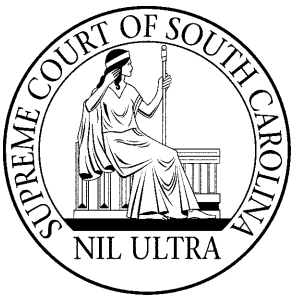

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 43
October 25, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Allie James, Claimant, Appellant,

v.

Anne's Inc., Employer, and
Villanova Insurance Company,
in liquidation through the South
Carolina Property & Casualty
Insurance Guaranty
Association, Carrier, Respondents.

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

Opinion No. 26762
Re-Heard June 24, 2010 – Re-Filed October 25, 2010

REVERSED AND REMANDED

Jody Vann McKnight, of the Reisen Law Firm, of Charleston, for Appellant.

Mark D. Cauthen, T. Jeff Goodwyn, Jr., and Peter P. Leventis, IV, all of McKay, Cauthen, Settana & Stubley, of Columbia, for Respondents.

Andrew Nathan Safran, of Columbia, Ronald J. Jebaily and Suzanne H. Jebaily, both of the Jebaily Law Firm, of Florence, and Stephen B. Samuels, of Columbia, all for Amicus Curiae South Carolina Injured Workers' Advocates; William Hughes Nicholson, III, of Nicholson & Anderson, of Greenwood, for Amicus Curiae South Carolina Association for Justice; Susan Berkowitz and Stephen Suggs, both of the South Carolina Appleseed Legal Justice Center, of Columbia, for Amicus Curiae South Carolina Appleseed Legal Justice Center; and John S. Nichols and Blake A. Hewitt, both of Bluestein, Nichols & Thompson, of Columbia, for the three foregoing Amici; and Samuel F. Painter, of Nexsen Pruet, of Columbia, for Amicus Curiae South Carolina Self-Insurers Association, Inc.

JUSTICE BEATTY: The South Carolina Workers' Compensation Commission found Allie James ("James") was totally and permanently disabled from a work accident and that she was entitled to a lump sum award of benefits. The Commission denied James's request to include language in the order prorating the lump sum award over her life expectancy after her employer and its carrier ("Respondents") objected. The circuit court affirmed. James appealed, arguing the Commission has the authority to include language in the order prorating the lump sum award over her life expectancy and should have done so. We affirmed the circuit court in James v. Anne's Inc., 386 S.C. 326, 688 S.E.2d 562 (2010). Subsequently, we granted James's petition for rehearing.[1] We now withdraw that opinion and

[1] Three organizations, the South Carolina Association for Justice, the South Carolina Injured Workers' Advocates, and the South Carolina Appleseed Legal Justice Center, filed a joint Brief of Amici Curiae in support of the petition for rehearing, and we granted their motion to participate in oral argument. An Amicus Brief opposing the petition was filed by the South Carolina Self-Insurers Association, Inc.

substitute the current opinion reversing the circuit court's order and remanding the matter in accordance with this decision.

I. FACTS

On May 10, 2002, James sustained injuries to her back, neck, and head when she slipped and fell down some stairs while working at Anne's Dress Shop in Charleston County. James worked for this employer for approximately twenty years before being terminated in 2003.

James sought workers' compensation benefits for her injuries. In 2005, the hearing commissioner found James was totally and permanently disabled as a result of the accident and that she was entitled to 500 weeks of compensation benefits, with a credit allowed for the weeks of compensation already paid. The hearing commissioner further found it was appropriate for the award to be made in a lump sum.

The hearing commissioner denied James's request to include language in the order prorating the lump sum award over her life expectancy using the life expectancy table provided by section 19-1-150 of the South Carolina Code[2] after Respondents objected. The hearing commissioner concluded she did not have the authority to include proration language in the order in the absence of consent from Respondents.

James sought review from the full Commission. In a two-to-one decision, the Commission upheld the hearing commissioner. The dissenting commissioner found the Commission does have the authority to include proration language in an order, but that there was no error in failing to include such language in the current case.

[2] See S.C. Code Ann. § 19-1-150 (Supp. 2009) (stating this table must be used to establish the life expectancy of a person in a civil action or other litigation and must be received by all courts and all persons having the power to determine evidence, along with other evidence as to the person's health, constitution, and habits).

James appealed to the circuit court, which affirmed the Commission in a form order. James moved for reconsideration, which the circuit court denied in a formal order filed November 15, 2006.

James appealed to this Court, which affirmed in a split decision. James v. Anne's Inc., 386 S.C. 326, 688 S.E.2d 562 (2010). The majority held that, without an express grant of authority from the South Carolina General Assembly, the Commission did not have the authority to include language prorating a lump sum award over a claimant's life expectancy without the consent of all parties. The dissent found that authority to include proration language existed by virtue of the statute conferring a general grant of authority to the Commission to decide all questions arising under the act, citing S.C. Code Ann. § 42-3-180 (1985).

II. LAW/ANALYSIS

James asserts the circuit court erred in holding the Commission lacks the authority to include language in workers' compensation orders prorating a lump sum award over a claimant's life expectancy in the absence of consent from all parties, and in refusing to include such language in her case. We agree.

(A) Standard of Review

An appellate court has the power upon review to reverse or modify a decision of an administrative agency if the findings and conclusions of the agency are (1) affected by an error of law, (2) clearly erroneous in view of the reliable and substantial evidence on the whole record, or (3) arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion. Gray v. Club Group, Ltd., 339 S.C. 173, 182, 528 S.E.2d 435, 440 (Ct. App. 2000).

(B) Justiciability

As an initial matter, we note the three amici participating in the oral argument of this case have filed a joint brief regarding the merits of the appeal and asserting as a threshold issue that this matter is not justiciable. The amici specifically assert Respondents lack standing because they cannot show any injury from allocating the lump sum award as it is merely a mathematical calculation that will have no effect on their liability for compensation. We conclude the amici's allegation regarding justiciability, and more particularly standing, is not properly before the Court in the current procedural posture.

"Before any action can be maintained, there must exist a justiciable controversy." Byrd v. Irmo High Sch., 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." Pee Dee Elec. Coop. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983). Justiciability encompasses several doctrines, including ripeness, mootness, and standing. Jackson v. State, 331 S.C. 486, 489 S.E.2d 915 (1997).

Rule 213 of the South Carolina Appellate Court Rules, governing Amicus Curiae Briefs, states an amicus brief is limited to the issues raised by the parties: "The brief shall be limited to argument of the issues on appeal as presented by the parties and shall comply with the requirements of Rules 208(b) and 211." Rule 213, SCACR.

Although James did argue that proration would not have any effect upon Respondents because it would not change the actual amount of the monetary award, it was in the context of responding to Respondents' argument that proration over a claimant's lifetime was not authorized because our workers' compensation statutes limit a claimant to a maximum of 500 weeks of compensation in most instances. Thus, justiciability and standing were not raised by the parties.

This Court has the inherent authority to consider justiciability. However, when a party belatedly attempts to raise the issue of standing, our courts have applied error preservation principles and held that the matter was not preserved for review where the trial court was not given an opportunity to first rule on the issue.[3]

In the current appeal, it is not a party, but the amici who are attempting to belatedly raise standing, but we find they are similarly precluded from asserting the issue on error preservation grounds because the amici can argue only the issues that were raised by the parties. See Rule 213, SCACR.

(C) Social Security Offset

In this case, James sought a proration of her lump sum award using the life expectancy table found at S.C. Code Ann. § 19-1-150. As noted by the circuit court, James's "concern is that her Social Security Disability benefits will be offset by the workers' compensation benefits she receives. [James] argues that the proration language is required to maximize her workers' compensation award . . . ."

