The Supreme Court of South Carolina

In the Matter of E. Pickens Rish, Respondent.

ORDER

The records of the office of the Clerk of the Supreme Court show that on December 15, 1955, E. Pickens Rish was admitted and enrolled as a member of the Bar of this State.

In a letter addressed to the Supreme Court of South Carolina, dated October 27, 2000, E. Pickens Rish submitted his resignation from the South Carolina Bar, effective October 29, 2000, as directed by this Court in In the Matter of Rish, 338 S.C. 462, 527 S.E.2d 360 (2000).

IT IS THEREFORE ORDERED that E. Pickens Rish shall, within fifteen days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State. In addition, his

name shall be removed from the roll of attorneys.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

November 21, 2000

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

December 9, 2000

ADVANCE SHEET NO. 42

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Estate of William D. Holden, Sr.:

William D. Holden, Jr., as Personal Representative for the Estate of William D. Holden, Sr., Petitioner,

v.

Zachary David Holden and Julia Lynn Holden, Minors, through their Guardian ad litem, Allan E. Fulmer, Jr., Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 25215
Heard October 31, 2000 - Filed November 27, 2000

In the Matter of the Estate of William D. Holden, Sr.

AFFIRMED

Daniel K. Felker of Law Offices of Daniel K. Felker, of Columbia, for petitioner.

James B. Richardson, Jr., of Richardson & Birdsong, and Allan E. Fulmer, Jr., of Columbia, for respondents.

JUSTICE BURNETT: This is a probate matter involving the validity of two disclaimers of interest in an estate and the validity of two documents revoking the disclaimers. The decision of the Court of Appeals is affirmed as modified.

FACTS

William Holden, Sr., (Father) died intestate on January 3, 1992. He was survived by his wife Julia S. Holden (Mother), two sons Petitioner William Holden, Jr., and Robert Holden (Sons), and one grandchild. A second grandchild was born within ten months of Father's death.

After Father's death, Sons filed disclaimers of their interests in Father's estate. In relevant part, the disclaimers state: "I hereby disclaim and renounce any interest in the estate and relinquish any claim I may have to it." Their attorney's letter accompanying the filing describes the disclaimers as "Disclaimers of the decedent's children in favor of the decedent's spouse." The personal representative subsequently distributed the proceeds of the estate to Mother.

After reviewing the estate's closing documents, the probate court informed the personal representative that, as a result of Sons' disclaimers, Respondents Zachary David Holden and Julia Lynn Holden (Grandchildren),

as Father's lineal descendants, may inherit a portion of the estate.[1] To avoid this unintended result, each Son executed a document entitled "Revocation and Withdrawal of Disclaimer" which provides, in part: ". . . [i]t was my intent in entering into this said Disclaimer and Renunciation of Interest to disclaim and renounce my intestate interest in favor of [Mother] . . . the spouse of [Father], so that she would become the sole heir of the Estate; . . .".[2]

The probate court appointed a guardian ad litem for Grandchildren and conducted a hearing to determine the validity of the disclaimers and revocations. The probate court held Sons' disclaimers were valid for federal tax law purposes and the revocations were ineffective. The court ordered 50% of the estate's assets distributed to Grandchildren.

The circuit court held the attorney's filing letter accompanying the disclaimers expressly provided Sons intended to direct their interest in the estate to their Mother. Concluding this intention was contrary to applicable provisions of the Internal Revenue Code, the circuit court held the disclaimers ineffective. In a two to one decision, the Court of Appeals held the disclaimers were valid and reversed the circuit court. Estate of Holden v. Holden, 336 S.C. 456, 520 S.E.2d 322 (Ct. App. 1999).

ISSUES

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[1]S.C. Code Ann. § 62-2-801(d) (1987) provides " . . . the disclaimed interest shall be transferred (or fail to be transferred, as the case may be) as if the disclaimant had predeceased the date of the effectiveness of the transfer of the interest; the disclaimer shall relate back to the date of effectiveness for all purposes . . . ". Where the transferor died intestate, the date of effectiveness of the transfer of the disclaimed interest is the date of the transferor's death. § 62-2-801(e)(1).

Under the intestacy statutes, one-half of the decedent's estate passes to the surviving spouse and one-half passes to the decedent's issue. § 62-2-102 (2). "Issue" is defined as all lineal descendants. § 62-1-201 (21).

[2]The revocations were filed almost thirteen months after the disclaimers were filed.

I. Did the Court of Appeals err by determining Sons filed valid disclaimers of their interest in their Father's estate?

II. Did the Court of Appeals err by failing to rule on Sons' additional sustaining ground that Sons effectively revoked their disclaimers?

III. Did the Court of Appeals err by refusing to apply equity principles to set aside the disclaimers?

DISCUSSION

The General Assembly established the statutory scheme for the disclaimer of property interests in South Carolina. Pate v. Ford, 297 S.C. 294, 376 S.E.2d 775 (1989) (discussing the predecessor statute to § 62-2-801). To disclaim an interest in property, a transferee must comply with that scheme. In the Matter of Will of Hall, 318 S.C. 188, 456 S.E.2d 439 (Ct. App. 1995). The General Assembly stated its intent in enacting the statutory scheme for disclaimers as follows:

> to clarify the laws of this State with respect to the subject matter hereof in order to ensure the ability of persons to disclaim interests in property without the imposition of federal and state estate, inheritance, gift, and transfer taxes. This provision is to be interpreted and construed in accordance with, and in furtherance of, that intent.

S.C. Code Ann. § 62-2-801(f) (1987).

Under the probate code, a person may disclaim an inheritance as follows:

> In addition to any methods available under the existing law, statutory or otherwise, if a person . . ., as a disclaimant, makes a disclaimer as defined in § 12-16-1910 of the 1976 Code, with respect to any transferor's transfer (including transfers by . . . intestacy. . .) to him of any interest in . . . property, . . . the

> interest . . . is considered never to have been transferred to the disclaimant.

S.C. Code Ann. § 62-2-801(a) (Supp. 1999).

Section 12-16-1910 addresses the effect of a disclaimer of property interests for purposes of estate taxes. It provides "if a person as defined in Section 62-2-801 makes a disclaimer as provided in Internal Revenue Code Section 2518 with respect to any interest in property, this chapter applies as if the interest had never been transferred to the person." § 12-16-1910 (Supp. 1999).

In relevant part, Internal Revenue Code § 2518 defines a "qualified disclaimer" for purposes of federal estate and gift tax laws as follows:

> (a) **General rule.** – For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.
>
> **(b) Qualified disclaimer defined.** – For purposes of subsection (a), the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property but only if –
>
> > **(1)** such refusal is in writing,
> >
> > . . .
> >
> > **(3)** [the disclaimant] has not accepted the interest or any of its benefits, and
> >
> > **(4)** as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either –

> **(A)** to the spouse of the decedent, or
>
> **(B)** to a person other than the person making the disclaimer.

26 U.S.C.A. § 2518 (1989) (underline added).

A United States Treasury Department regulation interprets Internal Revenue Code § 2518(b)(4) as follows:

> *Passage without direction by the disclaimant of beneficial enjoyment of disclaimed interest* - (1) *In general.* A disclaimer is not a qualified disclaimer unless the disclaimed interest passes without any direction on the part of the disclaimant to a person other than the disclaimant . . . If there is an express or implied agreement that the disclaimed interest in property is to be given or bequeathed to a person specified by the disclaimant, the disclaimant shall be treated as directing the transfer of the property interest.

26 C.F.R. § 25.2518-2(e)(1) (1998).[3]

"The requirement that the disclaimed property pass "without any direction" from the person making the disclaimer means that the disclaimer must result in a valid passing of the disclaimed interest . . . by operation of state law." DePaoli v. Comm'r, 62 F.3d 1259, 1260-61 (10th Cir. 1995); see Estate of Lute v. U.S., 19 F.Supp.2d 1047 (D. Neb. 1998); Estate of Gorre v. Comm'r, T.C. Memo. 1994-331 (1994). The "without any direction" requirement is satisfied "only if the interest passes to the ultimate recipient by virtue of the instrument of transfer or by operation of law; it prevents the disclaimant from designating a beneficiary." 5 Boris I. Bittker and Lawrence Lokken Federal Taxation of Income, Estates & Gifts § 121.7.6 (2nd ed. 1993);

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[3]But see Treas. Reg. 25.2518-2(e)(4) (the "without direction" requirement is not violated by precatory language in the disclaimer naming the takers of disclaimed property if the language has no effect under local law).

see In re Estate of Lyng, 608 N.W.2d 316 (S.D. 2000) (by directing the destination of attempted disclaimed assets, the alleged disclaimant demonstrates acceptance rather than rejection of the property).

In addition, a qualified disclaimer must also meet any state law requirements. Delaune v. U.S., 143 F.3rd 995, 1001 (5th Cir. 1998) ("[T]he clear terms of § 2518(b)(4) necessarily require the disclaimer itself be valid under state law, because only in such a situation can it be said that the interest passes 'as a result of the refusal' and 'without any direction on the part of the person making the disclaimer'."); Estate of Bennett, 100 T.C. 42, 67 (1993) ("[T]here must be a valid passing of an interest under State law requirements before a valid passing of an interest can be considered to have occurred for Federal estate tax law purposes.");[4] see United States v. Irvine, 511 U.S. 224, 237-38 (1994) (". . . although state law creates legal interests and rights in property, federal law determines whether and to what extent those interests will be taxed.").

I.

Sons argue the Court of Appeals erred by holding their disclaimers met the requirements of qualified disclaimers under I.R.C. § 2518(b)(4). Specifically, Sons argue their intention to direct their interests is apparent from 1) their attorney's filing letter accompanying the disclaimers, 2) the fact that two of the three heirs disclaimed their interest, indicating an intent to direct the disclaimed interest in favor of the third heir, and 3) their revocations once they realized the disclaimers might not transfer their interests to Mother. They assert each of these factors suggest an implied agreement to disclaim their interests in favor of Mother, that parol evidence of these factors was properly admitted without objection before the probate court, and that their disclaimers are ineffective. We disagree.

A.

