The Supreme Court of South Carolina

RE: The South Carolina Bar Young Lawyers Division
Public Service Challenge.

ORDER

The Young Lawyers Division of the South Carolina Bar has proposed a Public Service Challenge to encourage, enhance and expand the public service efforts and activities of South Carolina lawyers and law firms. A copy of the proposal is attached and incorporated into this order. We heartily endorse this endeavor by the Young Lawyers Division and urge all South Carolina lawyers to participate in the Challenge.

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

December 3, 2003

The South Carolina Bar Young Lawyers Division Public Service Challenge

The South Carolina Bar Young Lawyers Division Public Service Challenge ("The Challenge") is an effort by the Young Lawyers' Division ("YLD") to encourage, enhance and expand the public service efforts and activities of South Carolina lawyers and law firms. The YLD recognizes that, by undertaking public service initiatives, lawyers help build stronger communities, solve problems in their communities, open lines of communication with the public, and develop new skills. In return, lawyers help build respect and loyalty for the profession in the eyes of the public and expand networking opportunities both within and outside the law firm.

The Challenge asks participating law firms to pledge a minimum of ten (10) hours of public service per year for each lawyer in the firm. The Challenge defines public service broadly, to include traditional pro bono activities; however, it also encourages firms to expand their commitment to public service by engaging in activities that benefit the community in non-traditional ways. For example, participants in the Challenge could volunteer at a local school to assist with education initiatives, organize a blood drive, register voters or assist children with special needs. In addition, the Challenge asks each participating firm to track the number of hours spent by each attorney and report the results quarterly to the YLD. At the end of the year, the YLD will recognize and give awards the achievements to the law firms that donate the most time per lawyer. Participating law firms will be separated into categories, according to size, for award purposes. By participating, law firms also become eligible to be recognized by the White House for answering the administration's call to public service.

By agreeing to participate in the challenge, each law firm agrees to use its best efforts to meet its ten (10) hour commitment. There are no repercussions for failing to meet the commitment, and a law firm may withdraw from the Challenge if the need arises.

The YLD believes that all lawyers have unique talents, skills and resources that can benefit the community in which they practice. The Challenge seeks to harness those talents and resources to benefit the community. To make the Challenge possible, the YLD will provide participating law firms with information about community needs and will serve as a link between the law firms and the public service organizations, thus matching the needs of the community with the resources of its lawyers and law firms.

The ultimate goal of the Challenge is to foster a spirit of public service within South Carolina law firms and to encourage those firms to structure an institutional commitment to making their communities better. By donating their time, resources and skills, law firms will create positive synergy that will help build stronger communities and perhaps lead by example for other professions.

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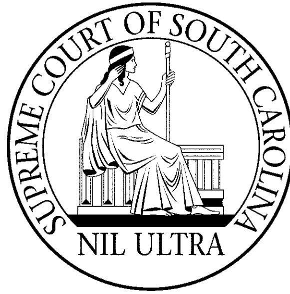

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

December 10, 2003

ADVANCE SHEET NO. 44

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

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PETITIONS - UNITED STATES SUPREME COURT

None

The Supreme Court of South Carolina

RE: Amendment to Rule 33 of Rule 413, SCACR

ORDER

Effective September 1, 2003, this Court made extensive amendments to Rule 402, SCACR, relating to admission to practice law. Unfortunately, Rule 413, SCACR, was not amended to reflect the changes made to Rule 402.

Accordingly, pursuant to Article V, § 4, of the South Carolina Constitution, the first sentence of Rule 33(f)(8) of the Rules of Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, is amended to read: "If disbarred or indefinitely suspended, the lawyer has successfully completed the examinations and training required by Rule 402(c)(5), (6) and (8), SCACR." This amendment is retroactive to September 1, 2003.

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
December 8, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Transportation, Appellant,

v.

Jan R. Thompson, f/k/a Jan R. Hardee, Respondent.

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 3705
Submitted October 6, 2003 – Filed December 8, 2003

AFFIRMED

B. Michael Brackett, of Columbia, for Appellant.

Howell V. Bellamy, Jr. and Robert S. Shelton, both of Myrtle Beach, for Respondent.

GOOLSBY, J.: Jan R. Thompson brought this action seeking compensation for property condemned by the South Carolina Department of Transportation (SCDOT). Thompson received a jury award of $38,000. The trial court awarded Thompson attorney's fees and costs pursuant to S.C. Code

Ann. § 28-2-510(B) (1991), finding she was the prevailing party as required by the statute. SCDOT appeals. We affirm.[1]

FACTS

SCDOT condemned a portion of Thompson's property in Horry County in order to construct the Conway Bypass. Prior to the condemnation, Thompson owned 10.04 acres. As a result of the condemnation of 3.35 acres, Thompson's land was split into two tracts totaling 6.69 acres.

At trial, SCDOT presented testimony that the value of the condemned land was only $6,821. That value was much less than the value given by Thompson's appraiser, who testified the property was worth $33,500. Thompson testified that she believed the property was worth $8,000 per acre and that the remaining 6.69 acres were damaged by either 50 or 60 per cent. The highest resulting compensation would therefore be $58,912.[2]

During cross-examination, SCDOT's counsel asked Thompson about a statement in her deposition regarding the value of the property. Thompson admitted that during her deposition testimony she had stated the property was worth $15,000 to $20,000 per acre, instead of the $8,000 she testified to at trial. This would have produced a high valuation of $147,280, using $20,000 per acre and additionally assuming the damage to the remainder of the land was 60 per cent.

At trial, however, Thompson asserted that the value was only $8,000 per acre. She explained, "It's Eight Thousand, because at that time I was really upset . . . about the taking of my land, and the way it was left, and I've had time to think about it, and I've gone back down and looked at it a lot more, and I think, to be fair and reasonable, Eight Thousand is better."

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

[2] This sum is calculated as follows: (3.35 condemned acres x $8,000 per acre) + (6.69 remaining acres x 60 per cent damage x $8,000 per acre).

After the jury returned a verdict for Thompson for $38,000 in total compensation, the trial court found she was the prevailing party and awarded her litigation expenses of $13,159.36. The court reasoned the verdict was closer to Thompson's value attested to at trial of $8,000 per acre (plus the damage to the remainder at 50 to 60 per cent) than SCDOT's highest valuation of $6,821 in total compensation. Moreover, the court found Thompson had expressly disavowed the value she had placed on the property in her deposition testimony; therefore, it was not the highest value attested to at trial by Thompson.

LAW/ANALYSIS

I. Value in Deposition Testimony

SCDOT contends the trial court erred in finding Thompson was entitled to litigation expenses as the prevailing party. Specifically, SCDOT maintains the highest value attested to by Thompson was the amount stated in her deposition, $15,000 to $20,000 per acre, which would have given a high valuation of $147,280, thus making SCDOT's valuation of $6,821 closer to the actual jury verdict of $38,000.[3] We disagree.

After a condemnation action is concluded, the landowner may petition for litigation expenses pursuant to section 28-2-510(B)(1), which provides: "A landowner who prevails in the trial of a condemnation action, in addition to his compensation for the property, may recover his reasonable litigation expenses . . . ."[4]

---

[3] In the order awarding Thompson litigation expenses as the prevailing party, the trial court incorrectly stated the highest value attested to at trial by Thompson was $48,192 instead of $58,912. Even when the correct figure is used, however, the jury's verdict was closer to the value testified to by Thompson than the value asserted by SCDOT.

[4] S.C. Code Ann. § 28-2-510(B)(1) (1991).

The statute defines "prevails" as follows:

> For the purpose of this section, "prevails" means that the compensation awarded (other than by settlement) for the property, exclusive of interest, is at least as close to the highest valuation of the property that is attested to at trial on behalf of the landowner as it is to the highest valuation of the property that is attested to at trial on behalf of the condemnor.[5]

The South Carolina Supreme Court has further defined the meaning of "prevails" in the case of City of Folly Beach v. Atlantic House Properties, Ltd., stating "a landowner 'prevails' if the difference between the value he offers at trial and the compensation awarded him is less than or equal to the difference between the value the condemnor offers at trial and the compensation awarded landowner."[6]

The central issue in this case turns on whether the value placed on the property in Thompson's deposition was ever "attested to at trial" by Thompson. We conclude the higher value of $15,000 to $20,000 per acre was not "attested to at trial" on behalf of the landowner as required by the statute.

SCDOT offered the testimony regarding the $15,000 to $20,000 per acre valuation in an attempt to discredit the testimony of Thompson. Thompson did not offer the deposition testimony as a reasonable value for compensation for the condemned property. Thompson unequivocally and expressly testified that the value she was utilizing at trial was $8,000 per acre and that the value she testified to in her deposition was not accurate and was the result of her emotions. Based upon the wording of the statute, we hold Thompson only attested to the $8,000 per acre value at trial and that is the amount to be used in determining whether she was the prevailing party so as to entitle her to litigation expenses.

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[5] Id. § 28-2-510(B)(2) (emphasis added).

[6] 321 S.C. 241, 243, 467 S.E.2d 928, 929 (1996).

II. Reference to Value in Closing Argument

SCDOT further contends that Thompson's attorney used the higher valuation in his closing argument and therefore it should be used in determining whether Thompson was the prevailing party.[7] We disagree.

Arguments made by counsel are not evidence.[8] Additionally, the statements clearly do not constitute an attestation at trial as required by the statute. Thus, this issue provides no basis for reversing the award of litigation expenses to Thompson.[9]

AFFIRMED.

HUFF and BEATTY, JJ., concur.

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[7] In closing argument, SCDOT's counsel specifically brought up Thompson's prior deposition testimony in an attempt to discredit her property valuation at trial. In response to this argument, Thompson's attorney again asserted that Thompson was not asking for that amount, but argued if the jury wanted to send a message to SCDOT about fairness, they could give her what opposing counsel was stating.

[8] McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."); see also Sessions v. Withers, 327 S.C. 409, 488 S.E.2d 888 (Ct. App. 1997); Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986).

[9] Cf. South Carolina Dep't of Transp. v. Richardson, 335 S.C. 278, 516 S.E.2d 3 (Ct. App. 1999) (rejecting a party's assertion that his own attorney's statements to the court and to the jury constituted the value attested to at trial for purposes of section 28-2-510(B)).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James C. Thornton, M.D.,

Respondent,

v.

Trident Medical Center, L.L.C., d/b/a Trident Medical Center,

Appellant.

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

Opinion No. 3706
Heard November 4, 2003 – Filed December 8, 2003

REVERSED

Allan Shackelford, of Greensboro; and James L. Gale, of Raleigh, for Appellant.

G. Dana Sinkler, of Charleston, for Respondent.

ANDERSON, J.: Trident Medical Center (Trident) appeals the circuit court's finding that the agreement between Trident and James C. Thornton does not involve interstate commerce and, therefore, is not subject to the Federal Arbitration Act, 9 U.S.C. § 2 (1999). We reverse.

FACTS/PROCEDURAL BACKGROUND

In 1999, Trident was suffering from a shortage of qualified physicians in its cardiovascular surgery group, South Carolina Cardiovascular Associates ("SCCA"). To alleviate this shortage, Trident began an effort to recruit physicians from other parts of the country to join SCCA. To entice physicians to move to Charleston, Trident offered substantial financial incentives that would not only cover the expenses of relocation but would provide bonuses and a guaranteed income stream for a period of time after their arrival.

Dr. James Thornton (Thornton) was one of the physicians Trident was able to attract to Charleston. In May 1999, Thornton and Trident entered into a "recruiting agreement" in which Thornton agreed to relocate his medical practice as a cardiovascular surgeon from Grand Rapids, Michigan to Charleston. In addition to the principal agreement under which Thornton agreed to relocate to Charleston and maintain his practice there for at least four years, the recruiting agreement contained four addenda: (1) a net collectable revenue guarantee which provided Thornton with a guaranteed income for twenty-four months; (2) a signing bonus; (3) a relocation agreement for payment of moving expenses; and (4) an agreement providing that Thornton was being recruited into the existing practice of SCCA.

Payment of all the financial incentives to Thornton under this agreement was contingent upon Thornton maintaining his practice in Charleston for at least four years. If he failed to do so, the payments made to Thornton under the agreement had to be repaid to Trident. Further, the agreement read: "In the event any dispute shall arise concerning any aspect of this Agreement, such dispute shall be submitted to final and binding arbitration in accordance with rules established by the American Arbitration Association."

Thornton moved to Charleston and joined SCCA in August 1999. However, he left the practice and relocated to Pennsylvania before the end of his four-year commitment. Thornton claimed he was excused from his

obligations under the recruiting agreement and refused to repay any of the financial incentives he had received from Trident.

Thornton brought the present declaratory judgment action seeking a determination that the arbitration provision contained in the recruiting agreement was unenforceable. The trial court found the provision (1) did not satisfy the requirements set out in § 15-48-10 of the South Carolina Uniform Arbitration Act, and (2) was not enforceable under § 2 of the Federal Arbitration Act ("FAA"), because the transaction between the parties did not involve interstate commerce.

STANDARD OF REVIEW

Determinations of arbitrability are subject to de novo review. Stokes v. Metropolitan Life Ins. Co., 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002). Nevertheless, a circuit court's factual findings will not be reversed on appeal if there is any evidence reasonably supporting the findings. McMillan v. Gold Kist, Inc., 353 S.C. 353, 577 S.E.2d 482 (Ct. App. 2003); Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003); Liberty Builders, Inc. v. Horton, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999). The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001); Evans, 352 S.C. at 549, 575 S.E.2d at 76; see also Vestry and Church Wardens v. Orkin Exterminating Co., Op. No. 3679 (S.C. Ct. App. filed September 22, 2003) (Shearouse Adv. Sh. No. 35 at 53) (whether claim is subject to arbitration is issue for judicial determination, unless parties have agreed otherwise).