Under federal law, when a person is deemed disabled and is entitled to monthly disability payments under the Social Security Act, the disability payments must be reduced when the combined amount of the person's monthly Social Security disability payments and any monthly workers' compensation benefits exceeds eighty percent of the person's pre-disability earnings. See 42 U.S.C.A. § 424a(a) (2003) (providing for the reduction of disability benefits). When the workers' compensation benefits are "payable

[3] See generally Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010) (finding the State's argument regarding standing was not preserved where it was not raised at the PCR hearing, but was raised in a motion for reconsideration); Michael P. v. Greenville County Dep't of Soc. Servs., 385 S.C. 407, 413 n.4, 684 S.E.2d 211, 214 n.4 (Ct. App. 2009) (noting some of the appellants' arguments in support of standing were not preserved for consideration on appeal because they were not raised to and ruled upon by the family court); A Fast Photo Express, Inc. v. First Nat'l Bank of Chicago, 369 S.C. 80, 630 S.E.2d 285 (Ct. App. 2006) (discussing whether the issue of standing was properly preserved for appeal and concluding the issue was preserved because it was both raised to and ruled upon by the master-in-equity).

on other than a monthly basis (excluding a benefit payable as a lump sum except to the extent that it is a commutation of, or a substitute for, periodic payments), the reduction under this section shall be made . . . in such amounts as the Commissioner of Social Security finds will approximate as nearly as practicable the reduction prescribed by subsection (a) of this section." Id. § 424a(b) (emphasis added). Thus, lump sum awards generally necessitate a reduction in Social Security disability benefits in instances where they result from a commutation of periodic payments.

The Social Security Administration does not apply a reduction or an offset, however, where a state has enacted a reduction of their workers' compensation benefits in these circumstances by February 18, 1981. This reduction (by the individual states) is known as a "reverse-offset" provision. Tommy W. Rogers & Willie L. Rose, Workers' Compensation and Public Disability Benefits Offset from Social Security Disability Benefits, 29 S.U. L. Rev. 57, 60 (2001).

South Carolina did not legislatively enact a reverse-offset provision. Grady L. Beard et al., The Law of Workers' Compensation Insurance in South Carolina, 567 (5th ed. 2008); see also 70B Am. Jur. 2d Social Security and Medicare § 1490 (2000) (listing states that the Social Security Administration has recognized as having met the legal criteria for reverse-offset plans; South Carolina is not included in this list).

In order to minimize the reduction of her Social Security benefits, James seeks to prorate her lump sum, workers' compensation award for a permanent disability over her lifetime using the life expectancy table set forth in section 19-1-150. James asserts the Social Security Administration expressly accepts the monthly amount derived from using a life expectancy table as one of the bases for calculating the offset to be made to Social Security benefits.

The Social Security Administration will use the prorated time frame stated in an order awarding a lump sum benefit if a time frame is provided; otherwise, it will use an alternative basis for this computation:

> According to SSA policy, a lump sum award of workers' compensation benefits . . . will be prorated at an established weekly rate. The priority for establishing a weekly rate of payment is as follows:
>
> (1) the rate specified in the lump sum award, including a rate based on life expectancy;
>
> (2) the periodic rate paid prior to the lump sum award if no rate was specified in the lump sum award; or
>
> (3) the state workers' compensation maximum rate in effect on the date of injury, which is the periodic rate that, in almost every case, would have been payable had periodic payments been made instead of a lump sum, if a workers' compensation claim is involved and if no rate was specified in the lump sum award and no prior periodic payments had been made.

2A Soc. Sec. Law & Prac. § 26:72 (2006) (footnotes omitted); see also United States Dep't of Health & Human Servs., 979 F.2d 1082, 1084 (5th Cir. 1992) (noting the Social Security Program Operations Manual specifically sets forth this method for prorating lump sum awards).

(D) Authority of the Commission

In the current appeal, the circuit court concluded that it was "constrained to agree with the decision of the Commission that no authority exists in our Workers' Compensation laws for allocation of a lump sum award over the claimant's life expectancy in the absence of consent of the parties."

(1) Utica-Mohawk Mills v. Orr

James initially cited Utica-Mohawk Mills v. Orr, 227 S.C. 226, 87 S.E.2d 589 (1955), in addition to the general authority of the Commission

under statutory law, for support of the Commission's use of proration language. Although Utica-Mohawk Mills is often cited in the Commission's orders along with statutory law when prorating lump sum awards, the circuit court concluded Utica-Mohawk Mills is not applicable here because that case involves "construing a permanent partial disability award of the Commission." The circuit court stated this case essentially stands for the proposition that, "in the absence of the consent of the parties" the Commission and the Courts are without authority to "increase the amount of the weekly installments above the sum [allowed by law] or [to] reduce the length of the statutory period."

Utica-Mohawk Mills interpreted a statute concerning partial disability and held that the weekly compensation (not to exceed 300 weeks) for a claimant who sustained a thirty percent permanent disability should be calculated by taking a percentage of the difference between the average weekly wages he was earning before the injury and the average weekly wages that the employee was able to earn after the injury. Id. at 230, 87 S.E.2d at 591.

As the parties concede on appeal, although the Commission, the Social Security Administration, and the courts have referred to the Utica-Mohawk Mills case in this context, it does not actually address the lifetime proration issue presently before us. Further, reliance on this case is misplaced because Utica-Mohawk Mills was issued in 1955, but the first offset provision in the Social Security Act was not added until 1956, which "conclusively shows that *Utica-Mohawk's* authority for a reduction in workers' compensation benefits before social security disability insurance benefits are reduced is unfounded." Grady L. Beard et al., The Law of Workers' Compensation Insurance in South Carolina, 568 (5th ed. 2008). "Nonetheless, due to its history of accepting the priority of workers' compensation reductions under South Carolina law, the Social Security Administration accepts this case as authority that workers' compensation benefits can be reduced to maximize a claimant's entitlement to Social Security disability insurance benefits." Id.

For the reasons noted above, we agree with the circuit court that the Utica-Mohawk Mills case has no application here. However, we turn now to consideration of the Commission's authority under statutory law.

(2) Statutory Authority

Section 42-3-180 of the South Carolina Code confers a general grant of authority on the Commission to decide all questions arising under the Workers' Compensation Act: "All questions arising under this Title, if not settled by agreement of the parties interested therein with the approval of the Commission, shall be determined by the Commission, except as otherwise provided in this Title." S.C. Code Ann. § 42-3-180 (1985) (emphasis added).

The circuit court found section 42-3-180 did not specifically address the Commission's authority to allocate lump sum awards over the employee's life expectancy. The circuit court further found that, because "workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, we must strictly construe such statutes, leaving it to the legislature to amend and define any ambiguities," citing Cox v. BellSouth Telecommunications, 356 S.C. 468, 472, 589 S.E.2d 766, 768 (Ct. App. 2003).

In Cox, the Court of Appeals held that the workers' compensation statute prohibiting total lump sum awards in lifetime benefits cases should be strictly construed and not expanded to prohibit partial lump sum awards in lifetime benefits cases. The court stated, as a matter of first impression, that the Commission erred as a matter of law in ruling that it was not empowered to award a partial lump sum. Id. at 473, 589 S.E.2d at 769. The court explained that "[p]ermitting partial lump sum payments provides the [C]ommission needed flexibility in lifetime benefits cases, flexibility it regularly exercises with respect to all other compensation awards, to ensure the best interests of the injured worker are protected." Id. at 472-73, 589 S.E.2d at 768-69 (emphasis added).

