of whether or not a product was defective and unreasonably dangerous involved

> a balancing act to consider whether (1) the product sold must be dangerous to an extent beyond that which would be contemplated by the ordinary user who purchases it ("consumer expectation test") and (2) the danger associated with the use of the product outweighs the utility of the product ("social utility test").

(citing Bray v. Marathon Corp., 356 S.C. 111, 588 S.E.2d 93 (2003); Bragg, 319 S.C. at 544, 462 S.E.2d at 329). In its application of these tests, the circuit court considered industry standards and practices, the warnings provided by KCI, the operator cab's design compared to other cranes on the market, and the feasibility and utility of installing video cameras on the crane.

While the circuit court considered industry custom in determining Holst failed to produce competent evidence that the crane was defective and unreasonably dangerous, it was only one factor considered by the court. Because this court has given weight to conformity with industry custom, we find the circuit court did not err in considering conformity with industry custom as one factor in its analysis. See Bragg, 319 S.C. at 544, 462 S.E.2d at 329 ("While conformity with industry practice is not conclusive of the product's safety, the cases where a member of industry will be held liable for failing to do what no one in his position has ever done before will be infrequent.").

III. Court Cases

Holst argues the circuit court erred in applying inapplicable legal standards from Bell Helmets, 926 F.2d 331, Mitchell Distributing Co., 270 S.C. 29, 240 S.E.2d 511, and Bragg, 319 S.C. 531, 464 S.E.2d 321. We disagree.

In Bell Helmets, the Fourth Circuit Court of Appeals held the testimony of the plaintiff's expert in a Kentucky products liability case did not establish a defect, and therefore, the expert's testimony should not have been considered by the jury. 926 F.2d at 338. The expert in Bell Helmets proposed a design alternative for the subject helmet that would accommodate high and low impact accidents. Id. at 335. In making its ruling, the Fourth Circuit considered evidence that no other manufacturer in the industry had designed or manufactured a helmet like the expert's prototype helmet, and that the subject helmet conformed to industry standards. Id. at 333, 335. Holst argues the circuit court erred in relying on Bell Helmets because of Kentucky's rebuttable presumption statute. We disagree. The rebuttable presumption statute was not considered by the Fourth Circuit in its determination that the expert's testimony was insufficient for submission to the jury. In fact, the Fourth Circuit expressed its "puzzlement" over the need for a statute, and found the lower court did not err in failing to submit the statute to the jury because a defendant always carries a presumption in his favor when the burden of proof is placed on the plaintiff. Id. at 333.

Holst also contends the circuit court erred in relying on Mitchell. In Mitchell, our supreme court affirmed the lower court's grant of summary judgment in favor of a crane's distributor on the basis that the subject crane was not defective. 270 S.C. at 35-36, 240 S.E.2d at 513-14. In concluding the plaintiff offered insufficient evidence to establish a defect, the supreme court noted the absence of an optional safety device does not render a product defective unless the product is unreasonably dangerous without the device. Id. Holst argues that because KCI designed and manufactured the crane, Marchant v. Lorain Division of Koehring (Marchant II), 272 S.C. 243, 251 S.E.2d 189 (1979), not Mitchell, provides the applicable standard. In Marchant II, our supreme court reversed the trial court's grant of summary judgment against a crane manufacturer where there was evidence the manufacturer knew of the crane's tendency to double-block, and the manufacturer sold an optional anti-two blocking device. 272 S.C. at 245, 251 S.E.2d at 191. The court noted the affidavit of a design engineer was sufficient evidence to create a jury issue regarding whether the crane was unreasonably dangerous without the incorporation of a safety device. Id. at 247, 251 S.E.2d at 191-92. The design engineer stated that the two-blocking syndrome was predictable based on the crane's design. Id. Here, unlike in Marchant II where the crane's tendency to malfunction was documented, the evidence indicates that no such incident like the one which occurred in this case had ever occurred. Furthermore, in Marchant II, the manufacturer sold an optional safety device; while in this case, the video camera alternative proposed by Holst has never been used on a RTG crane. Moreover, evidence in the record establishes that the proposed video camera would not eliminate the crane's blind spot. Thus, viewing this case under the holding in Marchant II, we find Holst is not entitled to relief.