LAW/ANALYSIS

The parties do not dispute the trial court's finding that the arbitration clause contained in the recruiting agreement is unenforceable under the South Carolina Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10 to -240 (Supp. 2002). If, however, the agreement involves interstate commerce, the FAA applies and trumps the state arbitration laws. See Doctor's Assocs., Inc.

v. Casarotto, 517 U.S. 681 (1996); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996).

The FAA provides: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The words "involving commerce" have been interpreted by the United States Supreme Court as being the functional equivalent of "affecting commerce"—words signaling "an intent to exercise Congress' commerce power to the full." Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 277 (1995); see also Citizens Bank v. Alafabco, Inc., 123 S. Ct. 2037, 2040 (2003) ("We have interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power."); Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) ("The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent."). "Because the statute provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause, it is perfectly clear that the FAA encompasses a wider range of transactions than those actually in commerce—that is, within the flow of interstate commerce." Citizens Bank, 123 S. Ct. at 2040 (internal quotation marks and citations omitted).

Thornton claims the recruiting agreement does not evidence interstate commerce and, consequently, the FAA does not apply. We disagree.

In all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001) ("To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts."). Thornton argues the recruiting agreement did not involve interstate

commerce because it only concerned the performance of his duties as a physician providing medical services within South Carolina.

Thornton is correct in urging this Court to focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce is involved. Our courts consistently look to the essential character of the contract when applying the FAA.

In Mathews v. Fluor Corp., our Supreme Court found interstate commerce was not involved in a contract for the sale of land in South Carolina to out-of-state parties—even though, incident to the sale, the parties obtained the services of a North Carolina engineer and financing from a Pennsylvania lender. Mathews v. Fluor Corp., 312 S.C. 404, 440 S.E.2d 880 (1994), overruled by Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360 (2001) (overruling Mathews "to the extent it considered whether the parties contemplated interstate commerce as a factor in determining if the FAA applied."). The Court held the transaction was outside the scope of the FAA because it was "unable to discern from the evidence presented whether the contract required respondent to administer anything related to interstate commerce." Mathews, 312 S.C. at 407, 440 S.E.2d at 882 (emphasis in original). See also Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360 (2001) (finding interstate commerce involved in a construction contract where builder was domiciled in South Carolina, but, under the contract, assigned rights to a Delaware creditor); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996) (holding interstate commerce involved in contract requiring removal of water and sludge from property in South Carolina to a facility in North Carolina); Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993) (stating that a contract between a nursing home and patient did not involve interstate commerce, despite the fact that the nursing home was a division of a Delaware partnership, marketed its services to persons residing outside of the state, and purchased the majority of its supplies and equipment from out-of-state; the Court reasoned that the performance of the contract—the provision of patient-resident services in South Carolina—did not require any activities in interstate commerce); Episcopal Hous. Corp. v. Federal Ins. Co., 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (concluding performance required under a contract for the construction of an eighteen-story building involved

interstate commerce because "[i]t would be virtually impossible to construct" such a building "with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina."); Blanton v. Stathos, 351 S.C. 534, 541, 570 S.E.2d 565, 569 (Ct. App. 2002) (determining that a contract for design and architectural services in the construction of a restaurant in South Carolina involved interstate commerce because "'the contract not only contemplated the use of materials manufactured outside the state of South Carolina, but realistically the project could not be constructed without the use of materials in interstate commerce.'").

In the present case, performance of the recruiting agreement requires activity involving interstate commerce. Contrary to Thornton's assertions, the subject matter of the contract clearly extends beyond Thornton's obligation to provide medical services in South Carolina. Thornton was recruited and agreed to move from one state to another. An essential requirement for performance under the agreement was Thornton's relocation from Michigan to South Carolina within a fixed period of time. Thornton was a resident of Michigan at the time the contract was entered. The contract recites that Thornton will be compensated for expenses incurred in moving his personal effects and household furnishings to South Carolina. Thornton accepted money to defray the cost of the move and agreed to repay these relocation expenses if he failed to maintain his practice in Charleston for four years. The contract terms provided for Trident's payment of money to induce the relocation and Thornton's promise to repay the money should he fail to perform fully under the contract. By the terms of the recruiting agreement, Thornton was obligated to relocate his practice from Michigan to South Carolina. Trident, in turn, was obligated to reimburse Thornton for expenses incurred in the transfer of his practice across state lines. After Thornton's relocation to South Carolina, he was then bound by the terms of the agreement to remain in the state as a practicing physician for at least four years, effectively preventing him from working in any other state during that time. The contract was denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines. The express purpose of the recruiting agreement was to provide a monetary incentive, consisting of multiple related promises, to induce Thornton to relocate his professional medical services practice from Michigan to South Carolina.

Thornton contends the present case is analogous to and controlled by the United States Supreme Court's decision in Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956). We disagree. First, we note that Bernhardt was decided over forty-five years ago. The law of arbitrability was nascent in 1956 and has evolved and maturated extant. Moreover, Bernhardt differs factually from the instant case. In Bernhardt, plaintiff sought to invoke the arbitration act with respect to an employment contract entered into in New York, but which was to be performed in Vermont. Id. at 199. The Court held that the FAA did not apply because the contract did not evidence "'a transaction involving commerce.'" Id. at 200. The Court's finding was based upon the absence of any proof demonstrating that plaintiff "while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce." Id. at 201.

Unlike the recruiting agreement in the case sub judice, the agreement in Bernhardt did not contemplate any actions affecting commerce outside of Vermont. Performance under the contract in Bernhardt was—by its terms—confined to a single state.

The case of Selma Med. Ctr., Inc. v. Fontenot, 824 So. 2d 668 (Ala. 2001), is instructive. The contract at issue in Selma (1) required two physicians to relocate their medical practices from one state to another; (2) provided guaranteed gross receipts or income for a certain period of time after relocation, with the stipulation that if the net collectible revenue exceeded $500,000 during that period, the physicians would repay the hospital the difference; (3) provided for payment of certain sums to assist in relocation expenses and start-up costs; and (4) contained a provision requiring arbitration in accordance with the rules of the American Arbitration Association. The similitude of the contract in Selma and the contract in the present case is striking.

A dispute arose when the hospital claimed, but the physicians disputed, that the physicians owed the hospital excess revenue collected during the guarantee period. Concordant with Thornton, the Alabama physicians challenged the arbitration agreement and attempted to have the court disregard the clear interstate aspect of the agreement and concentrate solely

on medical services to be provided in-state. South Carolina and Alabama each have a statute that places certain requirements on arbitration agreements if they are to be enforced. Thus, like the case at bar, if the FAA applied, Alabama's statutory requirement for arbitration agreements would be preempted.

In determining that the arbitration provisions contained within the physician recruitment agreements were governed by the FAA, the Selma court cited the three categories of activity that Congress can regulate pursuant to the Commerce Clause, namely: "(1) the use of the channels of interstate commerce; (2) *the instrumentalities of interstate commerce or persons or things in interstate commerce*; and (3) those activities having a substantial effect on interstate commerce." Id. at 674 (emphasis in original). The court concluded that, in the context of the physician recruitment agreement at issue in Selma, interstate commerce was involved because "the actual persons and things involved are themselves within the flow of commerce." Id. at 674 (internal quotations omitted). The court explained:

> The Physicians entered the flow of interstate commerce when they moved from South Carolina to Alabama. In fact, the sole purpose of the Agreements was to place the Physicians within the current of commerce and to move them to Alabama . . . . . Accordingly, when the Physicians moved across state lines, they became "persons . . . in interstate commerce." As part of the flow of commerce, then, the Physicians were properly subject to congressional regulation.
>
> The flow of commerce begins before, and ends after, the actual movement across State lines, in order to fulfill the purpose of the overall transaction. . . . .
>
> . . . .
>
> The Agreements required the Physicians to move themselves and their medical practices from South Carolina to Selma, Alabama, to provide anesthesia services to patients in the Selma community. Thus, the agreements were themselves an

> integral part of the Physicians' movement in the flow of commerce, subjecting their personal-service contracts to the jurisdiction of the FAA.

Id. at 675 (citations omitted).

Having determined the physicians were part of the flow of interstate commerce, the Selma court did not need to decide whether the physician recruitment agreements substantially affected commerce. "When a case involves allegations of the use of the instrumentalities of interstate commerce, or persons or things in interstate commerce, a court need not reach the question whether the underlying transaction 'substantially affects' interstate commerce, because such persons and things, by definition, substantially affect—because they are components of—interstate commerce." Id. at 674 (internal quotations omitted).

The Selma court's logic and analysis apply equally here and are in full accord with South Carolina case law. Irrefutably, there is a substantial impact on interstate commerce: (1) money was paid and is now owed as a result of recruiting across state lines; (2) factually, the record is replete with movement across state lines; and (3) negotiation, bargaining, and completion of an agreement was within the rubric of interstate commerce. The reach of the FAA, as explicated by the Commerce Clause, encapsulates the Trident-Thornton contract.

CONCLUSION

We conclude the recruiting agreement entered into between Thornton and Trident involved interstate commerce. Concomitantly, the FAA governs the agreement in this case and compels arbitration. Accordingly, the order of the trial court is

REVERSED.

GOOLSBY and CONNOR, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Williamsburg Rural Water and Sewer Company, Inc., Appellant,

v.

Williamsburg County Water and Sewer Authority, a Body Politic, County of Williamsburg, A Body Politic, and Town of Kingstree, a Body Politic, Respondents.

Appeal From Williamsburg County
John M. Milling, Circuit Court Judge

Opinion No. 3707
Heard June 11, 2003 – Filed December 8, 2003

AFFIRMED

Larry G. Reddeck, of Lake City; for Appellant.

Ernest J. Jarrett, W.E. Jenkinson, III, and Jennifer R. Kellahan, all of Kingstree; for Respondents.

HEARN, C.J.: The central issue in this case is whether a county's constructive approval of a water and sewer service proposal submitted by a non-profit corporation under former S.C. Code Ann. § 33-35-90 grants the non-profit corporation exclusive service rights such that the county may not give franchise rights to competing providers within the same service areas designated in the proposal. Williamsburg Rural Water and Sewer Company, Inc. (Williamsburg Water) commenced this action against Williamsburg County, Williamsburg County Water and Sewer Authority, and the Town of Kingstree (collectively, the County)[1] seeking: (1) a determination that Williamsburg Water possessed an exclusive right to provide water and sewer service within designated unincorporated areas in Williamsburg County, (2) damages in tort based on the County's interference with that right, and (3) injunctive relief. The circuit court granted summary judgment to the County, finding that Williamsburg Water did not possess an exclusive service right and that Williamsburg Water's cause of action in tort was barred by the South Carolina Tort Claims Act and the statute of limitations. Williamsburg Water appeals. We affirm.

FACTS/ PROCEDURAL HISTORY

The relevant facts of this case are largely undisputed and are gathered from a timeline of events to which the parties stipulated. On January 16, 1995, W.N. Kellahan, an organizer of Williamsburg Water, sent a letter to Elwood Gerald, the County's director of rural and community development, notifying the County of Williamsburg Water's intention to provide service to certain unincorporated areas of Williamsburg County pursuant to S.C. Code Ann. § 33-35-90 (1990).[2] Section 33-35-90 sets forth the statutory mechanism for a non-profit corporation to provide water and

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[1] Williamsburg Water named the Town of Hemingway and Barrineau Water Company, Inc., as defendants in the case, but these defendants were later dismissed as parties.

[2] In October of 2000, section 33-35-90 was repealed and replaced with section 33-36-270.

sewer services within the geographical areas designated in its articles of incorporation, provided the corporation notifies the county of the nature of the services to be provided and receives the county's consent.

In March and again in April of 1995, Kellahan appeared before the Williamsburg County Council on behalf of Williamsburg Water to reiterate Williamsburg Water's intent to provide services to the designated areas. Kellahan sent a copy of Williamsburg Water's master plan to the council and to Gerald. In May of 1995, Williamsburg Water filed its articles of incorporation with the Secretary of State. Shortly thereafter, Williamsburg Water began applying for loans and federal grants to fund its operation.

During this same time period, the county council began considering enacting an ordinance that would allow the County to expand its own water and sewer services into the same unincorporated areas that Williamsburg Water intended to service. The proposed ordinance allowed the County to grant franchises to organizations that submitted applications to the County seeking permission to provide service within these same areas.

The first of three public readings of the proposed franchise ordinance was held on March 6, 1995. On August 7 of that year, the ordinance was adopted. In May of 1998, the County applied for federal funding to construct its water system. On November 3, 1998, the County solicited bids for water and sewer services to the Industrial Park area, which is located within the service area designated in Williamsburg Water's proposal. The County awarded the bid to Tom Brigman Contractor's, Inc., of Newberry, on November 9, 1998.

In response, Williamsburg Water commenced this action against the County on December 4, 1998, claiming that Williamsburg Water possessed an exclusive right to provide services to the unincorporated areas specified in its proposal, including the area where the Industrial Park was located. In essence, Williamsburg Water claimed that its proposal was approved by the County by virtue of the County's failure to notify Williamsburg Water to the contrary in accordance with section 33-35-90. Williamsburg Water further claimed the County intentionally interfered with

and/or threatened to interfere with Williamsburg Water's ability to obtain federal funding and to provide service within the designated areas. The complaint alleged that as a result of the County's grossly negligent actions, Williamsburg Water suffered injury and damages. Finally, Williamsburg Water sought a declaration that it was exempt from the County's franchise ordinance and that it possessed an exclusive right to service the unincorporated areas designated in its proposal.

Williamsburg Water and the County filed cross motions for summary judgment. The circuit court granted summary judgment to the County on Williamsburg Water's first cause of action, ruling that Williamsburg Water had the right, but not the exclusive right, to provide water and sewer service to the designated areas. The circuit court also granted summary judgment to the County on Williamsburg Water's action in tort, finding the County was immune from liability under the South Carolina Tort Claims Act and that the statute of limitations had run. However, the circuit court found there was a genuine issue of material fact as to whether Williamsburg Water was exempt from the County's franchise ordinance. This appeal follows.

STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." Fleming v. Rose, 350 S.C. 488, 493, 567, S.E.2d 857, 860 (2002). 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. Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. Id.; SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990). "In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the

nonmoving party." Worsley Cos. v. Town of Mount Pleasant, 339 S.C. 51, 55, 528 S.E.2d 657, 659 (2000).

LAW/ANALYSIS

I. Exclusive Service Rights

The circuit court found that the notices contained in Williamsburg Water's proposal dated January 16, 1995, were both proper and adequate to comply with section 33-35-90. Moreover, the circuit court held Williamsburg Water possessed the right, but not the exclusive right, to provide service within the disputed area. The County did not appeal either of these findings; therefore, it is the law of this case that Williamsburg Water possesses a right to provide water and sewer services in Williamsburg County. See Bakala v. Bakala, 352 S.C. 612, 576 S.E.2d 156 (2003); Charleston Lumber Co. v. Miller Housing Corp., 338 S.E. 171, 525 S.E.2d 869 (2000) (stating an unappealed ruling is the law of the case). The question before this court is whether that right is an exclusive service right, such that the County is prohibited from awarding franchises within the areas identified in Williamsburg Water's proposal.

The circuit court's order does not indicate the basis for its finding that Williamsburg Water possesses a right to provide service in the county. We presume the circuit court found this right to be the product of the County's failure to comply with the mandatory notice provisions of section 33-35-90, for there is no other explanation in the order for the creation of this right. It is the law of this case that Williamsburg Water possesses a right of some degree; thus, determining the source of that right is not necessary to its existence. However, we believe it is necessary for a complete understanding of the controversy in this case to briefly set forth our view regarding the County's failure to comply with section 33-35-90, which must be the foundation for the circuit court's ruling.

Section 33-35-90 (1990) stated in relevant part:

> [P]rior to providing any of the services authorized in this section, nonprofit corporations or groups intending to organize such corporations shall first notify the governing body, of the county or municipality in which the services are to be provided, of their intentions and the nature of such services. The governing body shall, from the date of such notification, have a period of ninety days in which to approve the request to provide such services or inform the persons requesting permission to provide such services that the governing body intends to provide for such matters as a public function of government. Any such notification of intent by the governing body shall include a detailed description of the area to be served, the services to be provided and the time schedule under which such services will be available from the county or municipality.

(Emphasis added).

"The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 121 (1998). "Unless there is something in a statute requiring a different interpretation, the words used in the statute must be given their ordinary meaning." Mullinax v. J.M. Brown Amusement Co., 326 S.C. 453, 458, 485 S.E.2d 103, 106 (Ct. App. 1997). "The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998).

Section 33-35-90 unambiguously required the County to respond to Williamsburg Water's proposal within ninety days of its receipt. The statute further required the County to inform Williamsburg Water of its intention to provide such services and to give a detailed description of any area it wished to serve, as well as a time schedule for the availability of such services. Although the first reading of the proposed ordinance occurred within ninety days of Williamsburg Water's application, there is no evidence the reading of the ordinance notified Williamsburg Water that the County had rejected its proposal or that it described with detail the area it wished to service, the nature of services to be provided, and the time schedule for the availability of such services. Section 33-35-90 mandates that "any" such notification by the County "shall" include such information. It is irrelevant that representatives of Williamsburg Water attended the reading of the proposed ordinance because the reading did not satisfy the requirements of the statute. The County, therefore, failed to comply with section 33-35-90.

Unlike current section 33-36-270,[3] the former statute does not specifically state that a governing body's failure to respond to a non-profit corporation's proposal serves as an acceptance of the corporation's proposal. However, we believe the use of affirmative language stating that the County "shall . . . have a period of ninety days" in which to respond imposes an obligation upon the County to take action in accordance with the statute. See Horry County v. City of Myrtle Beach, 288 S.C. 412, 419, 343 S.E.2d 36, 39 (Ct. App. 1986) (stating the words "shall" and "must" are generally regarded as making a provision mandatory). Considering its overall purpose and the mandatory terms chosen by the legislature, we believe the only logical construction of section 33-35-90 is that the County's failure to respond within the ninety-day time limit constitutes approval of Williamsburg Water's proposal.[4]

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[3] S.C. Code Ann. § 33-36-270 (2000) includes the following language: "Failure to notify the corporation within ninety days of the governing body's approval or intent to serve is considered approval."

[4] Because only the extent of the service right is in issue, and not the existence thereof, we need not address Williamsburg Water's argument that section 33-36-270 applies retroactively to these facts.

We turn now to address the extent of the service rights acquired by Williamsburg Water as a result of the County's implicit approval of the proposal. Williamsburg Water argues its right to provide water and sewer services is exclusive; therefore, the County was prohibited from awarding franchises within the proposed service area. The County disagrees, contending that Section 15 of Article VIII of the South Carolina Constitution safeguards the County's right to choose whomever it desires to provide such services to its citizens.

Section 15 of Article VIII states in pertinent part:

> [N]or shall any law be passed by the General Assembly granting the right to construct and operate in a public street or on public property a street or other railway, or to erect waterworks for public use, or to lay water or sewer mains for any purpose, or to use the streets for any facility other than telephone, telegraph, gas, and electric, without first obtaining the consent of the governing body of the county . . . .

(Emphasis added).

Section 15 of Article VIII of the South Carolina Constitution prohibits the legislature from passing a law which grants the right to lay water or sewer mains without first obtaining a county's consent. See City of Aiken v. Aiken Elec. Co-op., Inc., 305 S.C. 466, 468, 409 S.E.2d 403, 404 (1991). However, section 15 conveys only a veto power; it is not a franchising mechanism. See City of Abbeville v. Aiken Elec. Co-op., Inc., 287 S.C. 361, 368, 338 S.E.2d 831, 835 (1985) ("The consent provision of § 15 is not an affirmative grant of franchise power, but is a restriction on legislative authority.") (Emphasis in original). Therefore, prior to receiving the County's consent, Williamsburg Water was prohibited from entering into any area of the county because Section 15 of Article VIII acted as a shield barring any such intrusion without the County's approval. In this case, the

County's constructive consent simply removed this constitutional shield; it did not, however, convert a previously non-existent right into a right that is exclusive against all others, including the County. Nothing in section 33-35-90 or case law of this state suggests such an extensive interpretation.

The cases in South Carolina that have addressed conflicts between rural service providers and governmental bodies give little guidance under the facts of this case. Both parties directed this court's attention to the line of cases involving annexation, including City of Aiken and City of Abbeville, as well as City of Rock Hill v. Pub. Serv. Comm'n of S.C., 308 S.C. 175, 417 S.E.2d 562 (1992), South Carolina Electric & Gas Co. v. Berkeley Elec. Co-op., Inc., 306 S.C. 228, 411 S.E.2d 218 (1991), Berkeley Elec. Co-op., Inc. v. S.C. Pub. Serv. Comm'n, 304 S.C. 15, 402 S.E.2d 674 (1991), and Blue Ridge Elec. Co-op., Inc. v. City of Seneca, 297 S.C. 283, 376 S.E.2d 514 (1989).

In this line of cases, the common facts involved a municipality's annexation of land which was within an area that the Public Service Commission had assigned to a rural service provider. An irreconcilable conflict developed between the alleged right of the rural service provider to expand its services within its assigned area and the municipality's right to determine who would provide services within the newly incorporated area. Cf., City of Rock Hill, 308 S.C. at 178, 417 S.E.2d at 564. If the rural service provider possessed an exclusive right to service the area, the municipality could not offer the services. However, the municipality could prevent the rural service provider from using the municipality's streets to extend its services by refusing to give consent as provided for in Section 15 of Article VIII. The result of this situation would be that the citizens within the disputed area would effectively be denied service because the rights possessed by each would prevent the other from servicing the area. Cf., id.; Blue Ridge, 297 S.C. at 289, 376 S.E.2d at 517-18. The supreme court refused to compel the municipalities to give their consent to the assigned provider because limiting a municipality's right to choose fatally undermines the concept of consent. Cf., City of Rock Hill, 308 S.C. at 178, 417 S.E.2d at 564; Blue Ridge, 297 S.C. at 289, 376 S.E.2d at 517-18. Instead, the supreme court found the service rights possessed by the provider were not exclusive

and that the right of consent embodied the right of the municipality to designate a supplier of the municipality's choosing. Cf., Berkeley Elec. Coop., 304 S.C. at 19-20, 402 S.E.2d at 677.

We find the annexation cases inapposite because in those cases, the source of the provider's service rights was an assignment by the Public Service Commission whereas Williamsburg Water acquired its service right as a result of the County's consent, which resulted from the County's failure to comply with section 33-35-90. Thus, unlike the annexation cases, the governmental body invading Williamsburg Water's proposed service area is the same body from which consent was obtained for that service. Moreover, in the annexation cases, the service providers were allowed to continue servicing areas where they maintained existing service. In this case, Williamsburg Water has no existing service facilities anywhere within the disputed region. There are two fundamental elements underlying the annexation cases which distinguish them from this case: (1) the governing body never consented to the provider, and (2) the provider had existing service in some portion of the disputed area. Because neither of these elements is present here, the annexation cases offer little guidance in resolving a dispute of this posture.

By failing to comply with section 33-35-90, the County consented to Williamsburg Water's service proposal. Therefore, unlike in the annexation cases, this factor is decided in favor of Williamsburg Water. However, nothing in section 33-35-90 suggests that the receipt of constructive consent is tantamount to obtaining a right so exclusive as to operate against the very entity from which the consent was initially required. Williamsburg Water's service rights are not superior to the County's own right to decide who will provide water and sewer services to its citizens, especially considering that Williamsburg Water has no existing service facilities in place as seen in the annexation cases.[5]

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[5] We recognize that the lack of existing facilities is likely the result of Williamsburg Water's inability to obtain funding due to the circumstances surrounding the County's award of franchises for the same areas which

The difficulty of this case lies in giving effect to the rights acquired by Williamsburg Water as a result of the County's failure to comply with section 33-35-90. If this statute is to have any meaning, there must be some enforceable quality belonging to those rights; otherwise, a party obtaining approval under this statute receives, in effect, nothing at all. Complicating the matter is the fact that during the pendency of this appeal, the County awarded numerous franchises affecting the disputed area, and those facilities are presently under development for the benefit of the people of Williamsburg County. Thus, in this case, valid but competing interests are diametrically opposed. An unfortunate result of our ruling today is that Williamsburg Water likely possesses a right which has little commercial value in light of the County's intrusion into the designated service area. Nevertheless, in the absence of case law on point, and without specific language in section 33-35-90 compelling the grant of exclusive rights, we hold that Williamsburg Water does not possess an exclusive service right within the described service area; rather, as the circuit court found, it possesses a non-exclusive service right.

II. Applicability of the Franchise Ordinance to Williamsburg Water

Williamsburg Water argues the trial court erred in failing to find as a matter of law that it was exempt from the County's franchise ordinance because it was a bona fide water/sewer system as defined by the ordinance. This issue is not directly appealable.

The supreme court's recent decision in Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 580 S.E.2d 440 (2003), resolves the issue of the appealability of the denial of a motion for summary judgment. While in the past this court has, in its discretion, heard an appeal from the denial of summary judgment where there was another appealable issue before the court, that is no longer the rule in South Carolina. Olson expressly holds "the denial of a motion for summary judgment is not appealable, even after final

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Williamsburg Water desired to service. However, we cannot ignore the absence of facilities in light of its significance in the annexation cases.

judgment." In so holding, the supreme court expressly overruled cases that are inconsistent with this rule. Id.

In this case, the trial court found there was a genuine issue of material fact as to whether Williamsburg Water was a bona fide water/sewer system thereby exempting it from the County's franchise ordinance. On remand, the trial court must first decide whether the ordinance is capable of being applied to Williamsburg Water in consideration of the timing and manner of its enactment.[6] Should the trial court determine the ordinance is capable of being applied to Williamsburg Water, it must then determine whether Williamsburg Water is exempt from the ordinance under either of the prescribed circumstances stated in the ordinance. See Section II, Williamsburg County Ordinance No. 1995-3 ("All areas of the county not now served by an existing bona fide water/sewer system or located within a County Council approved water/sewer service area are hearby designated as within the County water/sewer system service area."). Pursuant to the express terms of the ordinance, all areas that qualify under either of the exemptions stated above are not within the County's water/sewer system service area.

The fact that this issue is not directly appealable does not preclude the parties from again moving for summary judgment on this issue on the same or other grounds not previously considered by the trial court. The denial of summary judgment does not finally determine the merits of the case, and issues raised in a motion may be raised again in a motion to reconsider summary judgment or in a motion for directed verdict. Brown v. Pearson, 326 S.C. 409, 416-17, 483 S.E.2d 477, 481 (Ct. App. 1997). The parties may make a later motion for summary judgment based on matters not involved in the decision on the first motion. Croswell Enters., Inc. v. Arnold, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992).

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[6] During oral argument, counsel for Williamsburg Water conceded that it is subject to certain aspects of the ordinance.

III. The South Carolina Tort Claims Act

A. The County's immunity from liability

Williamsburg Water maintains the circuit court erred in granting summary judgment to the County on Williamsburg Water's tort cause of action because there was a genuine issue of material fact as to whether the County acted in a grossly negligent manner. We disagree.

Williamsburg Water alleged that the County's gross negligence in undertaking to provide water and sewer service to areas designated in Williamsburg Water's approved proposal caused Williamsburg Water damages as a result of its inability to obtain federal funding and, likewise, to provide service within the exclusive service area. The circuit court found the County was immune from liability under the South Carolina Tort Claims Act.