[4] But see 26 U.S.C.A. § 2518(c)(3) (a written transfer of the transferor's entire interest to someone who would have received the property pursuant to state law had the transferor made a qualified disclaimer is treated as a qualified disclaimer).

"The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary or explain the written instrument." Gilliland v. Elmwood Properties, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990). Where a written instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and meaning of the parties. Penton v. J.F. Cleckley & Co., 326 S.C. 275, 486 S.E.2d 742 (1997).

The parol evidence rule is a rule of substantive law, not a rule of evidence. Accordingly, admission of evidence violating the parol evidence rule is legally incompetent and should not be considered even if no objection is made at trial. Penton v. J.F. Cleckley & Co., supra; Muckelvaney v. Liberty Life Ins. Co., 261 S.C. 63, 198 S.E.2d 278 (1973).

The express language of Sons' written disclaimers is unambiguous. The disclaimers do not direct the transfer of Sons' interests in Father's estate. It is undisputed that, based on the written disclaimers alone, Sons' interests pass by operation of state law (the descent and distribution statutes) to Grandchildren as lineal descendants of Father. See Footnote 1.

Neither Sons' attorney's letter filed with the disclaimers nor the fact that two of the three intestate heirs filed a disclaimer (suggesting a desire to direct their interests to the third heir) were admissible to explain or contradict the written disclaimers. Both factors are extrinsic evidence created contemporaneously with or prior to the written disclaimers. Gilliland v. Elmwood Properties, supra. Even though Grandchildren failed to object to this parol evidence, the evidence is nonetheless incompetent. It would have been improper for the probate court to consider the evidence to contradict or explain the disclaimers. Penton v. J.F.Cleckley & Co., supra.

Finally, Sons' revocations thirteen months after the filing of their disclaimers are not parol evidence. Nonetheless, the revocations were not proper evidence of Sons' intent in filing the disclaimers. The revocations were filed to correct Sons' mistake of law. Since equity will not correct a mistake of law, See Discussion III, it would have been improper to consider the

revocations as evidence of Sons' intent in filing the disclaimers in the first instance.[5]

Since Sons offered no competent evidence that they directed their interests in favor of Mother, the disclaimers met the requirements of I.R.C. § 2518(b)(4), and their interests passed to Grandchildren by operation of state law.

B.

Sons rely heavily on the second sentence of Reg. § 25.2518-2(e)(1) in support of their argument that they impliedly agreed to direct their disclaimed interests to Mother. This portion of the regulation is inapplicable in this case.

According to a federal estate taxation treatise, the second sentence of the regulation means, in relevant part, "the disclaimant is deemed to designate the beneficiary if the initial taker of the disclaimed property agrees, either expressly or impliedly, to give or bequeath it to a person specified by the disclaimant." Bittker and Lokken Federal Taxation of Income, Estates & Gifts § 121.7.6, supra.

The second sentence of Reg. § 25.2518-2(e)(1) is inapplicable to the present case. The second sentence of the regulation applies to a disclaimant who directs subsequent transfers of his interest through either express or implied agreements with the initial taker. There was no evidence Sons had an agreement with Grandchildren to pass their inherited interests to Mother.

Instead, the first sentence of the regulation which states "a disclaimer is not a qualified disclaimer unless the disclaimed interest passes

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[5]Sons argue two alternative theories. First, they assert the revocations were not necessary to cancel the disclaimers but to establish the disclaimers were invalid. Second, they claim the revocations were necessary to cancel the valid disclaimers. See Discussion II.

without any direction on the part of the disclaimant . . .", is applicable. As Sons presented no competent evidence establishing they directed their interests to Mother, their disclaimed interests passed by operation of state law. The Court of Appeals properly held Sons executed qualified disclaimers pursuant to I.R.C. § 2518, S.C. Code Ann. § 62-2-801(a), and S.C. Code Ann. § 12-16-1910.

II.

Sons assert the Court of Appeals erred by failing to consider and rule on the validity of their revocations as an additional sustaining ground. We disagree.

Since the Court of Appeals held Sons' disclaimers were disclaimers within the meaning of § 12-16-1910, it necessarily concluded the disclaimers were irrevocable. As mentioned above, a person may make a disclaimer as defined in § 12-16-1910. Section 12-16-1910 requires the disclaimer to meet the terms of a qualified disclaimer as set forth in I.R.C. § 2518. I.R.C. § 2518 mandates the disclaimer be irrevocable. 26 C.F.R. § 2518(b). Because South Carolina adopts the federal definition of qualified disclaimer for purposes of its own disclaimer statute, it requires a disclaimer to be irrevocable. Having found Sons' disclaimers were qualified disclaimers, the Court of Appeals also found the disclaimers were irrevocable. See Northwestern Nat'l Cas. Co. v. Doucette, 817 S.W.2d 396 (Tx. App. 1991) (attempted revocation of otherwise valid disclaimer was ineffective where probate statute defined disclaimer as irrevocable). While the Court of Appeals *could* have ruled on Sons' revocation argument as an additional sustaining ground,[6] Sons suffered no prejudice as the court would have specified the disclaimers were irrevocable.

III.

Sons argue the Court of Appeals should have applied equity principles to set aside their disclaimers. We disagree.

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[6]Sons' additional sustaining ground was raised in their brief to the Court of Appeals.

A proceeding in probate court may either be an action at law or in equity. Matter of Howard, 315 S.C. 356, 434 S.E.2d 254 (1993). Whether the action is one at law or in equity is determined by the nature of the pleadings and the character of the relief sought. Bell v. Mackey, 191 S.C. 105, 3 S.E.2d 816 (1939). In that Sons want to cancel their disclaimers, this is an equitable matter. Smith Companies of Greenville, Inc. v. Hayes, 311 S.C. 358, 428 S.E.2d 900 (Ct. App. 1993) (action for cancellation of instrument is action in equity); see also DuPont v. Southern Nat'l Bank of Houston, 288 S.C. 312, 342 S.E.2d 590 (1986) (action alleging mistake is action in equity).

"[E]quitable relief is available where the parties acted under a mistake of fact going to the essence of the particular transaction, but not if the mistake was one of law." 27A Am. Jur. 2d Equity § 7 (1996); Smothers v. U.S. Fidelity and Guar. Co., 322 S.C. 207, 470 S.E.2d 858 (Ct. App. 1996) (a court of equity will not, in the absence of fraud or undue influence, grant relief from the consequence of a mistake of law). "[R]elief will not be granted where the complaining party took measure to secure knowledge as to the state of the law and, being misinformed, placed himself in the prejudicial situation of which he later complains. Everyone is presumed to have knowledge of the law and must exercise reasonable care to protect his interests." Id. S.C. at 210-211, S.E.2d at 860.

A mistake of fact is defined as "an unconscious ignorance or forgetfulness of a material fact, past or present, or of a mistaken belief in the past or present existence of a material fact which did or does not actually exist." 27A Am. Jur.2d Equity § 10. Unlike ignorance of the law, ignorance of facts does not "import culpable negligence, since no person can be presumed to be acquainted with all matters of fact . . . ". Id.

"A mistake of law occurs where a person is well acquainted with the existence or nonexistence of facts, but is ignorant of, or comes to an erroneous conclusion as to, their legal effect." 27A Am. Jur.2d Equity § 15.

Sons' execution of the disclaimers was not the result of a mistake of fact. Sons were fully aware of all facts (they were aware of the existence of at least one of the Grandchildren at the time they filed the disclaimers), but they did not realize the legal consequences of their disclaimers. Sons' error

was a mistake of law and is not subject to equitable relief. Webb v. Webb, 301 S.E.2d 570 (W. Va. 1983) (son's error in executing disclaimer of interest by intestate succession in an attempt to vest title to his share of the estate in decedent's widow was mistake of law and could not be set aside on grounds of mistake).

The decision of the Court of Appeals is **AFFIRMED.**

MOORE, A.C.J., WALLER, PLEICONES, JJ., and Acting Justice L. Henry McKellar, concur.

The Supreme Court of South Carolina

In the Matter of Francis
A. Humphries, Jr., Respondent.

O R D E R

By order dated September 20, 2000, respondent was placed on interim suspension because he had been indicted on one count of violating 18 U.S.C. § 1623 by knowingly making false declarations while testifying under oath before a Grand Jury on the United States in the District Court of South Carolina. On November 17, 2000, the United States District Court, District of South Carolina, granted respondent's motion for judgment of aquittal. Respondent has now filed a petition in which he seeks to be reinstated to the practice of law. The petition is granted.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina
November 22, 2000

The Supreme Court of South Carolina

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, the attached Rule 420, SCACR, Chief Justice's Commission on the Profession, is adopted and the attached Regulations for the Commission are approved.

Rule 420, SCACR, and the Regulations shall be effective immediately.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

November 22, 2000

RULE 420
CHIEF JUSTICE'S COMMISSION ON THE PROFESSION

(a) Purpose. The Chief Justice's Commission on the Profession is created in recognition of the need for the emphasis upon and encouragement of professionalism in the practice of law.

(b) Membership. The Commission's chairperson will be the Chief Justice or the Chief Justice's designee. The Chief Justice will appoint the Commission's other members as follows.

(1) State Judges: Two Circuit Court Judges, two Family Court Judges; and two additional judges from either the state appellate or trial bench.

(2) Practicing Lawyers: Seven practicing lawyers, giving due regard for diversity of representation, nominated by the Board of Governors of the South Carolina Bar.

(3) Law School Faculty: Two members of the faculty of the University of South Carolina School of Law.

(4) Instructor/Administrator: One person who is involved in the instruction of legal assistants, is involved in instruction at the undergraduate or technical college level, or serves as a law office administrator.

In addition, the Chief Justice may extend an invitation to serve on the Commission to a U.S. District Court Judge from the District of South Carolina.

(c) Responsibilities. The Commission shall ensure that the practice of law remains a high calling which serves clients and the public good. Its major responsibilities are:

(1) To monitor and coordinate South Carolina's professionalism efforts in the bar, the courts and the law school;

(2) To monitor professionalism efforts in other jurisdictions;

(3) To plan and conduct symposiums, seminars, and other meetings on professionalism;

(4) To ensure the presence of a professionalism component in Bridge the Gap;

(5) To make recommendations to the Court, the South Carolina Bar, voluntary bar associations and the law school concerning additional means by which professionalism can be enhanced;

(6) To receive and administer grants and to make expenditures therefrom as the Commission shall deem prudent; and

(7) To receive and respond to inquiries concerning professionalism from the judiciary and the bar. The Commission shall have no authority to respond to complaints within the province of the Commission on Lawyer Conduct or the Commission on Judicial Conduct.