Cox involved the strict construction of a statute prohibiting certain awards. In contrast, there is nothing in the Act that prohibits, either expressly or impliedly, the proration language at issue here. Cf. Geathers v. 3V, Inc., 371 S.C. 570, 641 S.E.2d 29 (2007) (finding where South Carolina had not adopted the last injurious exposure rule, but there was both statutory and case law that favored adoption of this rule rather than an apportionment rule, South Carolina would adopt the last injurious exposure rule; thus, the Commission erred in using the apportionment rule to apportion liability between two carriers when an employee is injured after working for successive employers).

Cox confirms that the Commission regularly exercises its flexibility in making compensation awards to ensure the best interests of the workers are protected to the extent the award is not otherwise prohibited by the Workers' Compensation Act. This is consistent with the general rule that workers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Act; only exceptions and restrictions on coverage are to be strictly construed. See Peay v. U.S. Silica Co., 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993) ("[W]orkers' compensation statutes are construed liberally in favor of coverage. It follows that any exception to workers' compensation coverage must be narrowly construed." (internal citation omitted)); Cross v. Concrete Materials, 236 S.C. 440, 114 S.E.2d 828 (1960) (stating workers' compensation law will be construed liberally to effect its beneficent purpose); Olmstead v. Shakespeare, 348 S.C. 436, 559 S.E.2d 370 (Ct. App. 2002) (noting the law is liberally construed to apply coverage, while exceptions are strictly construed). Therefore, Cox does not require the strict construction of the Act's provisions in this case.

Respondents argue the proration provision is typically part of a negotiated settlement, whereby the employee agrees to give up certain benefits to which they are entitled in exchange for inclusion of this proration language. We find Respondents' admitted desire to use proration language as a "bargaining chip" in these circumstances is inappropriate. This is particularly true since the South Carolina legislature did not choose to enact a reverse-offset provision. Moreover, if, as Respondents argue, the

Commission has not been authorized by the General Assembly to include proration language, then the Commission would not have the authority to include such language in cases where the employers and carriers give their "permission," as the Commission's authority is defined by law, not by consent.

Respondents further argue that, because the maximum period for benefits is generally 500 weeks, this is the maximum period that can be used for proration. See S.C. Code Ann. § 42-9-10(A) (Supp. 2009) ("In no case may the period covered by the compensation exceed five hundred weeks except as provided in subsection (C)."); id. § 42-9-10(C) (stating "any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life").

The 500 weeks limitation, however, represents the limit of the monetary amount of compensation that may be recovered. It has no relation to the duration or the extent of the injury. A permanent impairment, by definition, lasts for a lifetime. Thus, the proration of compensation over the claimant's lifetime is a reasonable method of accounting for this compensation. Proration of the lump sum award does not affect the amount of the award in any manner. Rather, it affects only the allocation of the award; it is purely an accounting mechanism specifically approved of by the Social Security Administration in determining the amount of a Social Security offset. The amount of the award is still limited to the value of 500 weeks of compensation and it has absolutely no effect on the liability of Respondents.

There is no reason for Respondents to object to this proration, except as a means of giving them the power to either positively or negatively impact a claimant's receipt of Social Security disability benefits based on whether they confer or withhold their consent to proration language. This kind of arbitrary outcome is not in accord with the purpose of our Workers' Compensation Act. See Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57

(1960) (observing the courts of this country have universally viewed workers' compensation law as being enacted for the benefit of employees and that the law is to be liberally construed for the employees' protection; further, one of the primary purposes of the Act is to help prevent employees from becoming charges upon society for support).

We do not believe that simply prorating benefits for the maximum period of weekly benefits available under state law is a rational solution to the problem of how to account for workers' compensation benefits. Such a method assumes the award is intended as compensation only for that period of time, when in reality the award is intended as compensation for a lasting disability. A permanent disability does not end after 500 weeks, and it thwarts the authority of the Commission to prohibit it from apportioning the award in the manner it deems appropriate. See 70B Am. Jur. 2d Social Security and Medicare § 1501 (2000) (observing proration for the maximum period of benefits under state law is inconsistent with the purpose of the Social Security Act as it improperly assumes the state lump sum workers' compensation award represents the maximum benefit over the shortest period of time, thus guaranteeing application of the Social Security offset); see also 1 Harvey L. McCormick, Social Security Claims and Procedures § 8:32 (5th ed. 1998) (noting at least one federal Circuit Court of Appeals has held that the Social Security Administration was required to prorate a lump-sum award or settlement over the remainder of an individual's working life (citing Hodge v. Shalala, 27 F.3d 430 (9th Cir. 1994))).

The purpose of allocating a lump sum disability award over the claimant's lifetime is to make sure a claimant is not being economically penalized by the Social Security Administration's calculation of an offset. The Social Security Administration expressly recognizes and accepts such allocations as a matter of routine practice. See 2A Soc. Sec. Law & Prac. § 26:72 (2006) (noting a state's proration based on life expectancy in the workers' compensation order is the Social Security Administration's first choice to use when calculating any offset).

Section 42-3-180 of the South Carolina Code confers a general grant of authority on the Commission to address all issues arising under the Workers' Compensation Act that are not otherwise provided for under South Carolina law. S.C. Code Ann. § 42-3-180 (1985). Further, section 42-9-301 authorizes the Commission to establish and award lump sum payments. Id. § 42-9-301.

The Commission is empowered to interpret its provisions and to issue regulations governing the administration of awards. See id. § 42-3-30 ("The Commission shall promulgate all regulations relating to the administration of the workers' compensation laws of this State necessary to implement the provisions of this title and consistent therewith."); see also 100 C.J.S. Workers' Compensation § 718 (2000) ("Workers' compensation boards or commissions are generally empowered to make and enforce rules and regulations to enable the board or commission to carry out . . . its duties, and such rules and regulations have the force and effect of law if reasonable and not inconsistent with pertinent statutory provisions.").

We hold the Commission has the authority to prorate a lump sum award over a claimant's expected lifetime pursuant to its general authority under section 42-3-180 to address all issues arising under the Act and its statutory authority to fix lump sum awards. It is undisputed that the Commission is responsible for making factual findings and addressing matters pertinent to the questions and issues before it. S.C. Code Ann. § 42-17-40(A) (Supp. 2009); S.C. Code Ann. Regs. 67-709 (1990 & Supp. 2009). Using the life expectancy table provided by South Carolina law to prorate a lump sum award given for a life-long disability is simply a mathematical calculation and, as such, a statement regarding this amount is a factual finding that is within the Commission's purview. This proration is specifically accepted under the procedures established for administering Social Security benefits and it does not affect the amount of, or the liability for, the workers' compensation award in any way.

"A state workers' compensation commission or board is, in the first instance, responsible for effectuating the purposes of the workers'

compensation act by administering, enforcing, and construing its provisions in order to secure its humane objectives." 100 C.J.S. Workers' Compensation § 706 (2000). "Such commission, board, or bureau is vested with the authority to formulate policies and standards for administering the workers' compensation act." Id.

The Commission has a long-standing practice of including proration language in the orders it issues. Despite the result reached in the current case, the Commission has since expressly concluded in subsequent cases that it has the authority to prorate lump sum awards in order to serve the purposes of the Workers' Compensation Act, and it has done so over the objection of the employer and its carrier.[4] We find Respondents' contention that use of the proration language cannot be used without its consent is untenable and is not a proper interpretation of our Workers' Compensation Act.

In our view, the Commission's proration of lump sum awards over an employee's life expectancy is clearly within the purview of the Commission's authority and serves to further the Act's humane objectives. This is particularly true in light of the fact that the Social Security Administration itself specifically provides for and accepts such proration language from state workers' compensation commissions all over the country when calculating the applicable offset. To deny proration in these circumstances to the employees of our state would be inconsistent with the recognized purpose of our Workers' Compensation Act.