The South Carolina Tort Claims Act declares that the State, its agencies, political subdivisions, and other governmental entities are "liable for their torts in the same manner and to the same extent as a private individual under like circumstances," subject to certain limitations and exemptions within the Act. S.C. Code Ann. § 15-78-40 (Supp. 2002). Section 15-78-60 sets forth exceptions to this waiver of sovereign immunity, and the exceptions restore certain limitations on the liability of a governmental entity. S.C. Code Ann. § 15-78-60 (Supp. 2002). Section 15-78-60(12) provides that a government entity is not liable for loss resulting from:

> licensing powers or functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority <u>except when the power or function is exercised in a grossly negligent manner</u>[.]

(Emphasis added).

"Gross negligence is the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." Clyburn v. Sumter County Sch. Dist. No. 17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994). "It is the failure to exercise even the slightest care." Faile v. South Carolina Dep't. of Juvenile Justice, 350 S.C. 315, 331-32, 566 S.E.2d 536, 544 (2002). "Gross negligence . . . means the absence of care that is necessary under the circumstances." Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000). "Additionally, while gross negligence ordinarily is a mixed question of law and fact, when the evidence supports but one reasonable inference, the question becomes a matter of law for the court." Id.

Although the County failed to comply with section 33-35-90 regarding notice to Williamsburg Water, there is no evidence to support Williamsburg Water's allegation that the County's conduct rose to the level of gross negligence. The record contains no indication that the County intentionally sought to interfere with Williamsburg Water's ability to service the area. Rather, the evidence suggests the County proceeded under the mistaken impression that it satisfied the notice provisions of section 33-35-90 when it gave public readings of the proposed ordinance. Accordingly, contrary to Williamsburg Water's contention, the evidence indicates the County was unaware that Williamsburg Water had acquired any service rights within the disputed area. Therefore, we believe the only reasonable inference from the evidence is that any intrusion by the County upon Williamsburg Water's service rights was unintentional and not the product of gross negligence. The Tort Claims Act bars recovery from government entities under such circumstances.

B. The statute of limitations

Williamsburg Water argues the trial court erred in determining its tort claims against the County were barred by the statute of limitations. We need not decide this issue in light of our holding that the County was entitled to summary judgment based on the lack of evidence supporting Williamsburg Water's claim of gross negligence.

CONCLUSION

We hold today that section 33-35-90 does not convey exclusive service rights to Williamsburg Water on the facts of this case. Nothing in the statutory language suggests such an extensive interpretation, and a contrary finding would be inconsistent with our view of the veto power granted to counties and municipalities by virtue of Section 15 of Article VIII of the South Carolina Constitution. By failing to act, the County consented to Williamsburg Water's proposal, but that consent does not transform a non-existent service right into an exclusive service right.

We also affirm the circuit court's grant of summary judgment in favor of the County with respect to Williamsburg Water's causes of action in tort, holding that the County is immune from liability under the South Carolina Tort Claims Act. The denial of summary judgment as to whether the franchise ordinance applies to Williamsburg Water is not appealable, and that issue is remanded to the circuit court for further proceedings consistent with this opinion.

AFFIRMED.

CURETON, HUFF, HOWARD, BEATTY, JJ., and JEFFERSON, A.J., concur.

ANDERSON, J. (Concurring in Result ONLY in a Separate Opinion): I concur in result **ONLY**. I disagree with the reasoning and analysis of the majority.

Williamsburg Rural Water and Sewer Company, Inc. (Williamsburg Water) commenced this action against Williamsburg County, Williamsburg County Water and Sewer Authority, and the Town of Kingstree (collectively, the County),[1] seeking: (1) a determination of Williamsburg Water's right to

[1] Williamsburg Water named the Town of Hemingway and Barrineau Water Company, Inc. as defendants in the case, but these defendants were later dismissed as parties.

provide water and sewer service within designated unincorporated areas in Williamsburg County; (2) damages in tort based on the County's actions; and (3) injunctive relief. The circuit court granted summary judgment to the County finding that Williamsburg Water did not have the exclusive right to provide service to the designated areas, and that Williamsburg Water's cause of action in tort was barred by the South Carolina Tort Claims Act and the statute of limitations. Williamsburg Water appeals.

FACTS/PROCEDURAL BACKGROUND

The facts of the case are largely undisputed and are gathered from a timeline of events to which the parties stipulated. On January 16, 1995, W.N. Kellahan, an organizer of Williamsburg Water, sent a letter to Elwood Gerald, the County's director of rural and community development, notifying the County of Williamsburg Water's intention to provide service to certain unincorporated areas of Williamsburg County pursuant to S.C. Code Ann. § 33-35-90 (1990).[2] Section 33-35-90 articulates a statutory mechanism for a non-profit corporation to furnish water and sewer services within the geographical areas designated in its articles of incorporation, subject to certain conditions relating to notice and consent.

In March and again in April of 1995, Kellahan appeared before the Williamsburg County Council on behalf of Williamsburg Water to reiterate Williamsburg Water's intent to provide services to the designated areas. Kellahan sent a copy of Williamsburg Water's master plan to the council and to Gerald. In May of 1995, Williamsburg Water filed its articles of incorporation with the Secretary of State. Shortly thereafter, Williamsburg Water initiated applications for loans and federal grants to fund its operation.

During this same time period, the county council began considering enacting an ordinance that would allow the County to expand its own water and sewer system to the same unincorporated areas that Williamsburg Water intended to service. The proposed ordinance allowed the County to grant

[2] In October of 2000, § 33-35-90 was repealed and replaced with § 33-36-270.

franchises to organizations that submitted applications to the County seeking permission to provide service to unincorporated areas within the County.

On August 7, 1995, the County adopted the proposed franchise ordinance. In May of 1998, the County applied for federal funding to construct a rural water system. On November 3, 1998, the County opened bids for water and sewer services to the Industrial Park located within the same service area designated in Williamsburg Water's articles of incorporation. The County awarded the bid to Tom Brigman Contractors, Inc., of Newberry, South Carolina, on November 9, 1998.

In response, Williamsburg Water filed an action against the County on December 4, 1998, claiming that Williamsburg Water had the exclusive right to provide services to the specified unincorporated areas of Williamsburg County, including the area where the Industrial Park was located. Williamsburg Water further averred the County intentionally interfered with and/or threatened to interfere with Williamsburg Water's ability to obtain federal funding and to provide service within the designated areas. The complaint alleged that as a result of the County's grossly negligent actions, Williamsburg Water suffered injury and damages. Finally, Williamsburg Water sought a declaration that it was a bona fide water system and, therefore, exempt from the County's franchise ordinance and that it had an exclusive right to service the unincorporated areas of the County.

Williamsburg Water and the County filed cross motions for summary judgment. The circuit court granted summary judgment to the County on Williamsburg Water's first cause of action, ruling that Williamsburg Water did not have the exclusive right to provide water and sewer service to the designated areas. The court granted summary judgment to the County on Williamsburg Water's tort cause of action, finding the County was immune from liability under the South Carolina Tort Claims Act and that the statute of limitations had run. However, the circuit court found there was a genuine issue of material fact as to whether Williamsburg Water was a bona fide water system exempt from the County's franchise ordinance.

STANDARD OF REVIEW

"Summary judgment is appropriate only 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.'" Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 130, 558 S.E.2d 271, 273 (Ct. App. 2001) (quoting Rule 56(c), SCRCP); see also Sauner v. Public Serv. Auth., 354 S.C. 397, 581 S.E.2d 161 (2003) (summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 563 S.E.2d 331 (2002); Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002). In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003); Glasscock, Inc. v. United States Fid. & Guar. Co., 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).

Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Regions Bank v. Schmauch, __S.C.__, 582 S.E.2d 432 (Ct. App. 2003); Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing, and Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991); Peterson v. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990); Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001).

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002); Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). On appeal from an order granting summary judgment, this court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the nonmoving party below. Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001); see also Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999) (all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party). The judgment may be affirmed only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Estate of Cantrell v. Green, 302 S.C. 557, 397 S.E.2d 777 (Ct. App. 1990).

LAW/ANALYSIS

I. MANDATED NOTICE UNDER § 33-35-90

South Carolina Code § 33-35-90 (1990) states in pertinent part:

> [P]rior to providing any of the services authorized in this section, nonprofit corporations or groups intending to organize such corporations shall first notify the governing body, of the county or municipality in which the services are to be provided, of their intentions and the nature of such services. The governing body shall, from the date of such notification, have a period of ninety days in which to approve the request to provide such services or inform the persons requesting permission to provide such services that the governing body intends to provide for such matters as a public function of government. Any such notification of intent by the governing body shall include a detailed description of the area to be served, the services to be

> provided and the time schedule under which such services will be available from the county or municipality.

S.C. Code Ann. § 33-35-90 (1990). In his order, the circuit judge found:

> [Williamsburg Water] specifically gave notice, as required by § 33-35-90 of the S.C. Code Ann., 1976, as amended, that it desired to provide water service in its designated area to the Williamsburg County Council on January 16, 1995, and again on March 6, 1995, of its intention to provide such service.
>
> . . . .
>
> . . . I further find that the notices to Williamsburg County provided on January 16, 1995, and again on March 6, 1995, were both proper and adequate to comply with Section 33-35-90 of the Code of Laws of South Carolina, 1976, as amended.

The County did not appeal the finding by the circuit judge that the notice given by Williamsburg Water under § 33-35-90 was adequate and proper. An unappealed ruling is the law of the case. Bakala v. Bakala, 352 S.C. 612, 576 S.E.2d 156 (2003); Charleston Lumber Co. v. Miller Housing Corp., 338 S.C. 171, 525 S.E.2d 869 (2000); ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997); Sandy Springs Water Co. v. Department of Health and Envtl. Control, 324 S.C. 177, 478 S.E.2d 60 (1996); Resolution Trust Corp. v. Eagle Lake & Golf Condos, 310 S.C. 473, 427 S.E.2d 646 (1993); Larimore v. Carolina Power & Light, 340 S.C. 438, 531 S.E.2d 535 (Ct. App. 2000); see also Brading v. County of Georgetown, 327 S.C. 107, 490 S.E.2d 4 (1997) (clarifying that where decision is based on more than one ground, appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case); In re Morrison, 321 S.C. 370, 468 S.E.2d 651 (1996) (recognizing court's ruling is the law of the case where it is not contested on appeal); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 166, 177 S.E.2d 544, 544 (1970) (stating an unchallenged ruling, "right or wrong, is the law of the case and requires affirmance"); Priester v. Brabham, 230 S.C. 201, 95

S.E.2d 167 (1956) (holding that, because there was no exception to the ruling of the court below, that ruling, right or wrong, was the law of the case); Unisun Ins. v. Hawkins, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000) (noting an unappealed ruling is the law of the case which the appellate court must assume was correct); Hall v. Clarendon Outdoor Adver., Inc., 311 S.C. 185, 428 S.E.2d 1 (Ct. App. 1993) (emphasizing that failure to argue against basis for trial court's ruling renders it the law of the case). Concomitantly, the ruling by the circuit judge is the law of the case.

II. EXCLUSIVITY

Williamsburg Water argues the trial court erred in failing to find that it had the exclusive right to provide service within the areas listed in its articles of incorporation. I disagree.

There is nothing in § 33-35-90 that gives exclusivity to the "nonprofit corporations or groups intending to organize such corporations." See S.C. Code Ann. § 33-35-90 (1990). Moreover, § 33-35-90 contains language which indicates that its service would NOT be exclusive. Section 33-35-90 states in relevant part:

> [S]uch corporations are specifically authorized to borrow funds and contract with municipalities, counties and other political subdivisions for the provision of such services in accordance with this chapter and the Rural Development Act of 1972, and counties, municipalities and other political subdivisions are authorized to so contract with such nonprofit corporations.

Section 33-35-90 does not confer upon Williamsburg Water any specific right, nor does it impose upon the County a duty owed Williamsburg Water in this case.

Furthermore, section 33-35-170 limits the application of § 33-35-90. See S.C. Code Ann. § 33-35-170 (1990).[3] Pursuant to § 33-35-170, "[t]he

[3] In October of 2000, § 33-35-170 was repealed.

powers and authorities conferred by this chapter shall be in addition to and supplemental to any other general, special or local law. This chapter is complete in itself and shall not repeal by implication or otherwise any other general, special or local law." This section does not grant any special powers by the provisions of this chapter or § 33-35-90. It makes these provisions supplemental to and does not repeal any other general, special or local law.

The provisions of the South Carolina Constitution place restrictions on what the General Assembly may do through statutes. See Knight v. Salisbury, 262 S.C. 565, 206 S.E.2d 875 (1974). Article VIII, Section 15 of the South Carolina Constitution provides:

> No law shall be passed by the General Assembly granting the right to construct and operate in a public street or on public property a street or other railway, telegraph, telephone or electric plant, or to erect water, sewer or gas works for public use, or to lay mains for any purpose, or to use the streets for any other such facility, without first obtaining the consent of the governing body of the municipality in control of the streets or public places proposed to be occupied for any such or like purpose; **nor shall any law be passed by the General Assembly granting the right to** construct and operate in a public street or on public property a street or other railway, or to **erect waterworks for public use, or to lay water or sewer mains for any purpose**, or to use the streets for any facility other than telephone, telegraph, gas and electric, **without first obtaining the consent of the governing body of the county** or the consolidated political subdivision in control of the streets or public places proposed to be occupied for any such or like purpose.

S.C. Const. art. VIII, § 15 (emphasis added). Article VIII, Section 16 reads: "Any incorporated municipality may, upon a majority vote of the electors of such political subdivision who shall vote on the question, acquire by initial construction or purchase and may operate gas, water, sewer, electric,

transportation or other public utility systems and plants." S.C. Const. art. VIII, § 16.

Article VIII, § 15 prohibits the legislature from passing any law granting a right to construct or operate a water or sewer system without the consent of the county's governing body. City of Aiken v. Aiken Elec. Coop., Inc., 305 S.C. 466, 409 S.E.2d 403 (1991). No statute passed by the legislature can limit or undermine the constitutional requirement of the county's consent. See Blue Ridge Elec. Coop., Inc. v. City of Seneca, 297 S.C. 283, 376 S.E.2d 514 (1989).