(d) Commission Regulations. Regulations may be promulgated by the Court or the Commission. Regulations will be effective only upon approval of the Court.

REGULATIONS FOR THE CHIEF JUSTICE'S COMMISSION ON THE PROFESSION

I. SCOPE

These regulations implement Rule 420, SCACR. The purposes of the Chief Justice's Commission on the Profession shall be as set forth in Rule 420(c).

II. MEMBERSHIP

A. The membership is defined in Rule 420(b). Members will serve for a term of three years provided, however, that initial appointments and subsequent appointments may be for terms less than three years to accomplish staggered terms.

B. Termination of membership of a member other than upon completion of a term will be upon resignation of that member or upon vote of two-third's of the other members and approval of the chairperson.

III. OFFICERS AND COMMITTEE CHAIRPERSONS; STAFF

A. The chairperson may designate officers and committee chairpersons as needed.

B. The Commission is empowered to hire or contract for staff as it deems necessary.

IV. MEETINGS; QUORUM; VOTING

A. The Commission will meet at least twice annually at the call of the chairperson. Notice of the time and place will be given at least two weeks in advance of the meeting. The meeting may be convened by telephone conference call, videoconference or Internet conference.

B. At all meetings eight members will constitute a quorum. The latest edition of Robert's Rules of Order will govern proceedings.

C. Voting may be in person, by proxy, by letter, by telephone, by fax or by email. Any matter or proposition will not be action of the Commission without affirmative vote of at least seven members.

VI. EFFECTIVE DATE; DISSOLUTION

A. These regulations will be effective upon adoption by the Court.

B. Upon dissolution of the Commission all assets will revert to the Supreme Court of South Carolina.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joseph Lee Quinn,

Appellant,

v.

The Sharon Corporation, Sharon Quinn, Dennis Baker,

Respondent.

Appeal From Greenville County
Charles B. Simmons, Special Circuit Court Judge

Opinion No. 3262
Submitted October 9, 2000 - Filed November 27, 2000

AFFIRMED

J. Falkner Wilkes, of Meglic & Wilkes, of Greenville, for appellant.

D. Denby Davenport, of Greenville, for respondent.

HUFF, J.: Joseph Lee Quinn brought an action against the Sharon Corporation, his daughter, Sharon Quinn, and Sharon's husband, Dennis Baker, seeking affirmation of his ownership of all of the issued and outstanding stock of the Corporation, damages, attorney's fees and court costs against Sharon and

Baker, and judgment of $272,330.82 on a promissory note. From an order granting the Corporation, Sharon, and Baker summary judgment, Joseph appeals.[1] We affirm.

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear 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, 488 S.E.2d 862 (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.

FACTUAL/PROCEDURAL BACKGROUND

Viewing the record in the light most favorable to Joseph, the record reveals the following facts. In August, 1976, Joseph organized the Corporation, to which he conveyed most or all of his land and wealth. All of the 10,000 issued and outstanding shares of the Corporation were issued to Joseph. In accordance with his estate plan, Joseph transferred his shares of the Corporation to Sharon. Sharon was elected to all offices of the corporation at one time or another. Joseph stated in an affidavit that he explained to Sharon that he would remain the sole owner of the Corporation and she would have no interest in the Corporation until his death.

Until 1986, Joseph kept all the certificates of shares in his bank safety deposit box, to which Sharon had access. In 1986, Sharon removed the certificates from the safety deposit box. Joseph filed a lis pendens to prevent Sharon from conveying any of the corporation's property. As a result of the dispute with her father, Sharon endorsed the shares in blank. Joseph stated he then returned the shares to his safety deposit box. In either 1990 or 1991, Joseph delivered the certificates to the Corporation's accountant in order to keep them with the corporate records. After a medical scare in 1996, Joseph informed

[1] Joseph does not challenge the trial court's holding that his action on the promissory note is barred by the statute of limitations.

Sharon of the location of the certificates and Sharon retrieved them from the accountant. Joseph instructed Sharon to put the certificates back in his safety deposit box, but she failed to do so. In October of 1996, Joseph attempted to terminate the employment of Sharon's husband, Dennis Baker. Thereafter, Sharon assumed control over the Corporation. Joseph filed the present action on November 19, 1996.

LAW/ANALYSIS

Joseph argues the trial court erred in granting the Respondents summary judgment on his claims. We disagree.

The supreme court expressly adopted the doctrine of judicial estoppel, as it relates to matters of fact, in the case of Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997). The doctrine precludes a party from adopting a position in conflict with one previously taken in the same or related litigation. Id. The purpose of the doctrine is not to protect litigants from allegedly improper or deceitful conduct by their adversaries, but to protect the integrity of the judicial process and the courts. Id. The supreme court explained,

> In order for the judicial process to function properly, litigants must approach it in a truthful manner. Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine thus punishes those who take the truth-seeking function of the system lightly. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.

Id. at 251-52, 489 S.E.2d at 477.

In Hayne, the appellant contended he owned certain property by virtue of a resulting trust. The appellant had, in a previous divorce action, claimed he had no legal interest in the property and that the property was

owned by his son. The court held, because the father had previously claimed his son owned the property, he was judicially estopped from later claiming ownership of the property.

In the instant case, the record shows Joseph had previously filed an answer and counterclaim dated March 16, 1992 in the case of Charles H. Smith v. Joe L. Quinn and The Sharon Corporation, Case No. 92-CP-23-304. There, Joseph admitted that Sharon owned and operated the Corporation and stated he had no authority to bind the Corporation. Similarly, in a hearing held June 16, 1992 in the case of State of South Carolina v. Joe Quinn, Case No. 91-GS-23-7358, 7359, Joseph testified Sharon owned the Corporation. He denied owning any real estate, stocks, bonds, notes, or other valuable property.

Joseph's claim in the present action that he is the sole owner of the Corporation is in direct contravention to his assertions in the prior litigations. Were we to allow Joseph to change his position as to the facts and now claim ownership of the Corporation, "the truth-seeking function of the judicial process [would be] undermined." Hayne, 327 S.C. at 252, 489 S.E.2d 477. We therefore hold Joseph's claim for ownership of the Corporation is barred by the doctrine of judicial estoppel.[2]

For the foregoing reasons, the order granting respondents summary judgment is

AFFIRMED.

GOOLSBY, J., concurs.

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[2] Although not ruled upon by the trial court, respondents' brief contains argument that appellant is judicially estopped from asserting he, and not his daughter, is the owner of all outstanding stock of the Corporation. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal"); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (It is not always necessary for a respondent to present his issues and arguments to the lower court and obtain a ruling on them in order to preserve an issue for appellate review. The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment.).

ANDERSON, J., concurring in result only in a separate opinion.

ANDERSON, J. (concurring): I concur in result. Judicial estoppel bars Joseph Lee Quinn's claim to sole ownership of the Sharon Corporation.

I. Definition and Purpose of Judicial Estoppel

A court must be able to rely on the statements made by the parties because truth is the bedrock of justice. Therefore, a litigant cannot "blow both hot and cold." McDaniels v. Gen. Ins. Co. of Am., 36 P.2d 829, 832 (Cal. Dist. Ct. App. 1934). Under the doctrine of judicial estoppel, a party that has assumed a particular position in a judicial proceeding, via its pleadings, statements, or contentions made under oath, is prohibited from adopting an inconsistent posture in subsequent proceedings. Black's Law Dictionary 848 (6th ed. 1990) (citation omitted); 28 Am. Jur. 2d Estoppel and Waiver §74 ("The fundamental concept of judicial estoppel is that a party in a judicial proceeding is barred from denying or contradicting sworn statements made therein." (footnote omitted)); see also City of New York v. Black Garter, 685 N.Y.S.2d 606, 607-08 (N.Y. 1999) ("Judicial estoppel, or the doctrine of inconsistent positions, precludes a party who assumed a certain position in a prior legal proceeding ... from assuming a contrary position in another action simply because his or her interests have changed .... The doctrine rests upon the principle that a litigant 'should not be permitted ... to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise.'" (citations omitted)).

The purpose of judicial estoppel is to prevent the manipulation of the judicial system by the litigants. Case of Canavan, 733 N.E.2d 1042 (Mass. 2000); see also 31 C.J.S. Estoppel and Waiver § 139 (1996) ("The ... function of judicial estoppel is to protect the integrity of the judicial process ... rather than to protect litigants from allegedly improper conduct by their adversaries." (footnote omitted)). A court invokes judicial estoppel to prevent a party from changing its position over the course of judicial proceedings. 31 C.J.S. Estoppel and Waiver § 139 (1996) (footnote omitted). The doctrine estops a party from playing "fast-and-loose" with the courts or to trifle with the proceedings. Id. (footnotes omitted).

QUINN v. THE SHARON CORPORATION

A quintessential case illustrating the efficacy and application of judicial estoppel is Allen v. Zurich Insurance Company, 667 F.2d. 1162 (4th Cir. 1982). Allen was assisting Zurich's insured, Scruggs, in installing a mobile home when the home, which Scruggs had placed on blocks, shifted, fell, and crushed Allen's hand. Allen sued Scruggs in South Carolina state court on a negligence theory to recover for his injuries "while in the employment of the Defendant, Carl H. Scruggs ...." Zurich defended Scruggs. The jury returned a verdict for Allen of $37,000, which Scruggs did not pay.

Allen then brought suit in federal court against Zurich to collect on Scruggs' automobile liability policy and alleged in the complaint he and Scruggs were joint venturers. Zurich claimed it was not liable because Allen was Scruggs' employee at the time of his injury and the policy expressly excluded coverage for bodily injury to any employee. Allen testified he thought he was Scruggs' employee when the accident occured, but now characterized their relationship as "working together." During cross-examination, Allen admitted he had testified he was Scruggs' employee and was paid a weekly salary at the time of his injury in a South Carolina Industrial Commission hearing, in a deposition, and before the state court. A verdict was returned for Allen. Zurich moved for judgment notwithstanding the verdict on two grounds: (1) Allen's status as an employee of Scruggs was affirmatively adjudicated in state court and Allen was bound by that determination, and (2) the only reasonable inference to be drawn from the evidence presented at trial is that Allen was Scruggs' employee and acting within the scope of his employment when he was injured. The district court granted the motion on the second ground.