III. CONCLUSION

Based on the foregoing, we hold the Commission has the authority to prorate a lump sum award over a claimant's life expectancy using the life expectancy table provided by South Carolina law. Consequently, we return

[4] See Pressley v. REA Constr. Co., 374 S.C. 283, 288, 648 S.E.2d 301, 303 (Ct. App. 2007) (stating "ordinarily, the construction of a statute by an agency charged with its administration will be accorded the most respectful deference and will not be overruled absent compelling reasons").

this case to the circuit court for it to remand it forthwith to the Commission so it can rule on James's proration request.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Demarcus Simuel, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal from Union County
James R. Barber, Circuit Court Judge

Opinion No. 26885
Submitted September 23, 2010 – Filed October 25, 2010

REVERSED

Appellate Defender LaNelle C. DuRant, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Petitioner.

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

Attorney General Salley W. Elliott, and Assistant Attorney General Ashley McMahan, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Demarcus Simuel (Petitioner) was convicted of possession with intent to distribute crack cocaine. A jury found Petitioner guilty and sentenced him to twelve years in prison. No direct appeal was taken. Petitioner filed an application for post-conviction relief (PCR) seeking a belated direct appeal and was denied. This Court granted a writ of certiorari from the denial of Petitioner's request.

FACTS/PROCEDURAL HISTORY

At the PCR hearing, Petitioner testified he discussed an appeal with his attorney after the trial. Petitioner claimed he asked his attorney to appeal, and that his attorney stated he would speak to Petitioner's mother about it, file an appeal, and "we'd come back and try it again."

Christopher Thompson (Thompson), Petitioner's attorney at trial, testified at the PCR hearing that he normally informs his clients of their right to appeal after trials. He did not specifically recall informing Petitioner of his right to appeal, but testified that he probably had that discussion with Petitioner. Thompson admitted to discussing an appeal with Petitioner's mother. Thompson informed her that twelve years was a good sentence considering Petitioner faced the possibility of thirty years, and that he did not think there were any grounds for an appeal. Thompson also testified Petitioner never asked him to appeal, but Petitioner contacted him some time later and told him "I can't do twelve." Thompson stated he told Petitioner it was too late to appeal, and he sent Petitioner a copy of the PCR statutes.

The PCR court found Petitioner failed to show he was entitled to a belated appeal. The PCR court held Thompson's testimony showed

Petitioner never requested Thompson to file an appeal on Petitioner's behalf. The PCR court also found that Thompson conferred with Petitioner's mother, who also did not ask Thompson to file an appeal on Petitioner's behalf. In regard to the allegation of ineffective assistance of counsel, the PCR court held Petitioner's testimony was not credible and Thompson's testimony was credible.

ISSUE

Did the PCR court err in finding Petitioner was not entitled to a belated direct appeal?

STANDARD OF REVIEW

In PCR proceedings, the burden of proof is on the applicant to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). On appeal, the PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). However, if there is no evidence to support the PCR court's ruling, this Court will reverse. *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000) (citation omitted). This Court gives great deference to a PCR judge's findings where matters of credibility are involved. *Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (citations omitted).

LAW/ANALYSIS

Petitioner contends the PCR court erred in denying his PCR application on his to right to a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). We agree.

Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal. *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (citation omitted) (*Turner I*); *see also Turner v. State*, 384 S.C. 451, 456, 682 S.E.2d 792, 794 (2009) (finding counsel must inform

criminal defendant found guilty of a crime after a trial about the possibility of an appeal) (*Turner II*). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967)." *Turner*, 380 S.C. at 224, 670 S.E.2d at 374 (citation omitted).[1]

Thompson testified that he normally discusses an appeal with defendants after trials, but he was not sure whether he did so with Petitioner. Thompson stated he discussed a direct appeal with Petitioner's mother. However, there is no probative evidence that Thompson informed Petitioner of his right to a direct appeal, nor is there any evidence that Petitioner waived his right to a direct appeal.[2] "To waive a direct appeal, a defendant must

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[1] In *Weathers v. State*, this Court held "absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995). Moreover, in *Turner II*, this Court held that the United States Supreme Court decision of *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029 (2000) is compatible with *Weathers*, and that *Weathers* remains good law with respect to guilty pleas. *Turner*, 384 S.C. at 456 n.6, 682 S.E.2d at 795 n.6. We take this opportunity to clarify that *Turner I* is the standard attorneys shall meet for trials and *Weathers* is the standard for pleas.

[2] Thompson did state that he "probably" spoke to Petitioner about his right to a direct appeal because that was his normal practice, but this was just after stating he was not sure whether he spoke with Petitioner about his right to appeal. Testifying that he "probably" spoke with Thompson about an appeal is not the same as affirmatively stating he spoke with Petitioner about an appeal. Muddying the waters somewhat is the fact that Petitioner testified he did speak with Thompson about an appeal right after trial, and that Thompson told Petitioner he would file an appeal on Petitioner's behalf. However, the PCR judge ruled Petitioner's testimony was not credible and Thompson's was. If the PCR judge had found Petitioner's testimony credible, then under the rule outlined in *Turner I* Petitioner was made fully aware of his right to appeal because he testified that he discussed an appeal with Thompson and asked Thompson to file an appeal. However, that would mean he asked for

make a knowing and intelligent decision not to pursue the appeal." *Sheppard v. State*, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) (citation omitted). Even considering the PCR judge's credibility findings, there is no probative evidence that: (1) Petitioner knowingly waived his right to a direct appeal, and (2) Thompson made certain Petitioner was fully aware of his right to appeal.

CONCLUSION

Because there is no probative evidence that: (1) Petitioner knowingly waived his right to a direct appeal, and (2) Thompson made certain Petitioner was fully aware of his right to appeal, the decision of the PCR court is reversed and Petitioner shall receive a belated appeal.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

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an appeal that was never filed. Hence, any way you look at the testimony offered at the PCR hearing, Petitioner should receive a belated appeal under the rule pronounced in *Turner I*.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sara Mae Robinson, Mary Ann Campbell, James Scott, Ellis Scott, William Scott, Shirley Pinckney Hughes, Julius Steven Brown, Leon Brown, Annabell Brown, Loretta Ladson, Kathleen Brown, Mozelle B. Rembert, Patricia Frickling, Ruth Mitchell, Gwendolyn Dunn, Angela Hamilton, Geraldine Jameson, Remus Prioleau, Julius Prioleau, Anthony Prioleau, Judy Brown, Franklin Brown, Kathy Young, Kenneth Prioleau, Willis Jameson, Melvin Pinckney, William "Alonzie" Pinckney, Ruth Russell, Hattie Wilson, Marie Watson, Gloria Becoat, Angela T. Burnett and Lawrence Redmond, Petitioners,

v.