Holst also argues the circuit court erred in relying on dicta in Bragg to support the proposition that conformity with industry custom is an appropriate basis for granting summary judgment. In Bragg, the court considered the plaintiff's expert's testimony that no one in the industry had designed or manufactured the type of special disconnect couplings he proposed. 319 S.C. at 544, 462 S.E.2d at 329. The court affirmed the directed verdict and held that "conformity with industry practice is not conclusive of the product's safety," and "industry standards are relevant to show both the reasonableness of the design and that the product is dangerous

beyond the expectations of the ordinary consumer." Id. at 543-44, 462 S.E.2d at 328-29. We find the court's holding in Bragg was not dicta because conformity with industry custom was an issue before the court. See Nash v. Tindall Corp., 375 S.C. 36, 40, 650 S.E.2d 81, 83 (Ct. App. 2007) (holding dicta is a statement on a matter not necessarily involved in the case). Moreover, in the present case, the circuit court did not rely solely on conformity with industry custom in determining there was no competent evidence by which a reasonable jury could conclude the crane was defective. Conformity with industry custom was only one factor the circuit court considered in reaching its decision. Thus, the circuit court did not err in relying on Bragg.

IV. Summary Judgment

Holst argues the circuit court erred in granting summary judgment on her strict liability and negligence claims for defective design, and her negligence claim for failure to warn. We disagree.

A. Strict Liability

Holst contends the circuit court improperly granted summary judgment on her strict liability claim because Pearsall and Leonard testified the crane was defective and unreasonably dangerous. As discussed above, we find the circuit court properly determined KCI was entitled to summary judgment on Holst's strict liability claim.

B. Negligence – Defective Design

Holst argues genuine issues of material fact exist as to whether KCI exercised due care in designing the crane. "Under a negligence theory, the plaintiff bears the additional burden of demonstrating the defendant (seller or manufacturer) failed to exercise due care in some respect, and, unlike strict liability, the focus is on the conduct of the seller or manufacturer, and liability is determined according to fault." Bragg, 319 S.C. at 539, 462 S.E.2d at 326. Holst contends KCI did not consider (1) installing video cameras on its cranes, (2) placing the cab on any part of the crane other than the trolley, or (3) the "variable elevating cabin" manufactured by Mi-Jack.

We find Holst failed to present a material question of fact as to whether KCI exercised due care in designing the crane. Evidence in the record indicates KCI designed a crane cab which, compared to its competitors, greatly increased the crane operator's visibility. Pursuant to requests from its users that KCI increase the visibility from the operator's cab, KCI minimized the areas of the cab that did not contain glass and increased the height of the crane. Ilpo Hakala, the KCI engineer who designed the crane, testified the crane's operator's cab had increased visibility compared to its competitors. Moreover, Leonard testified he had never seen a RTG cab with better visibility than the crane's cab.

While Holst contends KCI was negligent because it did not consider installing video cameras on the crane, the undisputed evidence in the record is that the crane's blind spot cannot be eliminated. Holst's experts testified that even with a video camera, the crane's blind spot is unavoidable. Additionally, the crane's design included safety measures which allowed the operator to communicate with personnel on the ground in compliance with the ASME standard. The crane's cab had a full view of the load block as required by the ASME, and was equipped with a telephone, horn, and intercom to allow the operator to communicate with personnel on the ground. Furthermore, although Holst argues KCI was negligent in failing to consider the variable-elevating cabin of the Mi-Jack, there is no evidence in the record the Mi-Jack design would eliminate the crane's blind spot. Finally, the mere fact that a video camera and closed-circuit television system could have been installed on the crane does not establish a design defect. See Disher, 371 F. Supp. 2d at 770 (concluding every product on the market could be "made stronger" or "more safe," but the mere fact that the product could be stronger or safer does not establish a design defect or an unreasonably dangerous condition, as a matter of law).