Article VIII, section 15 requires consent of the county at the time a water or sewer system is first constructed or when it is expanded. See City of Cayce v. AT&T Communications, 326 S.C. 237, 486 S.E.2d 92 (1997); City of Abbeville v. Aiken Elec. Coop., Inc., 287 S.C. 361, 338 S.E.2d 831 (1985). The consent requirement of Article VIII, section 15 permits counties to impose conditions on the grant of their consent to allow utilities to build and operate water and electric systems. City of Cayce, 326 S.C. at 241-42, 486 S.E.2d at 94. Counties have the right to grant public utility franchises and to determine who may or may not serve county residents. South Carolina Elec. & Gas Co. v. Berkeley Elec. Coop., Inc., 306 S.C. 228, 411 S.E.2d 218 (1991); City of Cayce, 326 S.C. at 241-42, 486 S.E.2d at 94. The County's constitutional authority includes the power to grant or deny franchises, as well as the power to deny expansion of existing franchisees or utility providers. City of Aiken, 305 S.C. at 468, 409 S.E.2d at 404.

In Berkeley Elec. Coop., Inc. v. South Carolina Pub. Serv. Comm'n, 304 S.C. 15, 402 S.E.2d 674 (1991), our Supreme Court explained:

> We reject Co-op's claim that, while a municipality may, itself, provide electric service within corporate limits, it may not designate a supplier through a franchise agreement. Our holdings in City of Abbeville v. Aiken Elec. Co-op., Inc. and Blue Ridge Elec. Co-op v. City of Seneca are dispositive of this issue.

In Abbeville, we rejected a municipality's claim that it had the right to oust an existing electric supplier upon annexation. We stated:

> [A] franchisee possessing a valid PSC territorial assignment to serve an area which is subsequently annexed:
>
> 1. Is permitted to continue service in that area to those premises being served at the time of annexation;
>
> 2. Is prohibited, without prior consent of the municipality, from extending or expanding service in that area by the use of any streets, alleys, public property or ways after the date of annexation.

287 S.C. at 370-371, 338 S.E.2d at 836.

In Blue Ridge, we addressed an assigned supplier's challenge to a municipal utility which provided electricity in a newly annexed area. There, we held that "a municipality may either consent to expanded service by the assigned supplier or itself serve new premises and customers within the assigned, annexed area." 297 S.C. at 289, 376 S.E.2d at 517.

The basic premise upon which Abbeville and Blue Ridge rest is a municipality's right of consent under S.C. Const. Art. VIII, § 15. In Blue Ridge, we declined to interpret the Territorial Assignments Act, as amended by Act 431 of 1984, in a way violative of this right. We stated:

> Absent the option of municipal service to new premises and customers in assigned, annexed areas, the assigned supplier would possess, for all practical purposes, an exclusive territorial service right.

> Municipalities could not realistically deny consent to expanded service by these assigned suppliers; denying consent would be tantamount to denying property owners in the annexed area any electric service at all.

297 S.C. at 289, 376 S.E.2d at 517-518.

Here, Co-op's contention that a municipally-franchised utility should be distinguished from a municipally-owned utility effectually denies Summerville's right of consent, leaving Summerville with the sole alternative of permitting Co-op to provide the service. This would clearly violate Abbeville and Blue Ridge, supra.

Summerville has granted SCE & G its consent to serve the annexed area by virtue of the franchise agreement. Accordingly, Circuit Court correctly held that SCE & G may continue providing electric service to Hardee's.

Berkeley Elec. Coop., Inc., 304 S.C. at 18-20, 402 S.E.2d at 676-77 (footnotes and emphasis omitted).

The Court addressed the efficacy of Article VIII, section 15 of the South Carolina Constitution in City of Aiken v. Aiken Elec. Coop., Inc., 305 S.C. 466, 409 S.E.2d 403 (1991):

> Article VIII, Section 15, of the South Carolina Constitution prohibits the General Assembly from enacting laws which grant the right to construct or operate upon the streets or property of a municipality without first obtaining the consent of such municipality.
>
> This Court has affirmed the right of municipalities to authorize expansion of existing service or to provide alternative service. See Berkeley Elec. Co-Op v. S.C. Public Service Comm'n, [304 S.C. 15,] 402 S.E.2d 674 (S.C. Sup. Ct. 1991)

> (citing Blue Ridge Elec. Co-Op v. City of Seneca, 297 S.C. 283, 376 S.E.2d 514 (1989)); City of Abbeville v. Aiken Elec. Co-Op, 287 S.C. 361, 338 S.E.2d 831 (1985). When service to a new area is not provided by the municipality, the municipally assigned supplier possesses exclusive rights. Our holding in Berkeley makes no distinction between a municipally owned supplier and a municipally franchised supplier. Hence, service by a franchised supplier is considered municipal service.
>
> We find that the City was within its constitutional authority to designate an electric service supplier for new customers in the annexed area and to enact ordinances affecting other suppliers of electricity. S.C. Const. Art. VIII, § 15.

City of Aiken, 305 S.C. at 468, 409 S.E.2d at 404.

Article VIII, section 15 was further discussed in City of Rock Hill v. Public Serv. Comm'n, 308 S.C. 175, 417 S.E.2d 562 (1992):

> Article VIII, § 15 of the South Carolina Constitution provides:
>
> > No law shall be passed by the General Assembly granting the right to construct and operate in a public street or on public property a street or other railway, telegraph, telephone or electric plant, or to erect water, sewer or gas works for public use, or to lay mains for any purpose, or to use the streets for any other such facility, without first obtaining the consent of the governing body of the municipality in control of the streets or public places proposed to be occupied for any such or like purpose.
>
> We have interpreted this provision in several cases. In City of Abbeville v. Aiken Elec. Co-op., Inc., 287 S.C. 361, 338 S.E.2d 831 (1985), we held that a municipality did not have the right to

> oust an existing electric supplier when the assigned area was subsequently annexed. However, we also determined that expansion by the use of any city street or public property by the supplier within the annexed area without the municipality's consent was prohibited. Id. In Blue Ridge Electric v. City of Seneca, 297 S.C. 283, 376 S.E.2d 514 (1989), the issue presented was whether a municipality could service new customers in an area assigned to another electrical supplier once the area was annexed into the city. We held that denying the municipalities the right to serve in the annexed areas would be tantamount to leaving the assigned supplier with an exclusive territorial right since the municipality would be faced with the choice of denying the property owners power or consenting to the assigned supplier's use of the streets and public ways for expansion of their service. As this would create an irreconcilable conflict between the Act 431 and municipality's rights under Article VIII § 15, we determined a municipality could not be enjoined from serving new customers within the annexed property.
>
> In subsequent cases, this Court held the city's right to consent included the power to designate another supplier other than the municipal utility or the assigned supplier. Berkeley Electric Co-op. v. South Carolina Public Service Commission, 304 S.C. 15, 402 S.E.2d 674 (1991); City of Aiken v. Aiken Elec. Co-op., 305 S.C. 466, 409 S.E.2d 403 (1991); South Carolina Electric & Gas v. Berkeley Electric Cooperative, Inc., 306 S.C. 228, 411 S.E.2d 218 (1991). In these cases, we have implicitly acknowledged that without the ability to provide service or authorize another utility to provide service, the constitutional right to grant or withhold consent would be meaningless.

City of Rock Hill, 308 S.C. at 177-78, 417 S.E.2d at 563-64.

Section 4-9-30(11) of the South Carolina Code authorizes counties "to grant franchises and make charges in areas outside the corporate limits of municipalities within the county in the manner provided by law for

municipalities and subject to the same limitations, to provide for the orderly control of services and utilities affected with the public interest." S.C. Code Ann. § 4-9-30(11) (Supp. 2002). The Williamsburg County Council passed a franchise ordinance regulating the water franchises to various entities in Williamsburg County which became effective on August 7, 1995. In Glendale Water Corp. v. City of Florence, 274 S.C. 472, 265 S.E.2d 41 (1980), our Supreme Court approved of cities extending their water lines if they had a valid franchise from the County.

The issue of exclusivity of a franchise is vested in the governmental entity pursuant to Article VIII, sections 15 and 16 of the South Carolina Constitution. The General Assembly may enact legislation placing responsibility upon a governmental entity to act upon a request by a non-governmental entity to provide water and sewer services by denying or granting such a request under certain conditions and time parameters. Section 33-35-90 is the paradigm of a legislative act involving procedural responses mandated by a governmental entity to either provide water and sewer services or to allow a non-governmental entity to engage in these activities. This section was efficacious at the time of the filing of the application by Williamsburg Water. Because the County is bound by the "law of the case" doctrine in regard to the issue of consent, my analysis is limited to the facts of this case.

CONCLUSION

I find that the issue of governmental consent by the County is controlled by the ruling of the circuit judge. His conclusion that Williamsburg Water gave proper and adequate notice under § 33-35-90 became the law of the case.

Based on the constitutional provisions and the evolving precedent extant in this field, I hold that Williamsburg Water is entitled to a **non-exclusive right** to provide water and sewer service to the areas designated in its proposal made pursuant to S.C. Code Ann. § 33-35-90. I rule the County

has a **non-exclusive right** to provide water and sewer service in the areas designated in the proposal.

Accordingly, I **VOTE** to **AFFIRM** the order of the circuit court.

STILWELL, J. (concurring in result only): Although I agree with the result of this case, I write separately to explain my reasoning, which differs from both the majority opinion and Judge Anderson's opinion concurring in result only.

The critical issue is whether Williamsburg Water's notice to the county and the county's action or inaction thereafter vested Williamsburg Water with the exclusive right to provide water service in the subject area or a non-exclusive right to provide such service. The trial court's order holding Williamsburg Water's authority to be non-exclusive came as a result of rather generic mutual motions for summary judgment, neither of which focused on the issue of whether the rights obtained were exclusive or non-exclusive. There may well be a genuine issue of material fact concerning whether the statute, Williamsburg Water's notice, and Williamsburg County's response or lack thereof creates exclusive or non-exclusive rights.

However, the status of this appeal is such that we are not able to address that issue. The question presented on appeal is whether the trial court erred in failing to find that Williamsburg Water had exclusive right and authority to serve within the specified area and Williamsburg Water's arguments all focus on its contention that it is so entitled. Thus, the issue as presented is the functional equivalent of an appeal of the refusal to grant summary judgment, an issue that is not appealable. Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994); Olson v. Faculty House of Carolina, 354 S.C. 161, 580 S.E.2d 440 (2003).

Nowhere in Williamsburg Water's brief do I find an assertion that the court erred in ruling that Williamsburg Water's rights were non-exclusive. Because that finding was not appealed, it is the law of the case and not subject to review by this court. ML-Lee Acquisition Fund, LP, v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997).

For that reason alone, I would affirm the trial court's ruling.

CONNOR, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Brentley Allen Blalock, Appellant.

Appeal From Spartanburg County
Donald W. Beatty, Circuit Court Judge

Opinion No. 3708
Heard October 8, 2003 – Filed December 8, 2003

AFFIRMED

Jack B. Swerling, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Senior Assistant Attorney General

Norman Mark Rapoport, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

KITTREDGE, J.: Brentley Blalock was tried on two counts of criminal sexual conduct with a minor. Blalock was acquitted on one count and convicted on the second count. Blalock appeals his conviction, arguing the trial judge committed reversible error by allowing the state to present extrinsic evidence in connection with a prior inconsistent statement by his wife, Lee Blalock. We affirm, finding the trial court did not abuse its discretion in admitting the evidence.[1]

FACTS/BACKGROUND[2]

On July 11, 2000, 14-year-old Jane Smith[3] and her family visited the home of their neighbors, Brentley and Lee Blalock. After passing the afternoon with the Blalocks, the Smiths returned to their nearby home. Jane, however, asked and was allowed to stay for a while longer. Brentley Blalock, Lee Blalock, one of their sons, and Jane continued watching television and "playing around" in the living room. After a while, Ms. Blalock left the room to take care of some chores in the adjacent kitchen. During this time, Jane claimed Brentley Blalock committed a sexual battery upon her.

At the center of this appeal is a statement Ms. Blalock provided to a police detective investigating the incident on the evening of July 11, 2000. In the statement, transcribed by the detective, Ms. Blalock described what she saw that night. In the critical portion of the narrative, Ms. Blalock reportedly

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1 Blalock's appellate counsel did not represent Blalock at trial.

2 Our discussion is limited to the facts and circumstances in connection with the charge resulting in a conviction.

3 The minor victim and her family are identified by a fictitious name.

said that when she returned from the kitchen to the living room she "saw [Jane] laying on her stomach in front of the T.V. Brentley [Blalock] was sitting beside her. I noticed he had his hand under her pants leg on her backside."

At trial, the prosecution called Ms. Blalock as a witness and examined her regarding what she saw on July 11, 2000 – focusing primarily on her statement to the police detective. Initially, however, the solicitor did not confront her with the exact words recorded in the statement. Instead, the solicitor characterized Ms. Blalock's statement in different terms—adding and deleting key words and changing the order of the words.

The solicitor first asked Ms. Blalock whether she saw her "husband's hand under [Jane's] pants and on her bottom." The solicitor's substitution of the word "pants" for "pants leg" and "bottom" for "backside" contributed to the confusion that would follow. Ms. Blalock answered "no" and attempted to explain:

> I did not see his hand on her butt per se, just for lack of a better word. When I walked in, they were fine, looking at television. She had shorts on that were what would have been acceptable for school. Her parents didn't allow her to wear teenybopper type clothes. So, they were kind of long and I did see his hand underneath her shorts on her leg.

Ms. Blalock apparently then tried to correct the solicitor's misquotation of her statement, explaining that "in my statement, it says on her back side." Before Ms. Blalock could continue, however, the solicitor protested to the court that she was being "non-responsive" and asked for permission to "take her as a hostile witness to impeach her under Rule 607," which was allowed.