The Estate of Eloise Pinckney Harris, Jerome C. Harris, a Personal Representative and sole heir and devisee of the Estate of Eloise P. Harris, Daniel Duggan, Mark F. Teseniar, Nan M. Teseniar, David Savage, Lisa M. Shogry-Savage, Debbie S. Dinovo, Defendants,

Martine A. Hutton, The Converse Company, LLC, Judy Pinckney Singleton, Mary Leavy, Michelle Davis, Leroy Brisbane, Frances Brisbane, and John Doe, Jane Doe, Richard Roe, and Mary Roe, who are fictitious names representing all unknown persons and the heirs at law or devisees of the following deceased persons known as Simeon B. Pinckney, Isabella Pinckney, Alex Pinckney, Mary Pinckney, Samuel James Pinckney, Rebecca Riley Pinckney, James H. Pinckney, William Brown, Sara Pinckney, Julia H. Pinckney, Laura Riley Pinckney Heyward, Herbert Pinckney, Ellis Pinckney, Jannie Gathers, Robert Seabrook, Annie Haley Pinckney, Lillian Pinckney Seabrook, Simeon B. Pinckney, Jr., Matthew G. Pinckney, Mary Riley, John Riley, Richard Riley, Daniel McLeod and all other persons unknown claiming any right title, estate, interest, or lien upon the real estate tracts described in the Complaint therein,

of whom Daniel Duggan is Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26886
Heard November 30, 2009 – Filed October 25, 2010

AFFIRMED

Donald Higgins Howe, of Howe & Wyndham, LLP, of Charleston; George J. Morris and Walter Bilbro, Jr., both of Charleston, for Petitioners.

Louis H. Lang, of Callison Tighe & Robinson, LLP, of Columbia, for Respondent.

Charles M. Feeley, of Summerville, for Guardian Ad Litem

PER CURIAM: In Petitioners' quiet title action, they allege the foreclosure of Kathleen and Bobbie Brown's property in 2000 should be set aside for lack of service of process. Since the foreclosure, the property has been transferred several times: in 2002, at a judicial sale to Robert L. Tuttle and Christl Gehring; Gehring later transferred her interest to Tuttle; and in 2003, Tuttle transferred his interest to Respondent Daniel Duggan. In 2005, Petitioners filed a complaint and *lis pendens*, seeking to quiet title to 28.6

acres of heirs' property, including the approximately .54 acre lot in question. Duggan moved for summary judgment, asserting as an affirmative defense under S.C. Code Ann. § 15-39-870 (2005 & Supp. 2008)[1] his status as a bona fide purchaser for value without notice. In response, Petitioners claimed lack of service of process in the 2000 foreclosure action, arguing the foreclosure was void for lack of personal jurisdiction over the necessary parties because: (1) they were never personally served with process; (2) they were both incompetent at the time of the alleged service; and (3) the alleged substituted service upon a relative never occurred. The trial judge found such "irregularities in the proceedings" could not defeat Duggan's status as a bona fide purchaser under the statute and granted Duggan summary judgment. The court of appeals affirmed. *Sara Mae Robinson v. Duggan*, 378 S.C. 140, 662 S.E.2d 420 (Ct. App. 2008). We affirm the court of appeals, pursuant to the following authority: *Sara Mae Robinson v. The Converse Co., LLC*, Op. No. 26864 (S.C. Sup. Ct. filed Aug. 16, 2010) (Shearouse Adv. Sh. No. 32 at 138) and *Sara Mae Robinson v. Hutton*, Op. No. 26865 (S.C. Sup. Ct. filed Aug. 16, 2010) (Shearouse Adv. Sh. No. 33 at 13) (holding that while a judgment to quiet title may be set aside for extrinsic fraud, notwithstanding the three-year statute of limitations in S.C. Code Ann. § 15-67-90, laches may bar such a claim).

TOAL, C.J., BEATTY, KITTREDGE, JJ., and Acting Justices James E. Moore and John H. Waller, Jr., concur.

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[1] Section 15-39-870 provides:

> Upon the execution and delivery by the proper officer of the court of a deed for any property sold at a judicial sale under a decree of a court of competent jurisdiction the proceedings under which such sale is made shall be deemed res judicata as to any and all bona fide purchasers for value without notice, notwithstanding such sale may not subsequently be confirmed by the court.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Delores Nelson and Bernard Nelson, Parents of Patrice N., a Minor, Appellants,

v.

Piggly Wiggly Central, Inc., d/b/a Piggly Wiggly of Bishopville, Inc., Melco of Bishopville, Inc., and Lola Nelson, Defendants,

of whom Piggly Wiggly Central, Inc., d/b/a Piggly Wiggly of Bishopville, Inc., and Melco of Bishopville, Inc. are the Respondents.

Appeal From Lee County
Ralph F. Cothran, Circuit Court Judge

Opinion No. 4754
Heard May 19, 2010 – Filed October 20, 2010

AFFIRMED

William W. Wheeler, III, of Bishopville, for Appellants.

D. Michael Freeman, II, of Myrtle Beach, and Thomas E. Player, Jr., of Sumter, for Respondents.

CURETON, A.J.: Delores and Bernard Nelson (Appellants) appeal the entry of summary judgment in favor of Piggly Wiggly Central, Inc., d/b/a Piggly Wiggly of Bishopville, Inc. (Piggly Wiggly), and Melco of Bishopville, Inc. (Melco) (collectively "Respondents"). Appellants argue the circuit court erred in granting Respondents' motion for summary judgment despite the existence of genuine issues of material fact and in finding Respondents owed no duty to Appellants. We affirm.

FACTS

On August 16, 2004, Appellants' thirteen-year-old daughter, Patrice Nelson (Nelson), accompanied her great-grandmother, Lola Nelson (Grandmother), to the Piggly Wiggly grocery store in Bishopville.[1] Nelson was familiar with the store, having shopped there before. After Grandmother pulled her car into a designated parking space adjacent to and facing the side of the store, Nelson exited the car. As Nelson walked between the building and the front of Grandmother's car, the car accelerated, crossed a concrete wheel stop, and pinned Nelson against the wall.[2] The impact fractured Nelson's left femur.

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[1] Melco owned the premises and leased them to Piggly Wiggly.

[2] At her deposition, Nelson described the events leading up to the accident: "I got out the car and [Grandmother] realized she was too far back, so I closed the door and walked across, like going into Piggly Wiggly, and she was trying to pull up and the car went forward."

In April 2006, Appellants filed suit against Grandmother, Piggly Wiggly, and Melco, alleging Nelson's injuries resulted from their "negligent, careless, reckless, and willful acts." Over the next two years, the parties deposed Appellants, Nelson, their expert, and others.

Appellants' expert witness, Bryan R. Durig, testified he examined the wheel stops in the Piggly Wiggly parking lot and found two different designs. The more recent wheel stop design consisted of a bar six inches tall with a flat top, vertical sides, and beveled edges between the top and sides. The older design consisted of a bar four to four and one-eighth inches tall that was sloped on one side. Durig did not know when the newer design came into use. According to Durig, the wheel stop in the parking space Grandmother used was of the older, slanted design. Although he believed a car could drive over the older design more easily than the newer design, Durig conducted no tests to determine the speed or force necessary for a car to cross over the older wheel stop and could give no opinion as to whether or not the newer design wheel stop would have prevented the accident.

Durig took some measurements but did not conduct any tests on the parking lot. He found the wheel stops were installed four feet away from the building, which allowed approximately two feet between the building and the front bumper of most cars if they did not cross over the wheel stop. Although he testified he found no building code violation in the parking lot, he stated that building codes do not "tell you how to design your parking lot." He was unaware which industry or safety standard governed parking lot design and construction in 1972, when the parking lot at issue was constructed. In addition, he was unaware of any requirement that sidewalks or walkways be placed in front of parking spaces. Nevertheless, he opined the wheel stops in the parking lot were "installed in a defective manner so that they created hazards."