C. Negligence – Failure to Warn

Holst also argues KCI was negligent in failing to warn users about the crane's blind spot. Holst argues KCI failed to conduct a formal training meeting with personnel from the SCSPA to disclose the crane's blind spots.

Furthermore, Holst argues the crane's Operation and Maintenance Manual (Manual) does not mention the blind spot.

> A supplier and manufacturer of a product are liable for failing to warn if they know or have reason to know the product is or is likely to be dangerous for its intended use; they have no reason to believe the user will realize the potential danger; and, they fail to exercise reasonable care to inform of its dangerous condition or of the facts which make it likely to be dangerous.

Livingston v. Noland Corp., 293 S.C. 521, 525, 362 S.E.2d 16, 18 (1987).

We find Holst's negligence claim for failure to warn fails because the evidence in the record reflects KCI provided proper warnings regarding the crane. KCI warned SCSPA personnel and other users about the dangers of working under the crane's hanging load in its Manual and in warning decals posted on the crane. Hakala testified the Manual warned users to "stay clear of spreader when in operation" and "do not stand under suspended load." Furthermore, "Danger" and "Hanging Load" warning decals were located at eye-level on the crane, and labels on the spreader bar warned users to "Stay Clear of Spreader When in Operation" and "Do Not Stand Under Suspended Load." Bhimani testified these warnings met industry standards and were consistent with the practices of other crane manufacturers. Because the evidence presented established that KCI warned users against working under the crane's hanging load, Holst's negligence claim for failure to warn fails.

CONCLUSION

Accordingly, the circuit court's grant of summary judgment is

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Franklin Hutson, Appellant.

v.

S.C. State Ports Authority, Employer, and State Accident Fund, Carrier, Respondents.

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

Opinion No. 4737
Submitted May 3, 2010 – Filed September 8, 2010

AFFIRMED IN PART AND REMANDED

Thomas M. White, of Goose Creek, for Appellant.

Margaret Mary Urbanic, of Charleston, for Respondents.

THOMAS, J.: This is a workers' compensation case. At issue in this appeal is the award to the claimant, Franklin Hutson, following his attainment of maximum medical improvement (MMI), that limited his recovery to correspond with a thirty-percent loss of use to his back. We affirm in part and remand this matter to the commission for further proceedings.[1]

FACTS AND PROCEDURAL HISTORY

In 1997, Hutson began working as a crane operator for the State Ports Authority (SPA). He had extensive prior experience in this line of work and attained an average weekly salary of $1,730. On October 21, 2004, Hutson was injured while attempting to remove a container from a ship. SPA admitted the injury and paid Hutson benefits.

In December 2004, Hutson began treatment with Dr. Stovall, an orthopaedic surgeon. On June 27, 2005, Dr. Stovall determined Hutson reached MMI and discharged him, noting that surgical intervention would not help him. Dr. Stovall assigned Hutson an impairment rating of ten percent of the whole person for his injury. He also noted that Hutson's permanent work restrictions would include lifting no more than thirty-five pounds on an occasional basis and no more than twenty-five pounds on a frequent basis, but otherwise opined that Hutson "should be able to carry on a moderate level of activity at medium work capacity."

On July 29, 2005, Hutson filed a request before the South Carolina Workers' Compensation Commission seeking continuation of his benefits. Hutson maintained he was permanently and totally disabled because of the effect of his injury on his back and right leg. On August 9, 2005, SPA filed a response denying Hutson was permanently disabled and admitting that only Hutson's back injury was compensable. On August 31, 2005, the State Accident Fund, on behalf of SPA, filed a Form 21 in which it sought to stop compensation on the ground that Hutson had reached MMI. The Fund also requested credit for overpayment of temporary total compensation.

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

When the matter first came before the single commissioner, Hutson had not yet completed the training at the South Carolina Vocational Rehabilitation Center that his vocational consultant had recommended. The matter was continued pending either Hutson's completion of the program or a determination that he was unable to undergo further training.