The solicitor then presented Ms. Blalock with a copy of her statement and had her read aloud the sentences quoted above. Again, when asked to confirm or deny the statement, Ms. Blalock instead tried to explain: "I'm saying that maybe some of the details are missing [from the statement]. Just

like you pointed out with Jane, a few minutes ago, all of the details were not included. When you're upset in a time like that, you don't think to include everything."

After further questioning, the solicitor returned to the statement a third time, but once again the solicitor changed the actual wording, asking Ms. Blalock: "You saw his hand on her back side under her pants?" Ms. Blalock again attempted explanation, responding:

> A. [Ms. Blalock] Her back side of her leg. That's another thing that was left out.
>
> Q. [Solicitor] Okay. And when did you come up with that? When did you realize that was missing?
>
> A. That was sometime after the, all the reports were gone and I had time to think over things in my mind, and when I was more clear headed so I could remember more of the details of what went on.

After a break in the testimony, the solicitor revisited the statement a final time.

> Q. [Solicitor] Mrs. Blalock, I want to show you your statement again, if I may, so that there's no misunderstanding. Okay?
>
> A. [Ms. Blalock] (Witness nods affirmatively.)
>
> Q. Did you say Brentley was sitting beside her, and I noticed he had his hand under her pants leg on her back side?
>
> A. I said that portion, and for whatever reason, the detail of, of her leg, the back side, was left out.
>
> Q. All right. So that's what you --?

A. But that portion, yes.

Q. Okay. Did you ever tell anybody back side of her leg until court today?

A. Well, I thought that I did.

Q. Okay. Who would you have told?

A. Detective Lindsey and cops or whoever else --.

Q. When would you have told Detective Lindsey?

A. -- that may have been there.

Q. I mean you are saying it happened that night you told him after you signed it or the following week? When did you do this?

A. It would have been at the time of the statement.

Q. Okay. So, again, when you said that, on the back side, you, at that time, you would of told him of her leg?

A. I feel like I said that. If I didn't, you know, I may have been unclear about it or he may of, you know, been paraphrasing what I was saying.

Immediately following this colloquy, the solicitor attempted to offer the statement into evidence but withdrew the offer after defense counsel requested a bench conference.

The State next called William Lindsey, the police investigator who took Ms. Blalock's statement. When the State sought to publish the statement through Detective Lindsey, defense counsel objected, citing Rule 613(b), SCRE. The trial court overruled the objection and Ms. Blalock's prior inconsistent statement was published.

STANDARD OF REVIEW

Our courts have consistently held that a trial court's decision to admit evidence of a witness's prior inconsistent statement will not be reversed absent a manifest abuse of discretion. State v. Lynn, 277 S.C. 222, 225, 284 S.E.2d 786, 788 (1981); State v. Sierra, 337 S.C. 368, 373, 523 S.E.2d 187, 189 (Ct. App. 1999) (finding appellant must show both abuse of discretion and resulting prejudice).

LAW/ANALYSIS

Blalock argues the trial court erred by admitting extrinsic evidence of his wife's prior statement to impeach her trial testimony. The State claims this issue is not preserved for appellate review. We disagree on both counts.

In order to preserve an error for appellate review, a defendant must make a contemporaneous objection on a specific ground. Rule 103(a)(1), SCRE; State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994); State v. Holliday, 333 S.C. 332, 338, 509 S.E.2d 280, 283 (Ct. App. 1999). "The objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge." McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996).

Here, defense counsel promptly objected when the State sought to introduce extrinsic evidence of Ms. Blalock's prior statement. First, the court promptly replied by referencing Rule 613(b), and the state withdrew the exhibit. Next, when Detective Lindsey was asked to publish Ms. Blalock's statement, defense counsel objected by reference to Rule 613(b). We find this evidentiary objection properly preserved. We have no difficulty discerning the issue from the targeted references by the trial court and defense counsel to Rule 613(b) and the context from which this issue arose.

Rule 613(b), SCRE, provides in pertinent part:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible.

The central question, therefore, is whether Ms. Blalock admitted making an inconsistent statement in her testimony. As described above, however, Ms. Blalock's testimony affords little in the way of a clear admission or denial. At various points in her testimony, she concedes that the material portions of the statement were in fact her own words; but she is simultaneously eager to explain and amend her words and intent. Overall, Ms. Blalock appears to have reacted as would be expected of anyone who realizes he or she has been called as the star witness against his or her spouse: self-conscious, confused, and wary of how her testimony will be perceived by the jury.

In determining whether a witness has admitted making a prior inconsistent statement and thereby obviated the need for extrinsic proof, the courts of our state and other jurisdictions have held that the witness must admit making the prior statement unequivocally and without qualification. See State v. Bottoms, 260 S.C. 187, 194, 195 S.E.2d 116, 118 (1973) (when a witness "admits unequivocally" that a prior inconsistent statement has been made by him, he has thereby impeached himself and further evidence is unnecessary and inadmissible); 98 C.J.S. Witnesses § 727 (2002) (stating admission must be "unequivocal").

Generally, where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement. For example, a witness's failure to fully recall her prior statement has been found to be a sufficient denial to allow extrinsic evidence. State v. Brown, 296 S.C. 191, 193, 371 S.E.2d 523,

524 (1988); State v. Miller, 262 S.C. 369, 371, 204 S.E.2d 738, 738-39 (1974); 81 Am. Jur. 2d Witnesses § 948 (2003) (stating that a "witness may be impeached by proof of prior contradictory statements, where he merely testifies that he does not remember, or has no recollection of, making the statements referred to"). Extrinsic evidence is also usually admitted when the witness simply avoids any direct answer. Confronted with this situation in State v. Sullivan, our supreme court held:

> If the witness neither directly admit [sic] nor deny [sic] the act or declaration, as when he merely says that he does not recollect, or, as it seems, gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had done or said by answering that he did not remember.

43 S.C. 205, 211, 21 S.E 4, 7 (1895).

In this case, we find Ms. Blalock's response, when confronted with her prior statement, does not meet the standard of a clear and unequivocal admission that the precedent case law demands. We are mindful that, towards the end of the solicitor's examination of Ms. Blalock regarding the statement, she does admit that she said the "portion" of the statement quoted. She is adamant throughout her testimony, however, that the statement as recorded by the detective was incomplete. As demonstrated in the excerpted testimony above, Ms. Blalock repeatedly insists that she did not merely say she saw her husband's hand on Jane's "backside," but that she saw his hand on the "back side of her leg." When the solicitor presses her on when and to whom she said "back side of her leg," Ms. Blalock testifies that she "feel[s] like" that is what she told Detective Lindsey at the time he took her statement. Ultimately, she equivocates as to whether the statement was in fact her own words, testifying that she may have been "unclear" or that Detective Lindsey had "paraphrased" what she said.

Clearly, by repeatedly insisting that she said or intended to say "back side of her leg" instead of "backside," Ms. Blalock was attempting to dispel the implication that she actually saw Brentley Blalock's hand on or near Jane's genital area. This disparity, therefore, goes to the essential meaning of what Detective Lindsey recorded as Ms. Blalock's statement. The entire probative value of Ms. Blalock's statement and trial testimony hinges on where she saw her husband's hand on Jane's body. Considered in toto, Ms. Blalock's testimony regarding her statement shrouds its meaning in doubt. Admission of extrinsic evidence to prove Ms. Blalock made the statement was therefore relevant to the jury's consideration of the veracity of Ms. Blalock as a witness and the consequent weight her testimony should be afforded.

We respectfully reject Blalock's position that State v. Lynn compels a different result. First, we are confronted with a different factual presentation. We do not believe Ms. Blalock's varying responses rise to the level of the unequivocal admission, as was present in Lynn, necessary to foreclose resort to extrinsic evidence. Second, as noted above, a significant feature in Lynn is the holding that "the cross-examination of a witness to test his credibility is largely within the discretion of the trial judge, and his decision whether to allow the contradictory testimony will not be disturbed on appeal except for manifest abuse of discretion." State v. Lynn 277 S.C. at 225, 284 S.E.2d at 788. Considering we are governed by an abuse of discretion standard, we cannot say under these facts that the trial judge erred in admitting extrinsic evidence of Ms. Blalock's prior inconsistent statement. Moreover, Detective Lindsey's publication of the prior statement was cumulative to Ms. Blalock's previous, unchallenged publication of the relevant portion of her statement.

As a final observation, we acknowledge Blalock's concern with the conduct of the solicitor and his role in fostering the present controversy. We are persuaded, however, that Ms. Blalock's varying responses cannot be solely attributed to the solicitor's paraphrasing of the prior statement.

CONCLUSION

The trial court acted within its discretion in admitting extrinsic evidence of Lee Blalock's prior inconsistent statement.

AFFIRMED.

STILWELL and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Theodore H. Kirkman and Karen K. Kirkman,	Appellants,
v.	
Parex, Inc.; Francis Coaxum, d/b/a Coaxum Stucco; R.E. Miller, Miller Housing, Inc., and Miller Development Group; and First Union National Bank of South Carolina	Defendants,
of Whom First Union National Bank of South Carolina is,	Respondent.

Appeal From Charleston County
A. Victor Rawl, Circuit Court Judge

Opinion No. 3709
Submitted October 6, 2003 – Filed December 8, 2003

AFFIRMED

John D. Kassel and William D. Robertson, III, both of Columbia, for Appellants.

Thomas E. Lydon, of Columbia, for Respondent.

KITTREDGE, J.: Pursuant to cross-motions for summary judgment, the trial court determined that First Union, as a lender, did not impliedly warrant the habitability of Ted and Karen Kirkman's house. Summary judgment was granted in favor of First Union and the Kirkmans appeal. We affirm.

FACTS

In 1989, Miller Housing began the construction of a house for speculative sale in Mt. Pleasant, South Carolina. Miller Housing financed the construction through South Carolina Federal, predecessor to First Union.[1] Notwithstanding financial difficulties, Miller Housing substantially completed the house by early 1991. The Kirkmans desired to purchase the property from Miller Housing in April 1991, but the property was in foreclosure. The Kirkmans agreed to a purchase price of $232,900. The foreclosure action determined that Miller Housing's indebtedness to First Union amounted to approximately $205,000.

The Kirkmans, Miller Housing and First Union initially agreed that First Union would not conclude the foreclosure. Other liens, however, necessitated foreclosure, and, with the parties' consent, the property was deeded to First Union in May 1991. It was further agreed that Miller Housing would complete construction. Miller Housing failed to do so. First Union, in an effort to mitigate its losses, hired Building Services of Charleston to complete construction, at a cost of $40,000 to $50,000.

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[1] For simplification we collectively refer to South Carolina Federal and its successor, First Union, as "First Union."

Building Services of Charleston's work included, among other things, installation of compressors and air handlers, but it did not include any aspect of the artificial stucco siding which is the subject of this suit. The artificial stucco siding was installed during Miller Housing's involvement, well prior to First Union's involvement. The house was completed and the Kirkmans took possession of the property in July of 1991.

In 1999, the Kirkmans were pursuing the sale of the property and discovered moisture damage in the stucco siding. After repairing the damage and selling the house, the Kirkmans filed suit against Miller Housing, the installer of the stucco, the manufacturer of the stucco and First Union. All claims have been resolved through default or settlement except the implied warranty of habitability against First Union.

STANDARD OF REVIEW

"Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Rule 56, SCRCP; South Carolina Prop. & Cas. Guar. Ass'n. v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). Here, there are no material facts in dispute. Thus, in light of the uncontested factual record, the dispositive question before the court is one of law.

LAW/ANALYSIS

The Kirkmans contend the trial court erred in finding First Union was not liable under an implied warranty of habitability. They maintain First Union was "substantially involved" in completing construction on the house. The Kirkmans also assert that it was not necessary for First Union to have been involved in the installation of the stucco for it to be liable under an implied warranty of habitability. We find First Union was a mere lender protecting its interest and should not be held responsible under an implied warranty of habitability.

A warranty of habitability springs from the sale of a home. See Lane v. Trenholm Bldg. Co., 267 S.C. 497, 500, 229 S.E.2d 728, 729 (1976). The warranty is grounded in the doctrine of caveat venditor. In Lane, the court found "[t]he law should not orphan the purchaser of a house, who has likely invested his life savings … by operation of the doctrine of [c]aveat emptor." Id. at 503, 229 S.E.2d at 731. It further wrote that a seller's "liability is not founded upon fault, but because it has profited by receiving a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects." Id.

Our supreme court has established that public policy disfavors imposing an implied warranty of habitability on a mere lender. See Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 340, 384 S.E.2d 730, 734 (1989). The court concluded that imposition of liability on mere lenders would be burdensome and would discourage lending in the state. Id. Additionally, the court held: "[I]t is unduly punitive to impose potential warranty liability on a lender that is searching for some way to recover the losses it has suffered due to the default of the debtor." Id. This court, following the Kennedy precedent, noted that "a construction lender is not responsible for the torts of the borrower unless the lender is involved in, or exercises control over, construction to an extent that exceeds the degree of involvement normally expected of a commercial lender." Whitfield Constr. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 216, 525 S.E.2d 888, 893 (Ct. App. 1999).

In Roundtree Villas Ass'n, Inc. v. 4701 Kings Corporation, 282 S.C. 415, 321 S.E.2d 46 (1984), the court found a lender was not liable for defects in construction which was completed prior to it undertaking repairs to several units. While the lender monitored the construction, this did not create a duty to prevent defects. Id. at 422, 321 S.E.2d at 50. Conversely, Roundtree Villas permitted liability against the lender when "it undertook to repair defects … [and] took over the project and undertook to market the units through a corporation it had created." Id. at 423, 321 S.E.2d at 51.