The Fourth Circuit affirmed the JNOV order on the grounds of judicial estoppel. "Closely related to collateral estoppel, but dissimilar in critical respects, is another principle that we conclude should preclude Allen on the dispositive issue. In certain circumstances a party may properly be precluded as a matter of law from adopting a legal position in conflict with one earlier taken in the same or related litigation. 'Judicial estoppel' is invoked in these circumstances to prevent the party from 'playing fast and loose' with the courts, and to protect the essential integrity of the judicial process." Id. at 1166. The court was persuaded the doctrine was properly applied in Allen's case. "Here is a party who, as the record conclusively shows, has earlier ... asserted a legal position respecting his employment relationship with another that is completely at odds with the position now asserted." Id. at 1167.

Judicial estoppel's essential function and justification is "to prevent the use of 'intentional self-contradiction ... as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.'" Id. (citation omitted).

II. History and Recognition of the Doctrine

The doctrine of judicial estoppel is rooted in antiquity:

> A party cannot ... in the course of litigation ... occupy inconsistent positions .... '[A] man shall not be allowed' in the language of the Scotch law 'to approbate and reprobate ....'
>
> If the parties in court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of courts of justice would in most cases be paralyzed; the coercive process of the law available only between those who consented to its exercise, could be set at naught by all. But the rights of all men, honest and dishonest, are in the keeping of the courts, and consistency of proceeding is therefore required of all those who come or are brought before them.

Melville M. Bigelow, A Treatise on the Law of Estoppel or of Incontestable Rights 732, 783 (Carter ed. 1913) (footnotes omitted).

The doctrine first emerged in our republic in Hamilton v. Zimmerman, 37 Tenn. (5 Sneed) 39 (Tenn. 1857). Douglas W. Henkin, Judicial Estoppel: Beating Shields Into Swords and Back Again, 139 U. Pa. L. Rev. 1711 (1991). Zimmerman purchased a failing drug business, with Hamilton, a former owner, remaining. The enterprise was later sold and Zimmerman refused to distribute any of the profits to Hamilton. Hamilton, maintaining he was a partner, not the employee Zimmerman contended, sued for his share. At trial, the evidence showed Zimmerman had admitted to third parties Hamilton was a partner, while Hamilton had frequently maintained he was nothing but a clerk. Hamilton explained his mercurial statements were attributable to his seeking to conceal his interest in the business from creditors. Additional facts demonstrated that sometime after Zimmerman's acquisition of the business, Hamilton and the other former owner had sued Zimmerman seeking specific performance on a contract. Zimmerman's answer contained an averment, which

stated, "one of the complainants [meaning Hamilton] in the bill ... was then in the house of respondent as clerk ...." Zimmerman additionally filed a counterclaim. In response, Hamilton professed "he ha[d] read carefully the answer of Zimmerman, and also his bill, and believe[d] that the allegations of said answer and bill are substantially true." As a result, the court precluded Hamilton from recovering any share of the business' sale:

> [F]or all purposes of the present [lawsuit], the admission must be taken as true, without enquiring whether, as a matter of fact, it be so or not. The law as against [Hamilton], presumes that it is true; and this presumption proceeds upon the doctrine of estoppel, which from motives of public policy or expediency, will not ... suffer a man to contradict ... what ... he may have previously said or done. This doctrine is said to have its foundation in the obligation under which every man is placed to speak or act according to the truth of the case; and in the policy of the law to suppress the mischiefs from the destruction of all confidence in the intercourse and dealings of men, if they were allowed to deny that which by their solemn and deliberate acts they have declared to be true. [T]his doctrine applies with particular force to admissions or statements made under the sanction of an oath in the course of judicial proceedings.

Hamilton, 37 Tenn. (5 Sneed) at 47-48.

The doctrine of judicial estoppel is recognized by most jurisdictions. Michael D. Moberly, Swapping Horses in Midstream: A Comparison of the Judicial Estoppel Doctrine in Arizona and Nevada, 32 Ariz. St. L.J. 233 (2000) (citations omitted); see also, e.g., Burch v. Grace St. Bldg. Corp., 191 S.E. 672, 677 (Vir. 1937) ("In Virginia, we have ... approved the general rule that a party is forbidden to assume successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other, or mutually contradictory. A litigant is estopped from taking a position which is inconsistent with one previously assumed ... in the course of litigation for the same cause of action ...."); Southmark Corp. v. Trotter, Smith & Jacobs, 442 S.E.2d 265 (Ga. Ct. App. 1994) (in its first use of the doctrine, the Georgia Court of Appeals held the plaintiff, which did not refer to any bankruptcy prepetition malpractice claim against its attorneys in its disclosure statements and reorganization plan, was judicially estopped from subsequently bringing its malpractice claim against defendants); Chase & Co. v. Little,

156 So. 609 (1934) (the Florida Supreme Court recognized judicial estoppel with citation to Corpus Juris; however, it found the doctrine was inapplicable to the case at bar because plaintiff did not make inconsistent statements); Medicare Rentals, Inc. v. Advanced Srvs., 460 S.E.2d 361 (N.C. Ct. App. 1995) (though the Court of Appeals reversed a trial court decision to issue a summary judgment order on the grounds of judicial estoppel, the Court impliedly acknowledged the permissiveness of the doctrine in North Carolina; however, the appellate court concluded judicial estoppel did not apply because plaintiff had not intentionally propounded inconsistent decisions in two different, but related, matters).

The South Carolina decision, which expressly embraces judicial estoppel, is Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997). In Hayne, Father purchased a house; however, the deed was put in Son's name. Son died and devised all of his property to his wife. Father did not make a claim against Son's estate as to the property. Wife later gave a mortgage to Credit Union, using the home as security. She later filed bankruptcy. Father filed a claim with the trustee asserting he was the owner of the property. The claim was settled. The settlement statement declared that "the [Bankruptcy] Trustee will transfer the estate's interest in the real property by Trustee's deed, without warranties, to [Father] …." Soon after, Credit Union commenced a foreclosure action. Father answered and counterclaimed, contending he owned the house. On appeal, the Supreme Court ruled Father was estopped from asserting an ownership claim over the property because he had sworn in a prior divorce action he had no legal interest in the property and that Son was the owner. The Court explicitly adopted the doctrine, stating:

> In order for the judicial process to function properly, litigants must approach it in a truthful manner. Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine thus punishes those who take the truth-seeking function of the system lightly. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.

Id. at 251-52, 489 S.E.2d at 477.

While it noted some jurisdictions had expanded judicial estoppel to conclusions of law or assertions of legal theories, the Hayne Court held the doctrine's application

applied only to inconsistent statements of fact. Id. at 251, 489 S.E.2d at 477 (citing United States v. Siegel, 472 F. Supp. 440 (N.D.Ill.1979)).

Prior to Hayne, several state court cases tangentially addressed judicial estoppel as a cognizable legal principle in South Carolina. In Boykin v. Prioleau, 255 S.C. 437, 179 S.E.2d 599 (1971), the Supreme Court touched on the issue of the doctrine's importance to the case: "The defense of judicial estoppel has not been raised, and the facts appearing here would not support it." Id. at 441, 179 S.E.2d at 601. In Zimmerman v. Central Union Bank, 194 S.C. 518, 8 S.E.2d 359 (1940), the Court presided over a dispute between a bank's receivers and the bank. The dispositive issue was whether the Circuit Court or the state's banking board had jurisdiction over liquidation of the bank. In a prior matter, the receivers had successfully contended the banking board was empowered to govern the liquidation. In subsequent proceedings, the receivers took the opposite tack. The Court forbade the receiver's change in position by reciting a maxim promulgated by the United States Supreme Court in Davis v. Wakelee, 156 U.S. 680, 689, 15 S.Ct. 555, 558, 39 L.Ed. 578 (1895): "[W]here a party assumes a certain position in a legal proceeding ... he may not thereafter, simply because his interests have changed, assume a contrary position." Id. at 532, 8 S.E.2d at 365.

III. Application of the Doctrine by the Courts

Judicial estoppel is an equitable concept; therefore, its application is within the discretion of the court. 31 C.J.S. Estoppel and Waiver § 139 (1996) (footnote omitted); see also Pro-Max Corp. v. Feenstra, 8 P.3d 831, __ (Nev. 2000) ("[B]ecause the purpose of the doctrine is to protect the integrity of the judicial process, it is 'invoked by a court at its discretion.'" (citation omitted)). There is no fixed method or formula that courts must follow in the doctrine's application. 31 C.J.S. Estoppel and Waiver § 139 (1996) (footnote omitted). This flexible standard permits a judge to consider all circumstances involved. Id. (footnote omitted).

Five elements are required for the application of judicial estoppel:

(1) two inconsistent positions must be taken by the same party or parties in privity with each other;

(2) the two inconsistent positions were both made pursuant to sworn statements;

(3) the positions must be taken in the same or related proceedings involving the same parties in privity with each other;

(4) the inconsistency must be part of an intentional effort to mislead the court; and

(5) the two positions must be totally inconsistent — that is, the truth of one position must necessarily preclude the veracity of the other position.

E.g., 28 Am. Jur. Estoppel and Waiver § 74 (2000) (footnotes omitted).

As originally conceived in Hamilton v. Zimmerman, the doctrine of judicial estoppel was based solely on the sanctity of the oath. Rand G. Boyers, Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel, 80 Nw. U. L. Rev. 1244 (1986). Under this philosophy, the fact a litigant is using the court as a forum for his inconsistent statements injures the judicial system; therefore, such abuse must be avoided under all circumstances. Id. Any perpetuation of untruth or misrepresentation eviscerates public confidence in the integrity of the judicial system. Boyers, supra, at 1252. Accordingly, whether a party was successful or not in propounding the validity of its initial position is immaterial: the party will be judicially estopped from assuming a different stance, relating to the facts, in subsequent proceedings.