The single commissioner heard the matter on August 1, 2006. Hutson testified he was forty-four years old and had finished high school. He further testified he had studied business management, culinary arts, and food sanitation at Trident Tech, but never received a degree or certificate. For most of his adult life, he had worked as a crane operator, and the only other significant experience he had was work as a rigger. He was unable to return to either line of work under the restrictions that were imposed as a result of his injury. Hutson described at length how the pain he experienced from his injury affected his day-to-day living. He acknowledged that when he was twelve, his hand was injured when someone shot him with a high-powered rifle. The accident resulted in a loss of coordination and several unsuccessful surgeries, but did not affect his ability to perform his work as a crane operator before his accident.

Hutson also testified that, as his vocational consultant had recommended, he made several visits to Vocational Rehabilitation, but was not offered any type of education, training, or other help. Although Hutson estimated he made three visits, the single commissioner found the program was commenced and completed on October 9, 2005. Hutson stated he then made unsuccessful applications for positions in a variety of settings, including a grocery store, a plumbing company, and a landscaping business.

In response to questions from his attorney about his future plans, Hutson stated he wanted to start a business of his own and was looking into a restaurant business. He testified he had studied culinary arts and other food-related courses at Trident Tech, and his family had been in the restaurant business "all their lives." He further noted that cooking, a pursuit that he enjoyed, was "not as strenuous as manual labor," and surmised he could make

a decent salary if he could supervise others to work for him. The single commissioner himself questioned Hutson about his plans to pursue a career in the food service industry, asking Hutson if he was sure he could run a restaurant. Hutson answered he was "sure" he could, but was unable to say how much money he could earn. On redirect examination, however, Hutson testified that one reason he decided on a plan to open a restaurant was to try to move up to a higher income bracket.

By order dated January 11, 2007, the single commissioner found Hutson had reached MMI on June 27, 2005. The commissioner further found Hutson failed to prove a loss of earning capacity to qualify for compensation under the general disability statutes; however, he found Hutson suffered a thirty-percent loss of use to his back and awarded compensation for a scheduled loss. In addition, the Fund was awarded a credit for overpayment of temporary total benefits.

Hutson moved for reconsideration. The single commissioner held a second hearing, but declined to alter his ruling. Hutson appealed the single commissioner's decision to the appellate panel, which, in a 2-1 vote, affirmed the single commissioner. Hutson then petitioned for judicial review. Following a hearing on March 11, 2008, the court of common pleas affirmed the appellate panel's order.[2]

ISSUES

A. Was there substantial evidence to support a finding that Hutson was capable of running a restaurant and therefore could not receive compensation for partial disability?

B. Was the decision to limit Hutson's recovery to loss of use of his back an error of law?

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[2] In her order, the circuit judge noted the single commissioner assigned a thirty-percent impairment to the "whole person." The single commissioner, however, found Hutson suffered a thirty percent loss of use of his back.

C. Should the matter have been remanded to the commission for findings of fact regarding Hutson's current earning capacity or the extent of his injuries?

STANDARD OF REVIEW

"In workers' compensation cases, the Full Commission is the ultimate fact finder." DeBruhl v. Kershaw County Sheriff's Dep't, 303 S.C. 20, 24, 397 S.E.2d 782, 785 (Ct. App. 1990). "Our standard of review requires that we determine whether the circuit court properly found the Commission's findings of fact are not supported by substantial evidence in the record." Doe v. S.C. Dep't of Disabilities and Special Needs, 377 S.C. 346, 349, 660 S.E.2d 260, 262 (2008). "While a finding of fact of the commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it." Edwards v. Pettit Constr. Co., 273 S.C. 576, 579, 257 S.E.2d 754, 755 (1979). "Under the scope of review established in the APA, this Court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005).

LAW/ANALYSIS

A. Evidence of wage loss

In his order, the single commissioner noted that had Hutson not made assurances that he was capable of running a restaurant, he would have been found to be permanently and totally disabled. On appeal, Hutson does not take issue with the denial of compensation for total disability; however, he asserts he is entitled to recover for partial disability. We disagree.