A lender, however, may be held liable under the theory of an implied warranty of habitability when its functions as a lender are secondary to its

function as a developer. See Lane, 267 S.C. at 503-04, 229 S.E.2d at 730. In Lane, the developer of a subdivision sold an undeveloped lot to a builder. The developer took a second mortgage on the house built on the lot. The builder deeded the house to the developer in satisfaction of its mortgage. The developer paid off the first mortgage on the house, and then sold it to Lane. Lane experienced problems with the septic system, and the developer was found liable under caveat venditor and the implied warranty of habitability. In that case, the court found: "Trenholm purported to be selling a new house and certainly Lane's objective in purchasing the house was to provide a home for his family. The sale contemplated the use of the house as the dwelling; an implied warranty does no more than fulfill the reasonable expectations of the parties." Id. at 503, 229 S.E.2d at 730.

In Kennedy, the court further addressed the issue and found a lender might be liable under implied warranty of habitability in certain situations:

> A lender will also incur liability for the performance of express representations made to a buyer. A lender should be held responsible if it is aware of defects but conceals them from an unwitting buyer. Liability may also attach when the lender becomes highly involved with construction in a manner that is not normal commercial practice for a lender. In such a situation, the lender might be said to be a joint venturer. The lender may be liable if it is so amalgamated with the developer or builder so as to blur its legal distinction. A lender may also be liable where it forecloses on a developer in the midst of construction, takes title, has substantial involvement in completing the construction and sells homes.

Kennedy, 299 S.C. at 340-41, 384 S.E.2d at 734 (internal citations omitted).

Here, we find the public policy reasons advanced in Lane do not apply because the Kirkmans will not be "orphaned" if they are unable to proceed against First Union. The Kirkmans know who built the house, who produced the stucco siding, and who installed the stucco siding. Their lawsuit has named all involved in the stucco siding, in addition to First Union.

Significantly, the Kirkmans entered into the contract for sale with the original builder, Miller Housing. They knew Miller Housing was in foreclosure and that First Union was involved only as a lender. The Kirkmans approached First Union about completing the house when Miller failed to do so. In view of these facts, we find none of the policy considerations discussed in Lane justifying imposing liability under an implied warranty of habitability are present in this case.

Moreover, none of the situations discussed in Kennedy favoring lender liability are present in this case. The Kirkmans argue that First Union's expenditure of $40,000 to $50,000, standing alone, compels a finding of First Union's "substantial involvement" in completing construction. However, we do not believe the supreme court in Kennedy intended the issue of "substantial involvement" to be determined solely by a mathematical approach. Instead, we believe the degree of a lender's involvement, in terms of completing construction and otherwise, must be qualitatively and quantitatively determined from the totality of the circumstances. Here, according to the first contract entered into by the Kirkmans, First Union was not to foreclose on the property and the Kirkmans were to purchase it outright from the builder. In order to clear title for the Kirkmans, however, the contract was later modified to allow foreclosure by First Union. At the time, First Union was owed over $200,000 on the property. First Union was then required to complete construction, at a cost of $40,000 to $50,000. This expenditure of funds by First Union did not alter its status as a lender because First Union had a right to expeditiously mitigate its losses resulting from the builder's financial troubles.

We find the public policy reasons articulated in Kennedy compel a result rejecting an imposition of lender liability on First Union. First Union was not the only party known to the Kirkmans, so they are not "orphaned" as in Lane. First Union would not be liable, as recognized in Roundtree Villas, for the stucco siding because it was not involved in the installation of the stucco siding. As found in Kennedy, it would be "unduly punitive to impose potential warranty liability on a lender that is searching for some way to recover the losses it has suffered due to the default of the debtor." Kennedy, 299 S.C. at 340, 384 S.E.2d at 734. Finally, since we find First Union was a

mere lender and its completion of construction was, at most, of secondary importance to its role as a lender, we conclude that no valid, recognized policy would be served by imposing lender liability on First Union.

Accordingly, the decision of the circuit court is

AFFIRMED.

STILWELL and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Rudolph Barnes, as Personal Representative of the Estate of Doris Ann Barnes, Respondent,

v.

Cohen Dry Wall, Inc., and Aelina Martin, as Personal Representative of the Estate of Orin Tilman Feagin, Defendants,

Of Whom Cohen Dry Wall, Inc. is the Appellant.

Appeal From Berkeley County
Clifton Newman, Circuit Court Judge

Opinion No. 3710
Heard October 8, 2003 – Filed December 8, 2003

AFFIRMED

N. Heyward Clarkson, III, Charles F. Turner, and Elizabeth J. Smith, all of Greenville, for Appellant.

George J. Kefalos, of Charleston and Steve Christopher Davis, of Moncks Corner, for Respondent.

GOOLSBY, J.: Rudolph Barnes, as personal representative of the Estate of Doris Barnes, filed a negligence action against Cohen Dry Wall and Orin Feagin. The jury returned a verdict for Barnes in the amount of $750,000. Cohen appeals. We affirm.

FACTS

On December 12, 1998, Cohen held its annual Christmas party for its employees and their families. As alcoholic beverages were to be served at the party, Cohen Gaskins, the president of Cohen, hired a professional bartender to verify guests' identification before serving alcohol. During the party, Gaskins announced to the party guests that there were police officers outside and that, if anyone had too much to drink, a ride home would be provided.

The day before the party, a supervisor informed Orin Feagin, a nineteen-year-old Cohen employee, that he would not be served alcohol at the party. Feagin stated he would bring his own bottle of alcohol. Although several Cohen employees observed Feagin with a bottle of gin at the party, no one saw him drink from the bottle. Only one person testified he saw Feagin drink alcohol from the bar.

Several guests testified Feagin was loud and disruptive at the party; however, others testified he behaved normally and did not act as if he had been drinking. Though Feagin left the party with a designated driver, he drove out of the parking lot in his own vehicle. After leaving the party, Feagin visited his girlfriend at her place of employment, drove to her mother's house, and then revisited his girlfriend. Both the girlfriend and her

mother testified Feagin did not appear to be intoxicated. A short time later that evening, Feagin was involved in a two-car accident that killed both him and the passenger in the other vehicle, Doris Barnes.

Barnes sued both Cohen and Feagin's estate, alleging, among other things, that Cohen was negligent in serving alcoholic beverages to Feagin at the party. Feagin's estate asserted a cross-claim against Cohen for negligence per se and gross negligence.

At the close of the evidence, Cohen unsuccessfully moved for a directed verdict. The jury returned a verdict against Cohen and Feagin's estate for $750,000 in actual damages.[1] Cohen then moved for judgment notwithstanding the verdict, new trial absolute, new trial nisi remittitur, new trial pursuant to the thirteenth-juror doctrine, and alteration of the judgment to reflect a setoff of the amounts paid by any or all of the insurance policies. The trial court granted only the last motion, holding "Cohen Dry Wall is entitled to modify the judgment to the extent of any liability insurance paid by the Defendant Feagin."

LAW/ANALYSIS

I.

Cohen argues that, under South Carolina law, "a social host does not incur any liability to third parties when he serves alcohol to his guests" and the trial court should therefore have granted its directed verdict motion. We disagree.[2]

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[1] The jury also awarded punitive damages to Barnes against Feagin's estate in the amount of $1,400,000, and no appeal was taken from this award. As to the claim of Feagin's estate against Cohen, the jury found Cohen was 20 per cent responsible for Feagin's death and Feagin was 80 per cent responsible.

[2] Barnes argued in his brief that Cohen failed to preserve this argument for appeal. After examining the record in its entirety, however, we hold Cohen sufficiently raised the issue before the trial court in order for us to address it

In support of this argument, Cohen relies on Garren v. Cummings & McCrady, Inc.[3] This reliance is misplaced. In Garren, this court held that South Carolina did not recognize a third-party action against a social host for serving alcohol to an adult guest. This holding was based on two determinations: (1) South Carolina is "in accord with the general common law view . . . that a social host incurs no liability to third parties when he serves alcohol to his adult guests"[4] and (2) no such liability was imposed by statute.[5] Neither of these circumstances applies to the present case.

Here, Barnes sought relief for losses allegedly resulting from Cohen's allowing the consumption of alcohol by a minor—rather than an adult guest. Even more important, however, is the fact that the South Carolina General Assembly has enacted several statutes making it unlawful for "any person," not just commercial establishments, to provide alcohol to persons under the legal drinking age.[6] Moreover, although these statutes specifically exempt

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on appeal. See State v. Dunbar, Op. No. 25732 (S.C. Sup. Ct. filed Oct. 13, 2003) (Shearouse Adv. Sh. No. 37 at 31, 34) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground.").

[3] 289 S.C. 348, 345 S.E.2d 508 (Ct. App. 1986).

[4] Id. at 350, 345 S.E.2d at 510 (emphasis added).

[5] Id. at 351, 345 S.E.2d at 510.

[6] See S.C. Code Ann. § 61-4-90 (Supp. 2002) ("It is unlawful for a person to transfer or give to a person under the age of twenty-one years for the purpose of consumption beer or wine at any place in the State.") and id. § 61-6-4070 ("It is unlawful for a person to transfer or give to a person under the age of twenty-one years for the purpose of consumption alcoholic liquors at any place in the State.").

certain situations, they do not exclude social hosts from the prohibition,[7] and as our supreme court has stated in Whitlaw v. Kroger, such statutes "are designed to prevent harm to the minor who purchased the alcohol and to members of the public harmed by the minor's consumption of that alcohol."[8]

Although Whitlaw concerned the unauthorized sale of alcohol to a minor by a commercial entity, we hold the supreme court's statement regarding the purpose of such statutory prohibitions is just as applicable to the provision of alcohol by a social host to a guest who is under the legal drinking age. In so holding, we follow other jurisdictions that have recognized civil causes of action against social hosts for serving alcohol to underage individuals when such an act was in violation of a statute.[9]

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[7] Sections 61-4-90 and 61-6-4070 both state their respective provisions do not apply to situations in which alcohol is provided (1) to a spouse or child within the family home, (2) in conjunction with a religious ceremony, and (3) within certain instructional settings.

[8] 306 S.C. 51, 54-55, 410 S.E.2d 251, 253 (1991) (emphasis added); cf. Tobias v. Sports Club, Inc., 332 S.C. 90, 93, 504 S.E.2d 318, 320 (1998) ("We hold today that our alcohol control statutes do not create a first party cause of action for an intoxicated adult patron, but that they do permit a third party action.") (emphasis added).

[9] See, e.g., Macleary v. Hines, 817 F.2d 1081 (3d Cir. 1987) (holding that, "under Pennsylvania law a defendant who knowingly and intentionally allows premises over which she has control to be used for the purpose of consumption of alcohol by minors . . . may be liable for injuries resulting therefrom" if the use of the premises is found to be "a substantial factor in bringing about the intoxication of the minor guest"); Ely v. Murphy, 540 A.2d 54, 58 (Conn. 1988) (recognizing the "legislative determination that minors are incompetent to assimilate responsibly the effects of alcohol and lack the legal capacity to do so" and holding that a minor's consumption of alcohol therefore does not as a matter of law "insulate one who provides alcohol to minors from liability for ensuing injury"); Thaut v. Finley, 213 N.W.2d 820, 822 (Mich. Ct. App. 1973) (holding the violation of a criminal

II.

A.

Cohen Dry Wall contends the trial court erred in allowing Barnes to read excerpts of a deposition at trial, arguing Barnes did not meet the burden of showing the witness was unavailable. We disagree.

Counsel for Barnes informed the trial court that he intended to read excerpts of a deposition at trial. Counsel argued this was permitted under Rule 32 of the South Carolina Rules of Civil Procedure because he could not procure the witness by subpoena. In support of this claim, counsel submitted an affidavit of attempted service. During the course of this colloquy, the parties also discussed their belief that the deponent was incarcerated in Columbia, which, according to Cohen's attorney, was less than 100 miles from where the case was being tried. Cohen now contends the trial court erred in allowing the deposition testimony because it was not sufficiently established that the deponent was either incarcerated or over 100 miles away.

Although the trial court did not make specific findings regarding the deponent's whereabouts, such findings were unnecessary. Barnes submitted an affidavit of failed service of the subpoena on the deponent. This was sufficient under Rule 32(a)(3)(D) to allow the deposition to be read into

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statute against furnishing intoxicants to a minor without a doctor's prescription created a third-party cause of action against a social host who violated the provision, notwithstanding the absence of any reference in the statute to civil liability); Cole v. O'Tooles of Utica, Inc., 643 N.Y.S.2d 283, 286 (N.Y. App. Div. 1996) (holding a complaint sufficiently stated a "dramshop" cause of action against social hosts who unlawfully procured alcoholic beverages for consumption by a minor who became intoxicated and then drove his car in a negligent and reckless manner, causing the death of his passenger).

evidence at trial.[10]

B.

Cohen further argues Barnes failed to give the required notice of his intent to use the deposition in lieu of having the witness testify. In addition, Cohen contends that, even if the allowance of the deposition had been proper, the trial court should have also allowed the jury to be informed that the deponent was incarcerated when the case came to trial.

These arguments, however, were not set forth in the Statement of Issues on Appeal in Cohen's brief; therefore, we decline to address them.[11] We

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[10] Rule 32(a)(3) of the South Carolina Rules of Civil Procedure provides as follows:

> The deposition of a witness, whether or not a party, may be used by any party for <u>any</u> purpose if the court finds:
>
> (A) that the witness is dead; <u>or</u>
> (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition; <u>or</u>
> (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; <u>or</u>
> (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; <u>or</u>
> (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(Emphasis added.)

further note that, with regard to the trial court's refusal to inform the jury that the deponent was incarcerated, Cohen presented no argument on appeal either challenging the trial court's finding that the information was hearsay or supporting its admissibility as a hearsay exception.

III.

Finally, Cohen argues the trial court erred in including in the jury charge language from South Carolina Code section 56-5-6110, known as the aiding and abetting statute. Specifically, Cohen contends that the reason the charge was error was that section 56-5-6110 is "not relevant to the issues raised by Barnes' allegations that Cohen Dry Wall provided and/or served alcohol to a person under the age of twenty-one" because section 56-5-6110 concerns aiding and abetting only those offenses within the same title and chapter, whereas the offenses of providing alcohol to persons under the legal drinking age are found in different parts of the code. We find no reversible error.