In February 2008, Respondents filed separate motions for summary judgment arguing Appellants failed to establish Respondents owed Nelson a duty of care and arguing the events in the parking lot were not reasonably

foreseeable.[3] At the hearing Appellants argued Nelson's injury was entirely foreseeable because the wheel stops were installed too close to the building and there was no room for a pedestrian to escape injury if a car crossed a wheel stop. Appellants also argued the grocery store appeared to recognize a need for sidewalks or curbing around the building as early as 1990, but neglected to install such curbing.[4] The trial court granted Respondents' motions for summary judgment. This appeal followed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the circuit court under Rule 56(c), SCRCP. Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993). This standard requires all facts and reasonable inferences to be drawn therefrom to be viewed in the light most favorable to the appellant. Id. However, "[a]n appellate court may decide questions of law with no particular deference to the trial court." In re Campbell, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008). Whether a duty exists in a negligence action is a question of law to be determined by the court. Doe v. Greenville County Sch. Dist., 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007).

LAW/ANALYSIS

[3] In addition, Melco's memorandum in support of its motion expressly incorporated the arguments made by Piggly Wiggly.

[4] Appellants based this argument on a scale drawing of the store and its parking lot produced by Respondents during discovery. Dated July 9, 1990, the drawing depicts additions to the grocery store, including what appear to be curbing and sidewalk areas around the front and sides of the building. Although Donald Melton, principal shareholder of Melco, admitted making "some additions" to the store in 1990 or 1991, he did not identify the purpose of the drawing. Not all changes reflected in the drawing were made. Moreover, no evidence indicated whether the additions triggered an obligation for Respondents to bring the entire building into compliance with the then-existing building codes or other building standards.

I. Genuine Issue of Material Fact

Appellants assert the circuit court erred in granting summary judgment despite the existence of genuine issues of material fact. We disagree.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). "[F]or purposes of summary judgment, an issue is 'material' if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action." PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., Inc., 297 S.C. 176, 179, 375 S.E.2d 331, 332 (Ct. App. 1988). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

A plaintiff seeking damages for personal injuries incurred due to a defendant's negligent acts or omissions must prove each element of his cause of action by a preponderance of the evidence. Grier v. Cornelius, 247 S.C. 521, 534, 148 S.E.2d 338, 344 (1966). When the burden of proof is by a preponderance of the evidence, a non-moving party need only present a scintilla of evidence to withstand a motion for summary judgment. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). However:

> A plaintiff cannot create a genuine issue of material fact with the argument that the jury does not have to believe a witness. A party defeats summary

> judgment by affirmatively demonstrating the presence of a genuine issue of material fact. As Rule 56(e), SCRCP, states, a party "may not rest upon the mere allegations or denials of his pleading[s]."

Hoard ex rel. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010) (alteration in original).

A plaintiff seeking damages suffered because of a dangerous or defective condition on a defendant's property must demonstrate that the defendant committed a specific act that created the dangerous condition, which in turn caused her injury. Pringle v. SLR, Inc. of Summerton, 382 S.C. 397, 404, 675 S.E.2d 783, 787 (Ct. App. 2009). Alternatively, she must demonstrate that the defendant had actual or constructive knowledge of an existing dangerous condition and failed to correct it. Id.

We affirm the circuit court's finding that no genuine issue of material fact existed. Summary judgment is appropriate when the material facts are not in dispute. David, 367 S.C. at 250, 626 S.E.2d at 5. Here, viewing the facts in the light most favorable to Appellants, we find none of the material facts is in dispute. Appellants failed to demonstrate Nelson's injuries resulted from any act of the Respondents that created a dangerous condition or, as is apparently Appellants' contention, that Respondents had actual or constructive knowledge of a dangerous condition and failed to remedy it.

It is undisputed that the parking lot was built in 1972, and there is no evidence that its construction, which included the installation of the wheel stops, violated any code or building standard in effect at that time. Moreover, Appellants' expert could not state that current building or safety standards for parking lots applied to the lot in question. See Elledge v. Richland/Lexington Sch. Dist. Five, 352 S.C. 179, 186, 573 S.E.2d 789, 793 (2002) (stating the general rule that evidence of industry standards is relevant to establishing the standard of care in a negligence action). Appellants claim that a 1990 drawing, which arguably shows an addition to the store and curbing in the area of the injury, creates a reasonable inference Respondents were on notice

as early as 1990 or 1991 that the installed wheel stops were unreasonably dangerous. Moreover, Appellants also argue their expert's testimony that raised sidewalks are preferred over wheel stops creates an inference that Respondents recognized as early as 1990 the superior safety of the sidewalk design and thus were negligent in not installing sidewalks in conjunction with the 1990 or 1991 renovations. This inferential leap does not create a genuine issue of material fact. See McKnight v. S.C. Dep't of Corr., 385 S.C. 380, 389-390, 684 S.E.2d 566, 570-71 (Ct. App. 2009) (holding a non-moving party may not rely on speculation to defeat a motion for summary judgment). The undisputed fact is that Grandmother's loss of control of her vehicle caused Nelson's injury. See Oliver v. S.C. Dep't of Highways & Pub. Transp., 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992) (ruling causation in fact is proved by establishing that the injury would not have occurred "but for" the defendant's negligence).

II. Judgment as a Matter of Law

Appellants assert the circuit court erred in granting summary judgment by finding Respondents owed no duty of care to Nelson. We disagree.

Initially, we note Appellants pled a cause of action for premises liability arising from negligent or willful acts. See Pringle, 382 S.C. at 404, 675 S.E.2d at 787 (quoting Anderson v. Racetrac Petroleum, Inc., 296 S.C. 204, 205, 371 S.E.2d 530, 531 (1988)) ("To recover damages for injuries caused by a dangerous or defective condition on a defendant's premises, a plaintiff 'must show either (1) that the injury was caused by a specific act of the respondent which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it.'"). The record does not indicate that Appellants later abandoned, or that the circuit court struck, any portion of the complaint. Although Appellants pled Nelson's injury occurred because of Respondents' "negligent, careless, reckless, and willful acts," the circuit court's discussion of duty focused only on negligence. Consequently, only the law relating to establishment of a duty in a negligence context is properly before this court.

A plaintiff prosecuting a negligence claim must demonstrate (1) the defendants owed her a duty of care; (2) the defendants breached that duty by a negligent act or omission; and (3) she suffered damage as a proximate result of that breach. Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000). Whether a defendant has acted negligently is a mixed question of law and fact. Moore v. Weinberg, 373 S.C. 209, 221, 644 S.E.2d 740, 746 (Ct. App. 2007).

> First, the court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, the defendant is entitled to a judgment as a matter of law. If a duty does exist, the jury then determines whether a breach of the duty that resulted in damages occurred.

Id. (internal citations omitted). "Generally, duty is defined as the obligation to conform to a particular standard of conduct toward another." Id. A "standard" is "a model accepted as correct by custom, consent, or authority." Black's Law Dictionary 1412 (7th ed. 1999). "Foreseeability of injury, in and of itself, does not give rise to a duty." Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co., 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2003) (emphasis in original). If the plaintiff fails to prove the defendants owed her a legal duty of care, she fails to prove actionable negligence. Doe v. Greenville County Sch. Dist., 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007).

Appellants' contention that the circuit court's ruling equates to a statement that Respondents owed "no duty" to Nelson misrepresents the circuit court's decision. The circuit court's actual ruling that Respondents "had no duty to make the parking lot accident proof" is accurate. South Carolina courts have long recognized that merchants owe their customers a general duty of care: "[a] merchant is not an insurer of the safety of his customer but owes only the duty of exercising ordinary care to keep the premises in reasonably safe condition." Garvin v. Bi-Lo, Inc., 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001). It is uncontested that Piggly Wiggly was in the business of selling products to the public and Melco owned the premises

from which Piggly Wiggly conducted that business. Nelson's unchallenged deposition testimony established that at the time of her injury, she was walking toward the door of the grocery store to help Grandmother, presumably by purchasing groceries. The allegations admitted by Respondents, coupled with Nelson's testimony, established Respondents were merchants and Nelson was their customer. Consequently, the record reflects evidence that Respondents owed Nelson a duty to exercise ordinary care to keep their premises in a reasonably safe condition. See id.