Under the South Carolina Workers' Compensation Act, "a claimant may proceed under § 42-9-10 or § 42-9-20 to prove a general disability;

alternatively, he or she may proceed under § 42-9-30 to prove a loss, or loss of use of, a member, organ, or part of the body for which specific awards are listed in the statute." Fields v. Owens Corning Fiberglas, 301 S.C. 554, 555, 393 S.E.2d 172, 173 (1990).[3] "It is well-settled that an award under the general disability statutes must be predicated upon a showing of a loss of earning capacity, whereas an award under the scheduled loss statute does not require such a showing." Id. A reversal of the finding that Hutson could not recover under section 42-9-20, then, would require a showing by Hutson that the record lacked substantial evidence to support the appellate panel's determination that he failed to show a loss of earning capacity resulting from his injury. We hold, however, that there was substantial evidence in the record to support the finding that Hutson was capable of running a restaurant and that this finding in turn precluded an award under section 42-9-20.

On appeal, Hutson contends the only evidence to support the finding that he could run a restaurant was his own testimony, which he describes as "speculative." He further argues the commissioner and the appellate panel disregarded the only expert evidence in the record, namely, the written statement of his vocational consultant. We do not agree with these arguments.

First, as the South Carolina Supreme Court has stated: "[W]hile medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record." Tiller v. Nat'l Health Care

[3] Section 42-9-10 of the South Carolina Code (1985 & Supp. 2009) describes various criteria that satisfy the requirements for a finding that a claimant is totally disabled and the method for computing the compensation to which a totally disabled claimant is entitled. Section 42-9-20 of the South Carolina Code (1985) gives the method for computing compensation for partial disability. In section 42-9-30 of the South Carolina Code (1985 & Supp. 2009), the legislature provides a detailed schedule of varying time periods of compensation for particular injuries. This section was amended in 2007; however, the changes do not affect the merits of this appeal.

Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). We see no reason not to apply this rule to other expert testimony.

Moreover, we disagree with Hutson's position that the vocational consultant's opinion was the only expert assessment of his ability to work.[4] According to his notes, Dr. Stovall opined that Hutson "should be able to carry on a moderate level of activity at the medium work capacity" and assigned only weight-lifting restrictions. In addition, on the advice of his attorney, Hutson consulted another physician, who indicated that Hutson could return to work on light duty.

We also agree with the circuit judge that Hutson's testimony regarding his plans to work in the restaurant business was not speculative. Hutson stated (1) he had studied culinary arts and food sanitation at Trident Technical College; (2) his family had been in the restaurant business for many years, so he was aware of the demands of the work and the initial investment necessary to invest in an establishment; (3) since his release from treatment he had been working on the restaurant project, researching locations, getting menu selections, and pricing equipment; and (4) he could perform in a supervisory capacity as well as work the register. We do not believe that the fact that Hutson had never actually attempted to handle the day-to-day tasks of running a restaurant necessarily makes his statements speculative. Cf. Sellers v. Pinedale Residential Ctr., 350 S.C. 183, 191-92, 564 S.E.2d 694, 699 (Ct. App. 2002) (rejecting the employer's argument that evidence of the claimant's future earnings was too speculative, that evidence consisting of (1) the claimant's demonstrated interest, aptitude, and ability to

[4] Hutson may have misinterpreted the vocational consultant's opinion regarding his ability to work. In his brief, he asserts that the vocational consultant indicated that "upon successful completion of a vocational training program, . . . his earnings would be between $5.15 and $6.50 an hour." The consultant actually stated that without a vocational rehabilitation plan, she was "of the opinion that Mr. Hutson will encounter very significant difficulty re-entering the competitive job market and will be relegated to at or near minimum wage ($5.15 - $6.50 per hour)."

become an electrician, (2) his stated ambition to become a master electrician, and (3) his demonstrated work ethic).