In Colleton Regional Hospital v. MRS Medical Review Systems, Inc., 866 F. Supp. 896 (D.S.C. 1994), the federal district court precluded a hospital from switching positions relative to the agency status of a utilization review company in a suit for breach of fiduciary duty: "A second equally compelling reason that MRS cannot be considered a fiduciary is that Plaintiffs took the opposite position, i.e., that MRS is not an ERISA fiduciary, earlier in this litigation. The doctrine of judicial estoppel

prevents Plaintiffs from switching positions." The hospital's initial posture was determined to be in contravention of prevailing ERISA law — in other words, the hospital did not enjoy any "prior success" from its first position. See id. at 901 ("Now that the court has rejected Plaintiffs' contention that [MRS was not a fiduciary], Plaintiffs assert that MRS is an ERISA fiduciary and can be sued for breach of fiduciary duty. Clearly there is a conflict in the position Plaintiffs previously took in these proceedings and the one they now take before this court. Therefore, this action is an appropriate case for the application of judicial estoppel."); see also Allen v. Zurich Ins. Co., 667 F.2d. 1162, 1167 (4th Cir. 1982) (stating the imposition of judicial estoppel is "perhaps not necessarily confined to situations where the party asserting the earlier contrary position there prevailed ....").

IV. Conclusion

Deceit and dishonesty are anathema of justice. "The chief security and safeguard for the purity and efficiency of the administration of justice is to be found in the proper reverence for the sanctity of an oath." Hamilton v. Zimmerman, 37 Tenn. (5 Sneed) 39, 48 (Tenn. 1857). Judicial estoppel guarantees the protection of the judiciary from the perversion created by a party's inconsistent and untruthful averments.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Farm Bureau Mutual Insurance Company, ... Appellant/Respondent,

v.

S.E.C.U.R.E. Underwriters Risk Retention Group, ... Respondent/Appellant

and Ralph Garrison, Mary Garrison, Garrison Pest Control, Inc., Jack C. Purvis, Susan Purvis, and Jordan Purvis, a minor under the age of fourteen (14) years, ... Respondents.

Appeal From Florence County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 3263
Heard September 11, 2000 - Filed November 27, 2000

AFFIRMED IN PART AND REVERSED IN PART

Louis D. Nettles, of Nettles, McBride & Hoffmeyer, of Florence, for appellant/respondent.

Carlton B. Bagby, of Columbia, for respondent/appellant.

CURETON, J.: In this declaratory judgment action, South Carolina Farm Bureau (Farm Bureau) and S.E.C.U.R.E. Underwriters Risk Retention

Group (SECURE) sought to determine insurance coverage for injuries sustained by Jordan Purvis, a minor, as the result of a dog bite she sustained while on the premises of Garrison Pest Control, Incorporated. Jordan and her parents brought an action for damages against Ralph Garrison, Mary Garrison, and Garrison Pest Control. Farm Bureau and SECURE sought a declaration of the extent of their coverages. The circuit court determined both carriers had a duty to defend and indemnify the parties in the underlying personal injury action. The court also held Farm Bureau's coverage was primary and SECURE's was excess coverage. Farm Bureau appealed and SECURE cross-appealed the order. We affirm in part and reverse in part.

FACTS / PROCEDURAL HISTORY

Farm Bureau issued Ralph and Mary Garrison a homeowner's insurance policy for their home at 2601 Claussen Road in Florence, South Carolina. The Farm Bureau policy provided personal liability coverage subject to certain provisions and exclusions. SECURE provided insurance coverage to Garrison Pest Control through a commercial general liability policy. Garrison Pest Control is owned by the Garrisons and Scott Newell.

On December 12, 1994, Jordan Purvis, a four-year-old girl, was bitten by the Garrisons' dog while lawfully on the business premises of Garrison Pest Control. The dog that bit Jordan was owned and kept by the Garrisons as their family pet. The dog was not kept for security purposes, as a mascot, or in connection with the pest control business. Mary Garrison brought the dog to Garrison Pest Control from the Garrison home when she did not have an alternative place to leave the dog when she came to the office. The dog was owned by the Garrisons and not Garrison Pest Control.

Jack and Susan Purvis are Jordan's parents. Jack, Susan, and Jordan made claims against Ralph Garrison, Mary Garrison, and Garrison Pest Control for injuries Jordan sustained as a result of the dog bite. As a result of this underlying action, coverage was sought from both Farm Bureau and SECURE. Both carriers provided legal defenses under a reservation of rights.

Farm Bureau filed this declaratory judgment action seeking a determination as to whether it had a duty to defend and indemnify its insureds, Ralph and Mary Garrison. SECURE counterclaimed and cross-claimed for

similar relief. All parties stipulated to the relevant facts and the admissibility of certain documents which are part of the record.

After a hearing on the matter, the circuit court found both Farm Bureau and SECURE had duties to defend and, if necessary, to indemnify the parties in the underlying personal injury action. The court further held Farm Bureau's coverage was primary and SECURE's coverage to be excess. These appeals follow.

LAW/ANALYSIS

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). A suit to determine coverage under an insurance policy is an action at law. Therefore, this Court's jurisdiction "is limited to correcting errors of law and factual findings will not be disturbed unless unsupported by any evidence." State Farm Mut. Auto. Ins. Co. v. James, 337 S.C. 86, 93, 522 S.E.2d 345, 348-349 (Ct. App. 1999); see also Townes Assocs. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

I. Duty to Defend and Indemnify

Both Farm Bureau and SECURE appeal the order of the circuit court finding they have a duty to defend and, if necessary, to indemnify the parties in the underlying personal injury action. Both carriers contend the other is solely responsible for the defense and indemnification of the parties in the underlying action. We disagree.

A. Farm Bureau's Appeal

Farm Bureau argues the circuit court erred in requiring it to defend and indemnify the Garrisons because (1) the incident occurred on premises which were owned by the Garrisons, but not described in Farm Bureau's policy and (2) the incident arose from a business pursuit. We disagree.

Under the Garrisons' homeowner's policy, Farm Bureau agreed to "pay the necessary medical expenses that are incurred within three years from the date of an accident causing bodily injury." The policy applied to a person off the

insured location if the bodily injury "[was] caused by an animal owned by or in the care of the insured." The policy excluded coverage where there was "bodily injury or property damage . . . arising out of business pursuits of an insured . . . [or] arising out of a premises . . . owned by the insured . . . that is not an insured location." Relying on these exclusions, Farm Bureau maintains the homeowner's policy excludes coverage for the dog bite in this case.

"[A]n insurer must show a causal connection between a loss and an exclusion before the exclusion will limit coverage under the policy." South Carolina Ins. Guar. Ass'n v. Broach, 291 S.C. 349, 351, 353 S.E.2d 450, 451 (1987). At the beginning of both policy exclusions sought by Farm Bureau are the words "arising out of." In McPherson v. Michigan Mut. Ins. Co., 310 S.C. 316, 320, 426 S.E.2d 770, 771 (1993), our supreme court held that "for the purpose of construing an exclusionary clause in a general liability policy, 'arising out of' should be narrowly construed as 'caused by.'" Furthermore, "[w]here the words of a policy are capable of two reasonable interpretations, that construction will be adopted which is most favorable to the insured." Id.

No South Carolina case specifically addresses whether a homeowner's policy provides coverage for a dog bite that occurs on a business premise away from the home. However, the Missouri court addressed this issue in Lititz Mut. Ins. Co. v. Branch, 561 S.W.2d 371 (Mo. App. 1977). In Lititz, a dog was taken from the residence to the business premises of a dairy where it was tethered. Subsequently, the dog bit a child. The homeowner's policy insurer filed a declaratory judgment action alleging it did not have a duty to defend and indemnify the insured. The policy exclusions in Lititz were very similar to those in this case. That policy excluded coverage for bodily injury or property damage arising out of business pursuits of any insured and injury or damage arising out of any premises, other than the insured premises, owned, rented or controlled by any insured. The Lititz court reasoned the dog bite was the result of personal tortious conduct and was not causally related to the business premises.

> Liability for injuries caused by an animal owned by an insured arises from the insured's personal tortious conduct in harboring a vicious animal, not from any condition of the premises upon which the animal may be located.

Id. at 374.

We find this reasoning persuasive. The dog bite to the face of Jordan Purvis was not "caused by" any specific business pursuit of the Garrisons nor by the business premises itself. The dog bite was the result of the Garrisons' possession of an animal with a propensity to attack others. The fact that the dog bite occurred on the business premises of Garrison Pest control does not mean that it arose out of a business pursuit or arose out of premises owned by the Garrisons but not insured under the homeowner's policy. Therefore, we hold Farm Bureau's policy exclusions are inapplicable to the injury sustained by Jordan Purvis and affirm the circuit court's determination that Farm Bureau has a duty to defend and, if necessary, indemnify the Garrisons in the underlying action.

B. SECURE's Appeal

SECURE appeals the order of the circuit court finding it has a duty to defend and, if necessary, indemnify the parties in the underlying action. We disagree.

1. Incident's Relationship to An "Insured" Under the Policy's Terms

SECURE argues the claims asserted in the underlying action do not relate to the duties of Ralph or Mary Garrison as officers or employees of Garrison Pest Control. SECURE maintains its policy does not provide coverage for this incident because the Garrisons' bringing the dog to the business premises and subsequently failing to supervise the dog were personal to the Garrisons and did not originate with any risk connected with their employment. SECURE further argues Mary Garrison is not an insured under the policy because she was not an executive officer, director, or employee acting within the scope of her official duties when this incident occurred.

SECURE overlooks, however, the Garrisons' role as owners of the business. "One who controls the use of property has a duty of care not to harm others by its use." Nesbitt v. Lewis, 335 S.C. 441, 446, 517 S.E.2d 11, 14 (Ct. App. 1999) (quoting Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997)). "The responsibility for an injury negligently caused by a defect or

dangerous condition or activity in or on real property usually attaches to the owner or possessor, by virtue of his control thereof . . . ." 62 Am. Jur. 2d Premises Liability § 4 (1990).