In the case sub judice, the question, however, is not whether Respondents owed Nelson a duty of care, but whether the scope of the acknowledged duty of reasonable care extends to the particular risk that led to her injury. A plaintiff must identify a duty that the defendant has to protect her from a particular harm to merit consideration of her claim by a jury. See, e.g., Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999) (requiring circuit court to determine as a matter of law whether a "particular duty" exists before sending the case to a jury). "Where a duty of due care exists, a person is required to consider only the foreseeable risks of his conduct or failure to act. If an injury is not foreseeable, he is not liable for that injury." Hubbard, F.P. and Felix, R.L., The Law of Torts In South Carolina 43 (3d ed. 2004). This means that the risk must be "reasonably foreseeable" before one is required to take action to prevent the injury. See, e.g., Hayes v. Peoples Fed. Sav. & Loan Ass'n, 289 S.C. 63, 66, 344 S.E.2d 624, 625 (Ct. App. 1986). Foreseeability "is determined by looking to the natural and probable consequences of the defendant's act or omission." Baggerly v. CSX Transp., Inc., 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006) (internal citations and emphasis omitted).

Under the facts of this case, Appellants' principal proof of negligence on the part of the Respondents rests upon the testimony of their expert that the design of the parking lot created an unreasonable risk of harm to Nelson because the wheel stops were improperly constructed and installed and/or Respondents should have installed curbing. The circuit court correctly found Durig's assertion of alternate parking lot designs was insufficient to create a question of fact as to Respondents' duty to conform to any of those designs.

Durig attested only to his own preferences rather than to the requirements of any law, ordinance, or recognized industry safety standard. His opinion did not, as a matter of law, establish a duty on Respondents to guard against the possibility that an improperly operated vehicle would injure Nelson. See Moore, 373 S.C. at 221, 644 S.E.2d at 746 (requiring circuit court to determine as a matter of law whether a duty exists before sending the case to a jury).

Additionally, Appellants assert that the testimony of Donald Melton, the principal shareholder of Melco, that the area where the accident occurred did not correspond with the 1990 drawing creates a question of fact as to whether Respondents had a duty to renovate the parking lot in accordance with the 1990 plans. As noted above, Appellants' expert could not point to any recognized safety standard or building code that required Respondents to modify the parking lot in 1990 or subsequently.

In their brief, Respondents point to case law from other jurisdictions addressing whether circumstances such as those present in this case are sufficiently foreseeable to obligate a merchant to protect his customers. We find the Alabama and Florida courts' analysis particularly apropros and hereby adopt it:

> We are not unmindful of the obvious fact that at times operators lose control over the forward progress and direction of their vehicles either through negligence or as a result of defective mechanisms, which sometimes results in damage or injury to others. In a sense all such occurrences are foreseeable. They are not, however, incidents to ordinary operation of vehicles, and do not happen in the ordinary and normal course of events. When they happen, the consequences resulting therefrom are matters of chance and speculation. If as a matter of law such occurrences are held to be foreseeable and therefore to be guarded against, there would be no

> limitation on the duty owed by the owners of establishments into which people are invited to enter. Such occurrences fall within the category of the unusual or extraordinary, and are therefore unforeseeable in contemplation of the law.

Albert v. Hsu, 602 So. 2d 895, 898 (Ala. 1992) (quoting Schatz v. 7-Eleven, Inc., 128 So. 2d 901, 904 (Fla. Dist. Ct. App. 1961)) (quotation marks omitted). In the case at bar, Nelson's injury resulted not from the condition or placement of the wheel stops but from the operation of Grandmother's vehicle. Although not entirely unprecedented, the vehicle's acceleration and contact with Nelson were unexpected and unusual. Consequently, in accordance with Albert, this occurrence was legally unforeseeable and beyond the realm of any duty Respondents owed to Nelson. As result, the circuit court did not err in finding Respondents were entitled to judgment as a matter of law.

CONCLUSION

With regard to the facts of this case, we find the circuit court properly determined that no genuine issue of material fact existed. Therefore, we affirm the circuit court's decision on this issue.

As to whether Respondents were entitled to judgment as a matter of law, we agree with the circuit court's conclusion that Appellants failed to provide any evidence that Respondents owed Nelson a duty of care as relates to the injury she suffered. In addition, we find, under the circumstances present herein, the improper operation of Grandmother's vehicle was not a foreseeable hazard against which Respondents were required to protect Nelson. Accordingly, the circuit court's grant of summary judgment is

AFFIRMED.

FEW, C.J., and THOMAS, J., concur.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Pearl C. Williams, Appellant,

v.

Dean Smalls, Respondent.

Appeal From Marion County

Michael G. Nettles, Circuit Court Judge

Opinion No. 4755

Submitted May 3, 2010 – Filed October 20, 2010

AFFIRMED AS MODIFIED

Michael T. Miller, of Florence, for Appellant

R. Hawthorne Barrett, of Columbia, and R. Heath Atkinson, of Florence, for Respondent.

THOMAS, J.: Pearl C. Williams appeals the trial court's grant of summary judgment which held section 47-7-130 of the South Carolina Code (1987) did not impose strict liability on the owner of livestock for personal injuries suffered when Williams's automobile collided with escaped cows. We affirm as modified.

FACTS

In January 2006, Pearl Williams was traveling along U.S. Highway 76 in Marion County, when her automobile collided with cows owned by Dean Smalls, causing Williams personal injury.

Williams sued Smalls alleging both negligence and, pursuant to section 47-7-130, strict liability. Smalls moved for summary judgment, and Williams conceded summary judgment on the negligence claim. The trial court subsequently heard the motion on the strict liability claim and granted summary judgment, finding section 47-7-130 extended only to real property damage and not personal injury. This appeal follows.

STANDARD OF REVIEW

A trial court may grant a motion for summary judgment when no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. However, "[d]etermining the proper interpretation of a statute is a question of law, and this [c]ourt reviews questions of law de novo." Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008); see also Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

LAW/ANALYSIS

The trial court held there was no support for the position that the damages recoverable under section 47-7-130 extended to personal injury. Accordingly, the trial court held that recovery for personal injury resulting

under these facts required a showing of negligence and therefore granted summary judgment. We agree, in part.

This case involves two novel questions of law: first, whether section 47-7-130 imposes a strict liability standard on the owners of livestock for personal injury, and second, if such a standard is imposed, whether it extends to personal injury occasioned when livestock is found at large upon a public roadway.

Section 47-7-130 of the South Carolina Code provides:

> Whenever any domestic animals shall be found upon the lands of any other person than the owner or manager of such animals, the owner of such trespassing stock shall be liable for all damages sustained and for the expenses of seizure and maintenance. Such damages and expenses shall be recovered, when necessary, by action in any court of competent jurisdiction. And the trespassing stock shall be held liable for such damages and expenses, in preference to all other liens, claims or encumbrances upon it.

When this court is confronted with construing a statute:

> [If] the statute's language is plain and unambiguous, and conveys a definite meaning, the rules of statutory construction are not needed and the court has no right to impose another meaning. What a legislature says in the text of a statute is considered the best evidence of legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.

Hardee v. McDowell, 381 S.C. 445, 453, 673 S.E.2d 813, 817 (2009) (internal quotations and citations omitted).