Finally, we concur in the single commissioner's decision to emphasize the fact that the testimony about Hutson's ability to work in a restaurant came from Hutson himself, who had the burden of proving his case. Cf. Smith v. Michelin Tire Corp., 320 S.C. 296, 298, 465 S.E.2d 96, 97 (Ct. App. 1995) (affirming the denial of benefits for the claimant's alleged psychological problems even though she received benefits for permanent partial disability for a physical injury and noting "[t]he claimant has the burden to prove such facts as will render the injury compensable"). This emphasis seems especially appropriate considering the efforts by the single commissioner to allow Hutson to qualify or otherwise explain his testimony about his ability to pursue a career in the restaurant business. Moreover, Hutson also admitted he drove himself to the hearing and took care of his household chores. Although these admissions alone may not support a finding that he could manage a restaurant, they would not undermine it.

B. Limitation of Hutson's recovery to loss of use of his back

Hutson alleges error in the determination that his recovery should be limited to the loss of use of his back, pointing to statements by the single commissioner both during the hearing and in his order that he had intended to take into account his belief that Hutson's injury affected his right leg as well as his back and the combination of the two injuries would enable Hutson to recover under section 42-9-20 as well as section 42-9-30. As we have previously determined, the record has substantial evidence to support the appellate panel's finding that Hutson did not prove a loss of earning capacity that would enable him to receive compensation benefits under section 42-9-20. We agree with Hutson, however, that he may be entitled to additional compensation under section 42-9-30 for the symptoms he was experiencing with his leg after his accident.

Although "an award under general disability statutes must be predicated upon a showing of a loss of earning capacity, . . . an award under

the scheduled loss statute does not require such a showing." Fields, 301 S.C. at 555, 393 S.E.2d at 173. "An award under the scheduled loss statute, however, is premised upon the threshold requirement that the claimant prove a loss, or loss of use of, a specific 'member, organ, or part of the body.' " Id. at 556, 393 S.E.2d at 173 (quoting S.C. Code Ann. § 42-9-30(22) (Supp. 2009)). Although most of the reported decisions concerning claims for more than one scheduled injury focus on whether the claimant is eligible to recover under one of the general disability statutes, the South Carolina Supreme Court has expressed its approval of awarding compensation for multiple scheduled losses under section 42-9-30. See Lail v. Georgia-Pacific Corp. 285 S.C. 234, 236, 328 S.E.2d 911, 912 (1985) (reversing an award for loss of use of the hand and remanding the matter to the commission for factual findings regarding the percentage of loss of use of the thumb and third finger and referencing the "legislative plan providing scheduled amounts for loss of use of thumbs and fingers").

In his order, the single commissioner made a finding of fact that Hutson suffered radicular symptoms in his right leg that affected the functioning of the limb. He reiterated this finding when, in commenting on Hutson's assurances that he was capable of running a restaurant, he indicated that but for this testimony, he would have found Hutson to be permanently and totally disabled "with affects to the right leg." Given this finding, which neither the SPA nor the Fund has appealed, we hold Hutson has established at least a prima facie case for compensation for the injury to his leg pursuant to section 42-9-30 and remand the matter to the commission for further findings of fact on this matter based on the present record. See Sigmon v. Dayco Corp., 316 S.C. 260, 262, 449 S.E.2d 497, 498 (Ct. App. 1994) (noting that only the commission is authorized to make findings of fact in workers' compensation cases and remanding the matter to the commission for a determination anew based on the present record of the claimant's right to workers' compensation benefits).

C. Remand

Finally, Hutson argues the court of common pleas should have remanded the matter to the commission for findings of fact regarding his current earning capacity or the extent of his injuries. In view of our decisions to affirm the finding that he is not entitled to benefits under section 42-9-20 and to remand the issue of additional compensation for his leg injuries pursuant to section 42-9-30, we decline to address this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when its decision on a prior issue is dispositive).

CONCLUSION

We affirm the finding that Hutson failed to show a loss of earning capacity that would have entitled him to compensation under section 42-9-20 following his attainment of MMI. We hold, however, Hutson may be entitled to additional compensation under section 42-9-30 for injuries to his leg and therefore remand this case to the commission for further findings of fact on this issue.

AFFIRMED IN PART AND REMANDED.

FEW, C.J, and PIEPER, J., concur.