Along with her husband, Mary Garrison owned sixty percent of the stock in Garrison Pest Control. Therefore, the Garrisons, along with one other shareholder, controlled what took place on the premises of Garrison Pest Control. Garrison Pest Control, the named insured on the SECURE policy, through its owners and officers, allowed the Garrison family pet on the business premises, thereby creating a dangerous condition. Garrison Pest Control had a duty to take reasonable care to protect the public from dangerous conditions it allowed to exist on the premises. Therefore, SECURE had a duty to defend Garrison Pest Control, its named insured, because of its potential liability for the dog bite.

This holding is not inconsistent with our reasoning that Farm Bureau's policy does not exclude coverage because the dog bite did not "arise out of" Garrison Pest Control's premises. As previously stated, "arising out of" is narrowly construed in policy exclusions to mean caused by the premises. However, SECURE's policy provides coverage for "'bodily injury' *caused by an accident . . . on premises you own or rent*." (Emphasis added). The policy further states SECURE "will make these payments regardless of fault." Therefore, the SECURE policy is not limited to injuries caused by the premises, but includes all injuries sustained on the premises unless the injury meets certain policy exclusions, none of which are applicable to this case.

Furthermore, a person may recover against a property owner under a premises liability theory for the personal tortious conduct of an employee or guest on the premises if the owner knows or has reason to know of the occurrence. See Bullard v. Ehrhardt, 283 S.C. 557, 324 S.E.2d 61 (1984); Burns v. South Carolina Comm'n for Blind, 323 S.C. 77, 448 S.E.2d 589 (Ct. App. 1994). In such instances, the injury is not caused by the premises, strictly speaking, but damages are recoverable because the incident occurred on the premises and the property owner failed to adequately warn or take precautions to avoid the injury. Id.; see also Henderson v. St. Francis Community Hosp., 303 S.C. 177, 399 S.E.2d 767 (1990) (a person owes an invitee the duty of exercising reasonable or ordinary care for her safety, and is liable for any injury resulting from the breach of that duty); Neil v. Byrum, 288 S.C. 472, 343 S.E.2d 615 (1986) (As

relates to a licensee, a landowner has a duty to use reasonable care to warn him of any concealed dangerous conditions or activities which are known to the possessor, or of any changes in the condition of the premises which may be dangerous to him, and which he may reasonably be expected to discover.).[1]

2. Premises Liability As A Covered Operation or Hazard Under the Policy

Additionally, SECURE argues its policy did not insure the duty to keep the business of Garrison Pest Control safe for the visiting public. SECURE bases this argument on the provision of the policy which states as follows:

> The coverage afforded by this policy pertains only to those operations identified on the signed S.E.C.U.R.E. application and in the Description of Hazards or Classifications pages (SEC-140) of this policy.

SECURE maintains the Description of Hazards and Basis of Premium included various potential hazards that relate only to the business of extermination. SECURE further asserts the presence of Jordan Purvis and the dog was not related to any of the covered hazards.

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[1] In this case, the Purvises were either licensees or invitees. A licensee is "a person who is privileged to enter upon land by virtue of the possessor's consent." Neil v. Byrum, 288 S.C. 472, 473, 343 S.E.2d 615, 616 (1986). A licensee has also been defined as one who enters upon the land of another at the "mere sufferance" of the owner with the primary benefit being to the licensee. 62 Am. Jur.2d Premises Liability § 108 (1990). An invitee is "one who enters upon the premises of another at the express or implied invitation of the occupant, especially when he is upon a matter of mutual interest or advantage." Parker v. Stevenson Oil Co., 245 S.C. 275, 280, 140 S.E.2d 177, 179 (1965). "Generally, the jury determines whether an individual is a licensee, invitee, or trespasser." Nesbitt v. Lewis, 335 S.C. 441, 448, 517 S.E.2d 11, 15 (Ct. App. 1999). In either instance, Garrison Pest Control may be liable for its failure to warn of the dog's presence or maintain the dog on the premises in a safe condition. See Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc., 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct. App. 1994) ("A landowner owes a licensee a duty to use reasonable care to discover the licensee, to conduct activities on the land so as not to harm the licensee, and to warn the licensee of any concealed dangerous conditions or activities. . . . A landowner owes an invitee a duty of due care to discover risks and to warn of or eliminate foreseeable unreasonable risks.").

As an initial matter, this issue is not preserved for appellate review. An issue must be raised to and ruled on by the trial court for an appellate court to review the issue. Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). Although SECURE raised the issue of whether the SECURE policy affords coverage only for those operations which are identified on the list of classifications and in the description of hazards, it was never ruled upon and SECURE failed to file a motion to alter or amend. See Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (1991) (issue was not preserved for appellate review where the trial court did not explicitly rule on the appellant's argument and the appellant made no Rule 59(e), SCRCP, motion to alter or amend the judgment). Accordingly, the issue is not preserved for appellate review.

Reaching the merits of the issue, the SECURE policy provides coverage for this incident. One of the hazards listed on the Description of Hazards and Basis of Premium and on the signed application was general pest control. SECURE argues general pest control is limited to the act of actual extermination and the SECURE policy "does not insure property. . . It only controls pest control activities." However, the policy's plain language defies such an interpretation. Under Coverage C- Medical Payments, the SECURE policy states, "We will pay medical expenses as described below for 'bodily injury' caused by an accident . . . *on premises you own or rent*. . . ." (Emphasis added). This language evidences a clear policy intent to provide premises liability coverage. Therefore, we do not adopt the narrow definition of "general pest control" advanced by SECURE. Doing so would inappropriately create an ambiguity in an otherwise unambiguous policy. See Myers v. Calvert Fire Ins. Co., 246 S.C. 46, 142 S.E.2d 704 (1965); South Carolina Ins. Co. v. White, 301 S.C. 133, 390 S.E.2d 471 (Ct. App. 1990) (If there is no ambiguity, an insurance policy's terms must be interpreted and enforced according to their plain, ordinary, and popular meaning.); Braswell v. Faircloth, 300 S.C. 338, 387 S.E.2d 707 (Ct. App. 1989) (In interpreting a policy, an ambiguity may not be created by pointing out only a single sentence or clause.). Therefore, the finding of the circuit court that SECURE has a duty to defend and, if necessary, indemnify the parties in the underlying action is affirmed.

II. Primary versus Excess Coverage

In addition to its argument that it had no duty to defend or indemnify the parties in the underlying matter, Farm Bureau appeals the circuit court's finding that its policy provided primary coverage and SECURE's policy provided

excess coverage. We agree.

The circuit court relied on the "total insuring intent" rule in holding Farm Bureau's policy provided primary coverage in this case while SECURE's policy provided excess coverage. The "total insuring intent" rule is set out in South Carolina Ins. Co. v. Fidelity and Guar. Ins. Underwriters, Inc., 327 S.C. 207, 489 S.E.2d 200 (1997). In that case, our supreme court held courts apportioning liabilities among multiple insurers should look to the overall language of policies to ascertain whether primary or secondary coverage is intended. Under the "total insuring intent" rule, the relevant question is the overall intent of the parties embodied in the policy. Id.

The circuit court determined the primary intent of SECURE's policy was to cover hazards associated with general pest control and extermination, whereas the Farm Bureau policy specifically provided coverage for household pets. Using this analysis, the circuit court determined the total insuring intent in the Farm Bureau policy more closely reflected the events at issue in this case, and held Farm Bureau's coverage should be primary. However, this analysis was improper under the facts of this case. The "total insuring intent" rule applies where policies at issue contain mutually exclusive "other insurance" clauses. See Fidelity, 327 S.C. 207, 489 S.E.2d 200. However, where the plain language of the policies provides that one is primary and one is excess, it is not necessary to resort to the "total insuring intent" rule. Cf. Fritz-Pontiac-Cadillac-Buick v. Goforth, 312 S.C. 315, 440 S.E.2d 367 (1994) (Insurance policies are subject to general rules of contract construction. This court must enforce, not write, contracts of insurance and we must give policy language its plain, ordinary, and popular meaning.).

In this action, the SECURE policy specifically provides that its coverage is primary "except for other insurance that is fire, extended coverage, builders risk, installation risk of similar coverage for 'your work' or; that is fire insurance for premises rented to you; or if the loss arises out of the maintenance or use of aircraft, autos, or water craft." Conversely, the Farm Bureau policy specifically provides that it "is excess over other valid and collectible insurance except insurance written to specifically cover as excess over the limits of liability that apply in [the Farm Bureau] policy." Therefore, the circuit court's determination of primary and excess coverage is reversed. Under the policies' plain language,

we hold SECURE must provide the parties in the underlying action with primary coverage and Farm Bureau must provide excess coverage.

CONCLUSION

We affirm the circuit court's determination that both the SECURE and Farm Bureau policies provided coverage for the dog bite to Jordan Purvis. However, we reverse the trial court's ruling concerning primary and excess coverage and hold SECURE's coverage is primary and Farm Bureau's coverage is excess. For the foregoing reasons, the order of the circuit court is

AFFIRMED IN PART AND REVERSED IN PART.

GOOLSBY and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

R & G Construction, Inc.,

Respondent,

v.

Lowcountry Regional Transportation Authority,

Appellant.

Appeal From Beaufort County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 3264
Heard November 9, 2000 - Filed December 4, 2000

AFFIRMED

H. Fred Kuhn, Jr., of Moss & Kuhn, of Beaufort, for Appellant.

William B. Harvey, III, of Harvey & Battey, of Beaufort, for Respondent.

ANDERSON, J.: In this breach of contract action, Lowcountry Regional Transportation Authority (LRTA) appeals the trial court's refusal to grant a directed verdict and the court's admission of a closure report and letter. We affirm.

R & G Constr., Inc. v. Lowcountry Regional Transp. Auth.

FACTS/PROCEDURAL BACKGROUND

LRTA runs a public transportation bus service for Beaufort, Jasper, Colleton, Hampton, and Allendale counties. From approximately 1983, LRTA operated a maintenance and fueling facility in the Burton area of Beaufort County. Two fuel pumps and two underground fuel storage tanks were located at the Burton site. The facilities were located on land owned by Beaufort County, which provided LRTA with the Burton site free of charge as part of its contribution to LRTA. LRTA installed the fuel tanks and used them for about twelve years.