At trial, when Barnes proffered the instruction, Cohen argued the charge was improper because it would "[supersede] the social host immunity" in that it would apply to serving visibly intoxicated adults as well as minors. After the trial court charged the jury, Cohen made only a general objection to the aiding and abetting charge, "just to preserve our position on the record."

We have reviewed the record before us and do not see a ruling by the trial court on the question of whether section 56-5-6110 can be applied to the statutory prohibitions in Title 61 concerning serving alcohol to a minor. Because the trial court did not have the opportunity to rule on this particular

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[11] See State v. Dunbar, Op. No. 25732 (S.C. Sup. Ct. filed October 13, 2003) (Shearouse Adv. Sh. No. 37 at 34-35) ("No point will be considered which is not set forth in the statement of issues on appeal.") (citing Rule 208(b)(1), SCACR).

issue, we likewise decline to address it on appeal.[12]

AFFIRMED.

HUFF and BEATTY, JJ., concur.

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[12] See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (ruling an issue was not preserved for appellate review because the trial court did not explicitly rule on it at trial and the appellant made no Rule 59(e) motion to alter or amend the judgment on that ground); Gurganious v. City of Beaufort, 317 S.C. 481, 488, 454 S.E.2d 912, 916 (Ct. App. 1995) ("It is well settled that one cannot present and try his case on one theory and then change his theory on appeal.") (citing McClary v. Witherspoon, 251 S.C. 523, 164 S.E.2d 220 (1968)).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

G & P Trucking, Respondent,

v.

Parks Auto Sales Service & Salvage, Inc., Appellant.

Appeal From Charleston County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 3711
Heard November 4, 2003 – Filed December 8, 2003

REVERSED

Robert A. McKenzie and Gary H. Johnson, II, both of Columbia, for Appellant.

Stephen E. Darling, of Charleston, for Respondent.

GOOLSBY, J.: In this action for contribution arising from a prior negligence claim, the trial court awarded damages to G&P Trucking against Parks Auto Sales, Service, & Salvage, Inc., in the amount of Parks Auto's pro rata share of the common liability. Parks Auto appeals. We reverse.

FACTS

On January 12, 1999, Donald Finkey, a G&P employee, while operating a tractor-trailer at the salvage yard of Parks Auto, struck a guy wire connected to a radio communications tower and caused the tower to fall.

After the accident, G&P entered into settlements with four separate entities in connection with the collapse of the tower. Payments by G&P pursuant to the settlements were as follows: (1) to Radio Communications of Charleston (RCC), the owner of the tower, G&P paid drafts totaling $200,000.00 on January 12, 1999, and March 29, 1999; (2) to The Hartford, which insured RCC and had a right to subrogation for payments made directly to RCC, G&P paid $72,295.13 on September 1, 1999; (3) to Wicks Broadcasting, which had equipment destroyed in the accident, G&P paid $94,181.17 on February 15, 2000; and (4) to Parks Auto itself, G&P paid $36,000.00 on November 10, 2000. The total amount paid by G&P was $402,476.30.

The record on appeal indicates that, in connection with the four settlements, G&P obtained signed releases from only RCC and Parks Auto. The release from RCC states in pertinent part that, in consideration of the sum paid by G&P, RCC "remise[s], release[s] and forever discharge[s] the said Zurich Insurance [G&P's insurer], G&P Trucking Company and Donald Finkey, their agents, servants, employees, executors, adjusters, insurance companies, subsidiaries, affiliated companies, administrators, successors, employees, and assigns." The release executed by Parks Auto, after acknowledging G&P, Zurich, and Finkey as "Payers," states that Parks Auto "and its heirs, executors, administrators, and assigns, release and forever discharge said Payers, their executives, administrators, assigns, and all other persons, firms, and corporations, both known and unknown."

Before all the agreed-upon amounts were paid in full, G&P brought this claim against Parks Auto for contribution under the South Carolina Contribution Among Tortfeasors Act (the Act). In its complaint, dated January 31, 2000, G&P alleged Parks Auto was negligent in failing to warn

of the guy wire and in maintaining its premises in an unreasonable condition. Parks Auto's answer, dated March 22, 2000, denied any and all claims asserted by G&P. As of January 12, 2002, when the statute of limitations had run on any claim arising from the underlying accident, the case was still pending and no hearing had taken place.

A hearing on the matter took place February 5 and 6, 2002. The trial court, with the consent of counsel for both sides, bifurcated the trial, allowing the jury to determine whether or not Parks Auto was negligent, but reserving to itself the determination of whether Parks Auto would be liable for contribution under the Act in the event the jury found negligence.

The jury found Parks Auto negligently and proximately caused damage or injury to G&P. Parks Auto immediately moved for judgment notwithstanding the verdict or, in the alternative, a new trial on several grounds, namely, that (1) Parks Auto's liability was not extinguished by the settlements, (2) Parks Auto had no duty to warn of an open and obvious condition, and (3) Finkey's intervening negligence was the sole proximate cause of the accident. The trial court denied the motion and directed counsel to provide proposed orders on the nonjury issues, with leave to reply to the other side's order within five days thereafter.

The trial court found that "[n]one of the settlements fully compensated the parties for their loss." Nevertheless, on June 14, 2002, the trial court issued an order granting G&P judgment against Parks Auto in the amount of $201,238.15. This award was equal to half the amount that G&P had paid in connection with the accident.

DISCUSSION

1. Parks Auto argues that, because G&P has not met the extinguishment requirement in the Act,[1] it has no legal right to contribution. We agree with

[1] S.C. Code Ann. §§ 15-38-10 through –70 (Supp. 2002).

this argument insofar as it concerns the payments to RCC, The Hartford, and Wicks Broadcasting.

"The common law rule against contribution was abrogated in 1988 when our General Assembly enacted the South Carolina Uniform Contribution Among Tortfeasors Act . . . ."[2] Because the Act is in derogation of the common law, it must be strictly construed.[3] Moreover, "[i]n a suit in which contribution is sought from a joint tortfeasor, the claimant obviously must prove facts sufficient under the statutes and the common law of his own state to establish a right to contribution between wrongdoers."[4]

Section 15-38-20(D) of the Act provides as follows:

> A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.[5]

The trial court held that section 15-38-20 is ambiguous about whether a tortfeasor who has reached a settlement with the injured party on the underlying tort could bring a contribution action after the statute of limitations has run on the injured party's claim against the joint tortfeasor even if the settlement did not cover the injured party's damages. In reaching

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[2] Vermeer v. Wood/Chuck Chipper, 336 S.C. 53, 68, 518 S.E.2d 301, 309 (Ct. App. 1999).

[3] See Watson v. Sellers, 299 S.C. 426, 433, 385 S.E.2d 369, 373 (Ct. App. 1989) (noting that a particular act, being in derogation of the common law, must be strictly construed).

[4] 18 Am. Jur. 2d Contribution § 126, at 129 (1985).

[5] S.C. Code Ann. § 15-38-20(D) (Supp. 2002) (emphasis added).

this conclusion, the trial court noted that the terms "extinguish" and "discharge" are not defined within the statute for purposes of the Act. The trial court then found G&P was entitled to contribution from Parks Auto based on Castillo v. Roger Construction Co.,[6] in which the third circuit court of appeals interpreted analogous sections of the Pennsylvania Contribution Among Tortfeasors Act and gave the term "extinguish" a liberal construction.

We, however, decline to follow Castillo and note that later state cases in Pennsylvania have not adhered to this decision.[7] In addition, our review of case law from other jurisdictions indicates the trial court incorrectly determined that section 15-38-20(D) is ambiguous.[8]

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[6] 560 F. 2d 1146 (3d Cir. 1977).

[7] See, e.g., Walton v. Avco, 610 A.2d 454, 461 (Pa. 1992) ("If, . . . a settling defendant acts only to remove himself from the uncertainties of litigation, he may not then ask the non-settling defendant to 'cover his losses' if, upon judgment, it turns out that he has made a bad business decision."); Schuman v. Vitale, 602 A.2d 390, 392 (Pa. 1992) (holding the Pennsylvania Legislature intended that "where there are two or more joint tort-feasors and one of them settles with the injured person, such settling joint tort-feasor may not recover contribution from the other non-settling joint tort-feasors unless the settlement by the settling joint tort-feasor extinguishes the liability of the non-settling joint tort-feasor to the injured person") (emphasis added).

[8] See, e.g., Pearson Bros. Co. v. VCV Eng'g & Supply, Inc., 476 N.E.2d 73 (Ill. App. Ct. 1985). In Pearson, the Appellate Court of Illinois, in considering the application of an extinguishment requirement that is analogous to that in section 15-38-20(D), stated as follows:

> An obvious purpose of the [legislation concerning contribution among joint tortfeasors] is to reduce the amount of litigation. A limitation on the right to obtain contribution ought to reduce the amount of litigation. The situation where a statute of limitations runs on a joint tortfeasor . . . is a rare occasion. We do not choose to torture the language of [the extinguishment

The plain language of section 15-38-20(D) yields only one interpretation, namely that extinguishment of the defending joint tortfeasor's liability must have resulted directly from the settlement itself.[9] We have found nothing in section 15-38-20, or, for that matter, any other part of the Act, that would suggest that the running of the statute of limitations on an action arising from the underlying tort would "extinguish" a joint tortfeasor's liability so as to entitle a settling tortfeasor to contribution.[10]

Moreover, we agree with Parks Auto's argument that the running of the statute of limitations in and of itself cannot operate to "extinguish" a tortfeasor's liability.[11] Although, as G&P argues, a statute of limitations can

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> requirement] to permit the seeking of contribution here even though it might seem fair to do so.

Id. at 75 (emphasis added).

[9] See Vermeer, 336 S.C. at 69, 518 S.E.2d at 309 (noting that because the joint tortfeasor had been dismissed by the injured party with prejudice, the tortfeasor seeking contribution did not "extinguish" the joint tortfeasor's liability because "no liability . . . existed to be extinguished").

[10] To the contrary, the Act limits a tortfeasor's right to seek contribution in such a way that is consistent with the requirement in section 15-38-20(D) that the liability of the joint tortfeasor from whom contribution is sought must have been "extinguished by the settlement." See S.C. Code Ann. § 15-38-40(D) (Supp. 2002) (providing in pertinent part that, if there has been no judgment against the tortfeasor seeking contribution arising from the underlying tort, the tortfeasor's right of contribution is barred unless the tortfeasor has "discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him") (emphasis added).

[11] See Langley v. Pierce, 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993) ("'A statute of limitations is a procedural device that operates as a defense to

foreclose the right of a claimant to file suit, unlike a statute of repose, it is subject to certain counter-assertions, such as waiver, tolling, and estoppel.[12]

In the present case, there was no evidence of a release that would discharge any liability of Parks Auto for claims asserted by The Hartford or Wicks Broadcasting. With regard to the agreement executed in connection with G&P's payment to RCC, that document purported to release only G&P and any related entities. None of these three claimants, then, agreed that the payments received from G&P relieved Parks Auto of liability in the underlying tort.[13]

Given both the absence of a release as to Parks Auto and the unappealed finding by the trial court that none of the payments by G&P fully compensated any of the injured parties for their losses, we hold that, as a matter of law, G&P has failed to establish entitlement to contribution from Parks Auto under the South Carolina Uniform Contribution Among Tortfeasors Act.

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limit the remedy available from an existing cause of action. A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time.'") (citations omitted) (quoting Goad v. Celotex Corp., 831 F.2d 508, 511 (4th Cir. 1987).

[12] Cf. Florence County Sch. Dist. # 2 v. Interkal, Inc., 348 S.C. 446, 453, 559 S.E.2d 866, 869 (Ct. App. 2002) (noting in passing "the proposition that the running of a statute of limitations against one tortfeasor does not affect another tortfeasor's ability to sustain a contribution action" and holding that "[t]he Statute of Repose bars actions for contribution under the Uniform Contribution Among Tortfeasors Act brought more than thirteen years after the completion of an improvement to real property").

[13] Thomas S. Nolan, the adjuster who resolved the various claims, testified the payments represented a full and reasonable settlement of the potential claims; however, he also admitted on cross-examination that the respective claimants could potentially try to make additional claims.

2. Although the agreement executed by Parks Auto in connection with the payment it received from G&P released "all other persons, firms, and corporations, both known and unknown," we agree with Parks Auto that G&P cannot obtain contribution under the Act for this particular claim because Parks Auto, the only alleged tortfeasor other than G&P, was also the injured party and, as such, could not have been a tortfeasor as to its own injury, let alone a joint tortfeasor.[14] Because Parks Auto was not a joint tortfeasor in this particular instance, there was no "common liability."

Furthermore, we reject G&P's argument that, notwithstanding Parks Auto's status as the injured party, the award should be upheld because G&P had a contractual right under the agreement to "seek and pursue indemnity and/or contribution rights for all monies paid herein or otherwise." Without question, G&P had this right and exercised it. With respect to all four payments, including that made to Parks Auto, however, G&P requested only contribution—and not indemnity. Because there was no common liability on which to base a claim for contribution for payment of Parks Auto's own damages, G&P was not entitled to this relief for this particular claim.[15] We therefore hold that, with respect to G&P's payment of compensation to Parks Auto, the trial court was incorrect in granting G&P's request for contribution.

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[14] See Shipes v. Piggly Wiggly St. Andrews, 269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977) (defining "duty" in a negligence case as "the obligation to conform to a particular standard of conduct toward another") (emphasis added).

[15] See First Gen. Servs. of Charleston v. Miller, 314 S.C. 439, 443-44, 445 S.E.2d 446, 449 (1994) (noting the requirement in section 15-38-10 that a tortfeasor must pay more than his or her pro rata share of the "common liability" to recover contribution).

3. Because our holding on G&P's right to contribution is dispositive of this appeal, we do not address Parks Auto's argument that it was entitled to a directed verdict on the issue of negligence.

REVERSED.

CONNOR and ANDERSON, JJ., concur.