Initially, the plain language of section 47-7-130 imposes strict liability for "all damages." S.C. Code Ann. § 47-7-130 (emphasis added). We find the plain meaning of the language "all damages" contemplates not only injury to real property, but also personal property. See Kirby v. Mathis, 89 S.C. 252, 71 S.E. 862 (1911) (imposing strict liability on the owner of trespassing stock for damage done to plaintiff's wheat crop); Restatement (Third) Torts: Liab. Physical Harm § 21 (2005) (recognizing the tendency of wandering animals to not only injure real property, but also to damage structures and other personal property unaffixed to the land, such as: harvested crops, livestock, and feed supplies); Vangilder v. Faulk, 426 S.W.2d 821 (Ark. 1968) (recognizing the owner of a trespassing bull to be liable for damage caused when the bull attacked the plaintiff's livestock); Hart v. Meredith, 553 N.E.2d 782 (Ill. App. Ct. 1990) (recognizing liability on the owner of a trespassing bull for impregnating plaintiff's cow); W. Page Keeton et al., Prosser & Keeton on the Law of Torts 560 (5th ed. 1984) (discussing the liability of the owner of trespassing stock for infecting plaintiff's animals with disease). Additionally, this plain reading contemplates strict liability for personal injury. See Robinson v. Kerr, 355 P.2d 117 (Colo. 1960) (finding strict liability for personal injury caused by livestock while plaintiff was attempting to expel the trespassing stock); Nixion v. Harris, 238 N.E.2d 785 (Ohio 1968) (imposing strict liability for personal injury caused by trespassing livestock); Williams v. River Lakes Ranch Development Corp., 116 Cal.Rptr. 200 (Ct. App. 1974) (imposing strict liability on the owner of a bull when the bull trespassed on neighboring property and gored the owner).

However, just as the plain language of section 47-7-130 imposes strict liability for "all damages," the title of the statute directly and specifically addresses the "liability of owners of trespassing stock." See S.C. Code Ann. § 47-7-130 (emphasis added). In the general sense, a trespass is an intentional tort in which a trespasser invades a plaintiff's interest in the exclusive possession of his real property. See, e.g., Cedar Cove Homeowner's Ass'n, Inc. v. DiPietro, 368 S.C. 254, 264, 628 S.E.2d 284, 289 (Ct. App. 2006) (Anderson, J., dissenting). Accordingly, the language of section 47-7-130 is not as explicit in regards to when strict liability is appropriate as it is about what damages an owner shall be strictly liable for. Consequently, we must look beyond the language of the statute to determine if strict liability applies only when the damage is a result of a trespass.

Traditionally, the common law did not, and in the absence of a statute to the contrary does not, impose a strict duty to keep one's stock from entering public highways or roadways unless the animal has reasonably known dangerous propensities. See Gibbs. v. Jackson, 990 S.W.2d 745, 747 (Tex. 1999) (indicating that at the common law, although the owner of stock had a duty to prevent the animal from trespassing upon another person's land, he had no duty to prevent the animal from straying onto a public roadway unless the owner had prior knowledge that the particular animal had dangerous propensities) (citing Cox v. Burbidge, 13 C.B. (N.S.) 430, 438-39 (Eng. C.P. 1863); Heath's Garage, Ltd. v. Hodges, [1916] 2 K.B. 370, 375-84 (Eng. C.A.); Salmond, Salmond on Torts § 127, at 494, 500 (W.T.S. Stallybrass, ed. 7th ed. 1928)). In the absence of this strict duty, the preferred standard is negligence. See Restatement (Third) Torts: Liab. Physical Harm § 21 (noting that traditionally when stock strays onto highways, liability should rest only on a negligence standard and distinguishing between stock trespassing on private land, where the stock is the sole active entry and incidents on highways which must involve at least two actors).

The very essence of trespass, as a cause of action, is to ensure protection of an individual's rights and interests in real property, not the least of which is the right of exclusion. In the simplest sense, these rights which support the imposition of strict liability are not implicated in situations in which stock enter upon public highways or roadways, and consequently, it seems universally accepted that liability in these circumstances shall be found only upon a showing of negligence. See Toole v. DuPuis, 735 So.2d 582 (Fla. Dist. Ct. App. 1999) (specifically considering and rejecting the application of strict liability to the owner of stock straying onto highways); Hand v. Starr, 550 N.W.2d 646 (Neb. 1996) (indicating a standard of strict liability for trespassing stock and negligence for stock entering public highways); Byram v. Main, 523 A.2d 1387 (Me. 1987) (finding an owner's liability for stock straying onto highways shall be based upon negligence, not strict liability); Davert v. Larson, 209 Cal.Rptr. 445 (Ct. App. 1985) (indicating that the appropriate standard for trespassing stock is strict liability, but the standard for stock entering public highways is a negligence standard); Vaclavicek v. Olejarz, 297 A.2d 3 (N.J. 1972) (declining to apply strict liability to owners of stock entering public highways); Scanlan v.

Smith, 404 P.2d 776 (Wash. 1965) (ruling negligence is the applicable standard for stock straying upon highways).

In this case, because Smalls's cows strayed onto a public highway and not Williams's private land, no property right of Williams's was impinged solely by the cows' presence upon the highway. Similarly, Williams enjoys neither the right of exclusive possession nor the right to expel other persons or property from the highway. Consequently, the historic justifications for the imposition of strict liability upon the owner of stock are not at stake here. Williams is entitled to no expectation that the roadways will be free and clear of all hazards, simply those hazards interposed by the unreasonable conduct of others. Likewise, a collision would require conduct on the part of Williams beyond merely the intrusion by the stock, which is not a risk common to trespassing stock. Therefore, we must find strict liability is not to be imposed when stock strays onto a highway or roadway. Rather, liability shall be found only upon negligence.

This holding aligns with the jurisprudence of this State which has recognized the imposition of a duty upon stock owners not to willfully or negligently permit animals to run at large. See S.C. Code Ann. § 47-7-110 (1987) (stating it shall be unlawful to willfully or negligently allow stock to run at large). Similarly, the courts of this State have suggested that liability for collisions with stock wandering into a highway rests on a negligence theory. Swindler v. Peay, 227 S.C. 157, 161, 87 S.E.2d 296, 299 (1955) (finding in a case in which a driver collided with livestock it was not error to suggest the predecessor of section 47-7-110 stated a duty on the part of the owner of the escaped stock); see also Reed v. Clark, 277 S.C. 310, 314, 286 S.E.2d 384, 387 (1982); McCullough v. Gatch, 251 S.C. 171, 175, 161 S.E.2d 182, 183-84 (1968) (both applying a negligence standard under the predecessor of section 47-7-130 in cases where a car collided with stock in the highway).

Recognizing the applicable standard of liability in this case is negligence, we find no error on the part of the trial court. Significantly, because Williams conceded any issues of negligence in this case we are not occasioned to consider what conduct will sufficiently support such a claim. It suffices that because our supreme court has held the duty imposed by section

47-7-110 to not willfully or negligently allow stock to run at large will not support negligence *per se*, a plaintiff must provide evidence of negligence in order to overcome summary judgment. See McCullough, 251 S.C. 171, 161 S.E.2d 182 (finding a plaintiff who collided with stock must present evidence of negligence on the part of the defendant).

CONCLUSION

We find section 47-7-130 imposes strict liability for personal injury caused by trespassing stock; however, we also find that negligence, not strict liability, is the appropriate standard for instances in which livestock wander into a highway. Accordingly, because we can affirm for any reason appearing in the record,[1] the trial court's grant of summary judgment for failure to provide evidence of negligence is

AFFIRMED AS MODIFIED

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

[1] See I'On v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (noting that an appellate court can affirm the trial court for any reason appearing in the record).