Sometime in 1994 or 1995, LRTA decided to move its maintenance and fuel site from Burton to Bluffton. In anticipation of LRTA's move to Bluffton, Beaufort County located a buyer for the Burton site. However, before the County could sell the land, it had to ensure the site was environmentally clean. Over the years LRTA used the site, the underground fuel tanks corroded and leaked fuel into the surrounding soil. The County requested LRTA remove the two underground fuel tanks.

LRTA asked Beaufort County to solicit bids for the tank removal and cleanup of the Burton facility. In February of 1995, Beaufort County issued an invitation for bids for the "removal/disposal" of the two 4,000 gallon underground fuel tanks.

On March 16, 1995, R&G Construction submitted a bid setting out the following prices:

> (1) $4,000 for the "Removal/Disposal of two (2) 4000 gallon fuel tanks";
> (2) $17.60 per ton for field monitoring and soil analysis;
> (3) $64.00 per ton for soil disposal; and
> (4) $6.00 per yard for fill dirt.

Over three months later, Samuel Smith, LRTA's Executive Director, sent R&G a purchase order for the "Removal of fuel tanks in accordance with bid dated 3-16-95 . . . $4,000.00." The purchase order was issued on a form bearing the name, address, and telephone number of LRTA.

R&G removed the fuel tanks and disposed of and replaced contaminated soil. The total cost for the job was $47,982.98. LRTA refused to pay more than $4,000. LRTA contended it neither contracted for R&G to test, remove, or replace the soil at the facility nor agreed for it to do so.

R&G filed a complaint against LRTA alleging breach of contract. Alternatively, R&G claimed it performed valuable work for LRTA and should be paid under the theory of quantum meruit. R&G sought damages in the amount of the remaining contract balance, $43,982.98. LRTA answered, denying the existence of a contract and alternatively averring it withheld payment due to R&G's alleged failure to complete the project.

At the close of R&G's case, LRTA moved for a directed verdict on the grounds (1) Samuel Smith did not have the authority to bind LRTA to the alleged contract and (2) LRTA did not have a contract with R&G for the removal and replacement of the soil, but only for the removal and disposal of the tanks, which totaled $4,000. The court denied the motion. The jury awarded R&G $43,982.98 in actual damages.

STANDARD OF REVIEW

Breach of Contract Action

An action for breach of contract seeking money damages is an action at law. Sterling Dev. Co. v. Collins, 309 S.C. 237, 421 S.E.2d 402 (1992); Kuznik v. Bees Ferry Assocs., Op. No. 3242 (S.C. Ct. App. filed Sept. 25, 2000)(Shearouse Adv. Sh. No. 36 at 1). See also South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Co., 310 S.C. 232, 423 S.E.2d 114 (1992)(action seeking money damages for breach of contract is action at law). Our review of an action at law tried by a jury extends merely to correcting errors of law. We will not disturb the facts determined by the jury unless there is no evidence which reasonably supports the jury's findings. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976); Brown v. Smalls, 325 S.C. 547, 481 S.E.2d 444 (Ct. App.1997).

Directed Verdict

In ruling on a motion for directed verdict, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Futch v. McAllister Towing, 335 S.C. 598, 518 S.E.2d 591 (1999); Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998). See also Weir v. Citicorp Nat'l Servs., Inc., 312 S.C. 511, 435 S.E.2d 864 (1993)(illustrating an appellate court must apply the same standard when reviewing the trial judge's decision on such motions). When the evidence yields only one inference, a directed verdict in favor of the moving party is proper. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (1999); Arthurs v. Aiken County, 338 S.C. 253, 525 S.E.2d 542 (Ct. App. 1999). If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury. Mullinax v. J.M. Brown Amusement Co., 333 S.C. 89, 508 S.E.2d 848 (1998); Arthurs, supra. In ruling on a directed verdict motion, the trial court is concerned only with the existence or non-existence of evidence. Long v. Norris & Assocs., Ltd., Op. No. 3243 (S.C. Ct. App. filed September 25, 2000)(Shearouse Adv. Sh. No. 36 at 28); Jones v. General Elec. Co., 331 S.C. 351, 503 S.E.2d 173 (Ct. App. 1998). This Court may only reverse the denial of a motion for directed verdict if no evidence supports the trial court's ruling. Swinton Creek Nursery, supra; Arthurs, supra.

ISSUES

I. Did the trial court err in denying LRTA's motion for directed verdict?

II. Did the trial court err in admitting the closure report and closure letter?

LAW/ANALYSIS

I. Directed Verdict

A. Apparent Authority

LRTA argues the trial judge erred in refusing to direct a verdict for LRTA where Samuel Smith had neither actual nor apparent authority to bind LRTA. We disagree.

In reviewing the trial court's denial of LRTA's motion for directed verdict, this Court must determine whether, viewing the evidence in the light most favorable to R&G, there is any evidence in the record to support the trial court's finding Smith had authority to enter into the contract on LRTA's behalf. See Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997).

A true agency relationship may be established by evidence of actual or apparent authority. See Fochtman v. Clanton's Auto Auction Sales, 233 S.C. 581, 106 S.E.2d 272 (1958). See also Fernander v. Thigpen, 278 S.C. 140, 293 S.E.2d 424 (1982)(agency relationship may be proven by evidence of apparent or implied authority, even where parties have entered agreement to contrary). The doctrine of apparent authority focuses on the principal's manifestation to a third party that the agent has certain authority. Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292 (1996). Concomitantly, the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption. Fernander, supra; Eadie v. H.A. Sack Co., 322 S.C. 164, 470 S.E.2d 397 (Ct. App. 1996). Thus, the concept of apparent authority depends upon manifestations by the principal to a third party and the reasonable belief by the third party that the agent is authorized to bind the principal. Beasley v. Kerr-McGee Chem. Corp., 273 S.C. 523, 257 S.E.2d 726 (1979); Visual Graphics Leasing Corp. v. Lucia, 311 S.C. 484, 429 S.E.2d 839 (Ct. App. 1993). See also Moore v. North American Van Lines, 310 S.C. 236, 423 S.E.2d 116 (1992)(basis of apparent authority is representations made by principal to third party and reliance by third party on those representations).

Apparent authority must be established based upon manifestations by the principal, not the agent. See Shropshire v. Prahalis, 309 S.C. 70, 419 S.E.2d 829 (Ct. App. 1992). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but on that between the principal and the third party. Vereen v. Liberty Life Ins. Co., 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991). An agency may not be established solely by the

declarations and conduct of an alleged agent. Frasier v. Palmetto Homes, 323 S.C. 240, 473 S.E.2d 865 (Ct. App. 1996).

Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him. Id. Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such belief. Id. See also Watkins v. Mobile Oil Corp., 291 S.C. 62, 352 S.E.2d 284 (Ct. App. 1986)(to establish apparent agency, party must prove purported principal has represented another to be his agent by either affirmative conduct or conscious and voluntary inaction).

The elements of apparent agency are: (1) purported principal consciously or impliedly represented another to be his agent; (2) third party reasonably relied on the representation; and (3) third party detrimentally changed his or her position in reliance on the representation. See Graves v. Serbin Farms, Inc., 306 S.C. 60, 409 S.E.2d 769 (1991); ZIV Television Programs, Inc. v. Associated Grocers, Inc., 236 S.C. 448, 114 S.E.2d 826 (1960). In the principal and agent relationship, apparent authority is considered to be a power which a principal holds his agent out as possessing or permits him to exercise under such circumstances as to preclude a denial of its existence. Beasley v. Kerr-McGee Chem. Corp., 273 S.C. 523, 257 S.E.2d 726 (1979); Anthony v. Padmar, Inc., 307 S.C. 503, 415 S.E.2d 828 (Ct. App. 1992).

When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances. Mortgage & Acceptance Corp. v. Stewart, 142 S.C. 375, 140 S.E. 804 (1927). The apparent authority of an agent results from conduct or other manifestations of the principal's consent, whereby third persons are justified in believing the agent is acting within his authority. Genovese v. Bergeron, 327 S.C. 567, 490 S.E.2d 608 (Ct. App. 1997). Such authority is implied where the principal passively permits the agent to appear to a third person to have the authority to act on his behalf. Id.

Generally, agency is a question of fact. Gathers v. Harris Teeter Supermarket, 282 S.C. 220, 317 S.E.2d 748 (Ct. App. 1984). Agency may be implied or inferred and may be proved circumstantially by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal. Fernander v. Thigpen, 278 S.C. 140, 293 S.E.2d 424 (1982). If there are any facts tending to prove an agency relationship, it then becomes a question for the jury. Gathers, supra.

The record reveals LRTA made the following representations of Smith's authority. The bid invitation referred prospective bidders to "contact Mr. Sam Smith at LRTA" for a site inspection. Smith testified he was the Executive Director of the LRTA during the entire period of dealing with R&G concerning the project. Thomas Heywood, who succeeded Ronald Voegeli as LRTA Chairman, corroborated the fact that Smith was Executive Director. According to Smith, he was the only person "within the LRTA organization that would have any knowledge of this matter."

After receiving the R&G bid, Smith presented it to the Board. The Board voted, authorized the project, and instructed Smith to proceed with the removal of the tanks. Smith directed Mary Palmer, an "administrative assistant" with LRTA, to issue a purchase order. The purchase order for the project was typed on LRTA letterhead. Smith's signature was featured prominently in the middle area of the purchase order. Palmer confirmed Smith was the Executive Director.

Smith's office was located at the LRTA Burton site. Smith monitored the progress of the project. He contacted DHEC to request the agency check on the removal of the soil when he became concerned too much soil was being removed by Dr. Lowell Sieck, a consultant for Native Soils, the subcontractor.

Viewing the evidence in the light most favorable to R&G, the evidence gives rise to a reasonable inference LRTA represented to others that Smith had the authority to enter into the contract. The bid invitation referred R&G and other prospective bidders to Sam Smith. LRTA conceded Smith was its Executive Director. Smith presented the bid to the Board and issued the purchase order for the job on LRTA letterhead. After requesting and receiving the closure letter, Smith issued partial payment of $4,000 to R&G. Smith monitored R&G's performance throughout the process. These words and acts, reasonably interpreted, could lead a third person to

believe LRTA consented to have Smith act on its behalf to enter into a contract for the cleanup of the Burton site.

R&G reasonably relied on the representation by LRTA as to Smith's authority. Further, in reliance on this representation, R&G completed the work to its detriment because LRTA refused to compensate R&G for the full amount of the work.

R&G presented overwhelming evidence "tending to prove" Smith's apparent authority. See Gathers v. Harris Teeter Supermarket, 282 S.C. 220, 317 S.E.2d 748 (Ct. App. 1984). Thus, the trial court properly submitted this issue to the jury.

B. Contract Provided for Removal of Contaminated Soil

LRTA alleges the contract only covered the removal of the tanks. LRTA further claims there is no evidence in the record it had a contract with R&G for the disposal and replacement of the soil. This contention is contradicted by the evidence that Smith monitored the soil removal and even contacted DHEC out of concern that R&G was removing more soil than required by the contract.

Smith testified he checked to make sure R&G was performing in accordance with the bid:

> And in accordance to [sic] the bid they were required to have--got [sic] all of the permits, any fees that needed--that were associated, **anything that was associated with the removal of those tanks** they were required to get those approvals. (Emphasis added).

The record is replete with evidence that the disposal and replacement of contaminated soil in accordance with DHEC requirements was part of the turnkey nature of the job.

The document entitled "Specifications for Removal/Disposal of Two (2) 4000 Gallon Underground Fuel Tanks," which was included with the bid invitation, read in part:

> 3. **Contractor must furnish everything necessary for "turn[k]ey" job** to include, but not necessar[il]y be limited to, insurance, business

> license, permits, **compliance with all local, state and federal regulations/laws**, and lab reports.
>
> 4. Contractors are to furnish lump sum bids for all known items and **unit prices for any unknown items**. (Emphasis added.)

In compliance with the bid invitation, R&G supplied LRTA with a fixed price for the known work and with unit prices for the unknown work, the testing, disposal, and replacement of contaminated soil. Samuel Smith and Ronald Voegeli specifically testified that LRTA was responsible for DHEC's requirements regarding the removal of contaminated soil. Voegeli declared:

> Q. So you would agree with testimony of Mr. Smith that whatever DHEC required in cleaning up whatever pollution or contaminants came from those tanks is your responsibility?
>
> A. We knew that would be our responsibility, yes, sir.

Immediately prior to LRTA's acceptance of R&G's bid, Smith called Tom Whetsell, Vice-President of R&G. Smith was concerned because the bid was about to expire. Whetsell informed Smith that R&G would still perform the job for the same price. Smith stated "that was great because they were really pressured to get it cleaned up so that they could turn it back over to Beaufort County, that they needed to get this [site] cleaned up." Further, the two men "briefly discussed the fact that if there was any contamination that [contamination] needed to be removed because they had to give a clean site back to the county."

Dr. Sieck met with Smith prior to starting the job. Dr. Sieck "explained to Mr. Smith that there was probably going to be considerable soil that had to be remediated." According to Dr. Sieck, Smith's response "was the same as it had been in his office that the property was being sold and needed to be cleaned up and we should do what we had to do to make sure that no contamination was left on site that would compromise the sale of that property." Further, Dr. Sieck testified: "[Smith] said in the pre-construction meeting on this . . . that the site needed to be cleaned for this sale and that money was available to do it."

At a later meeting, Dr. Sieck explained to Smith that the soil was being transported to the Hickory Hill landfill. Smith signed the manifest for the delivery of contaminated soil to the Hickory Hill dump site. Smith never told Dr. Sieck not to proceed with the transport. Moreover, at this meeting with Dr. Sieck, Smith did not indicate LRTA was not paying for the removal or transport of the soil.

We find there is evidence that LRTA contracted with R&G to remove the soil and to complete everything required in order to turn the site over to its new owner. Smith agreed the contract required LRTA to pay for removal of only the amount of soil that was absolutely necessary. There is no evidence in the record that R&G removed more soil than was necessary.

We conclude the trial court properly denied LRTA's motion for directed verdict on this ground.

C. Performance of Work by Subcontractor

LRTA, citing no authority, makes a conclusory argument in its brief that R&G did not perform the work and is therefore not entitled to payment under the contract. An issue is deemed abandoned if the argument in the brief is only conclusory. See Solomon v. City Realty Co., 262 S.C. 198, 203 S.E.2d 435 (1974).

Nonetheless, R&G had the right to subcontract the work. The arrangement between R&G and Native Soils is fully explained by the testimony. Tom Whetsell is vice-president of R&G Construction in Charlotte, North Carolina. R&G is a licensed contractor. Whetsell contracted with Native Soils and its consultant, Dr. Lowell Sieck, for Native Soils to be the subcontractor on the LRTA project. The fact that R&G chose to perform the work through a subcontractor does not lessen its right to recover its fee for the work performed.

The jury concluded R&G performed the contract. This Court will not disturb a jury's findings of fact unless there is no evidence that reasonably tends to support those findings. See Brown v. Smalls, 325 S.C. 547, 481 S.E.2d 444 (Ct. App. 1997). The subcontractor relationship is permissible as long as R&G remained liable for the performance. There was no evidence in the record that R&G was not liable

to LRTA for the completion of the work. The court did not err in submitting the case to the jury.

II. Admission of Closure Report and Closure Letter

LRTA contends the trial court erred in admitting the closure report and closure letter. LRTA maintains the report and letter contain inadmissible hearsay.

Dr. Sieck, who was qualified at trial as an expert in the field of biochemistry, environmental toxicology, and removal of underground fuel tanks and remediation of contaminated soil, testified he prepared the closure report. Dr. Sieck supervised the project and was the project manager. Dr. Sieck personally performed the field operation tests. As he conducted these tests, Dr. Sieck made notes in a field log regarding his results. These notes later became part of the closure report. Dr. Sieck opined the soil was contaminated. According to Whetsell, a "closure report shows all of the facts, the amount of soil that was removed, the amount of contamination, testing, the amount of testing, goes into detail, and also the amount of soil removed, and also where it is disposed of, that it's properly disposed of. This is a requirement of DHEC to issue a clean bill of health on any property."

Trident Labs, a DHEC certified testing laboratory, corroborated the readings Dr. Sieck "got in the field." The readings "came back as certified data." A technician with Trident Labs tested the samples collected by Dr. Sieck and found the soil showed a total petroleum hydrocarbon concentration of over 2,500 parts per million. The closure report prepared by Dr. Sieck contained and relied upon the test results from Trident Labs and the weight measurements from Hickory Hill.

The admission of evidence is within the trial court's discretion. Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1994); Haselden v. Davis, 341 S.C. 486, 534 S.E.2d 295 (Ct. App. 2000). The court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law. See Strother v. Lexington County Recreation Comm'n, 332 S.C. 54 n.2, 504 S.E.2d 117 n.2 (1998). See also Carlyle v. Tuomey Hosp., 305 S.C. 187, 407 S.E.2d 630 (1991)(absent showing of clear abuse of discretion, trial court's admission or rejection of evidence is not subject to reversal on appeal).

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801, SCRE. "'If, then, an utterance can be used as circumstantial evidence, i.e. without inferring from it as an assertion to the fact asserted, the Hearsay rule does not oppose any barrier, because it is not applicable.'" Player v. Thompson, 259 S.C. 600, 609-10, 193 S.E.2d 531, 535 (1972)(testimony of defendant automobile driver, who was called by plaintiff injured passenger, that several weeks prior to accident filling station attendant had stated to driver and wife of owner that automobile had bad tires would be receivable, not as testimonial assertion by attendant to prove fact of slick tires, but as indicating that driver and wife, who gave driver permission to use vehicle, obtained knowledge of slick tires, the fact of slick tires being proved by other evidence; inasmuch as testimony was not offered to prove truth of matter asserted but solely to prove notice, which is a state of mind, the hearsay rule did not apply)(quoting 6 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 1788 (3d ed. 1940)).

A statement that is not offered to prove the truth of the matter asserted should not be excluded as hearsay. Hawkins v. Pathology Assocs., 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998)(allowing admission of letters, an anniversary card, and video to show close familial bond between decedent, her husband, and her children in malpractice action).

In this case, the closure letter and report were not admitted for the truth of the matters asserted within them. They were offered to show that R&G completed all acts precedent to receiving payment. Counsel for R&G informed the court: "Your Honor, we're not offering this for the [truth of the] matter asserted. We're offering this for the purpose of establishing one, that we complied with DHEC protocol and procedures, and two, that we completed the job. And part of completing the job is getting a closure report of a clean site assessment by DHEC." On direct examination, Whetsell was asked: "Did you have any conversation with Mr. Smith about the submittal of a DHEC closing letter?" Whetsell responded: "Mr. Smith asked us to submit a closure report so that he could give us a check, basically is what he told us. He said . . . [h]e needed a closure report so he could show that the job was complete so that we could be paid."

LRTA claimed R&G did not complete the job. LRTA requested that R&G provide a closure letter as a condition precedent to receiving payment. R&G complied and requested that DHEC send a letter. Mark Berenbrok with DHEC sent a letter to Jeff Logan at LRTA stating: "The report documents results of an environmental assessment performed during June of 1996. Based on the information submitted to date, the SCDHEC does not require further site assessment or rehabilitation."

The closure letter and report were not admitted to prove the truth of their contents but to demonstrate R&G completed the work. Therefore, the hearsay rule was not applicable and the trial court properly admitted them.

CONCLUSION

We hold the trial court properly denied LRTA's motion for directed verdict based on a trifurcated analysis: (1) R&G presented overwhelming evidence tending to prove Smith's apparent authority; (2) evidence exists that LRTA contracted with R&G to remove the tanks and the soil and to complete everything required in order to turn the site over in a "clean" condition to its new owner; and (3) there was no evidence in the record that R&G was not liable to LRTA for the completion of the work even though it subcontracted the work out to Native Soils. Finally, the trial court did not err in admitting the closure report and closure letter. We conclude the report and letter were not offered to prove the truth of the matter asserted and, thus, should not be excluded as hearsay. Accordingly, the judgment of the Circuit Court is

AFFIRMED.

HEARN, C.J., and STILWELL, J., concur.