Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6092

M E D I A R E L E A S E
February 25, 2004

The Judicial Merit Selection Commission is currently accepting applications for the judicial offices listed below. In order to receive application materials, a prospective candidate must notify the Commission in writing of his/her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

Michael N. Couick, Chief Counsel
Post Office Box 142, Columbia, South Carolina 29202
(803) 212-6092

The Commission will not accept applications after **12:00 noon on Thursday, March 25, 2004.**

A vacancy exists in the office formerly held by the late Honorable Carol Connor, Judge of the Court of Appeals, Seat 1, which term expires on June 30, 2005;

A vacancy will exist in the office currently held by the Honorable William L. Howard, Sr., Judge of the Court of Appeals, Seat 2, upon Judge Howard's retirement on or before July 30, 2004. The term of this office expires on June 30, 2005;

A vacancy exists in the office formerly held by the Honorable Roger L. Couch, Master-in-Equity for Spartanburg County, which term expires on June 30, 2009.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/html-pages/judmerit.html.

* * *

The Supreme Court of South Carolina

In the Matter of Kenneth B. Massey, Respondent.

ORDER

Respondent was suspended from the practice of law for two years. In the Matter of Massey, Op. No. 24784 (S.C. Sup. Ct. filed February 23, 2004). The Office of Disciplinary Counsel has filed a petition for the appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that the petition is granted, and Norton M. Geddie, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Geddie shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Geddie may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Norton M. Geddie, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Norton M. Geddie, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Geddie's office.

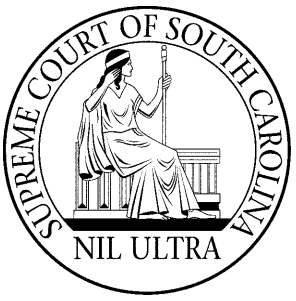
This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

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

Columbia, South Carolina

February 25, 2004



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

March 1, 2004

ADVANCE SHEET NO. 8

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

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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Richard Bernard Moore, Appellant.

Appeal From Spartanburg County
Gary E. Clary, Circuit Court Judge

Opinion No. 25786
Heard January 7, 2004 - Filed March 1, 2004

AFFIRMED

Deputy Chief Attorney Joseph L. Savitz, III, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III, all of Columbia, and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondents.

JUSTICE WALLER: Appellant, Richard Benjamin Moore, was convicted of murder, armed robbery, assault with intent to kill, and possession of a firearm during commission of a violent crime; he was

respectively sentenced to death, thirty years, ten years and five years. This appeal combines his direct appeal with this Court's mandatory sentencing review pursuant to S.C. Code Ann. § 16-3-25 (1985). We affirm the convictions and sentences.

FACTS

The charges in this case stem from the September 16, 1999, armed robbery of Nikki's, a convenience store on Highway 221 in Spartanburg. According to Terry Hadden, an eyewitness, Moore walked into Nikki's at approximately 3:00a.m. and walked toward the cooler. Hadden was playing a video poker machine, which he did routinely after working his second shift job. Hadden heard Jamie Mahoney, the store clerk, yell, "What the hell do you think you're doing?" Hadden turned from the poker machine to see Moore holding both of Mahoney's hands with one of his hands. Moore turned towards Hadden, pointed a gun at him, and told him not to move. Moore shot at Hadden, and Hadden fell to the floor and pretended to be dead. After several more shots were fired, Hadden heard the doorbell to the store ring. He heard Moore's pickup truck and saw him drive off on Highway 221. Hadden got up and saw Mahoney lying face down, with a gun about two inches from his hand; he then called 911. Mahoney died within minutes from a gunshot wound through his heart. A money bag with $1408.00 was stolen from the store.

Shortly after the incident, Deputy Bobby Rollins patrolled the vicinity looking for the perpetrator of the crime. Approximately one and one-half miles from the convenience store, Deputy Rollins took a right onto Hillside drive, where he heard a loud bang, the sound of Moore's truck backing into a telephone pole. He turned his lights and saw Moore sitting in the back of a pickup truck bleeding profusely from his left arm. As Deputy Rollins ordered him to the ground, Moore advised him, "I did it. I did it. I give up. I give up." A blood covered money bag was recovered from the front seat of Moore's pick-up truck. The murder weapon, a .45 caliber automatic pistol, was found on a nearby highway shortly before daylight.

Moore was tried for the crimes in October 2001. The jury convicted him of all counts. In a separate sentencing proceeding, the jury recommended a sentence of death.

ISSUES

1. Did the trial court err in limiting the scope of Moore's closing argument to the guilt phase jury?

2. Did the trial court err in limiting the scope of Moore's closing argument to the sentencing phase jury?

1. GUILT PHASE CLOSING

Moore contends he should have been permitted to argue, to the guilt phase jury, that he was on trial for his life, and that his life was in jeopardy. We disagree.

Prior to the opening statements of counsel in this case, the trial court advised the jury that this was a death penalty trial which would be bifurcated into two parts. The jury was advised that a separate sentencing would be held if and only if the defendant were convicted of murder. The trial court went on to specifically advise the jury that "the purpose of my telling you this is to emphasize that **you are not to consider punishment or sentence at this phase of the case. You are only to determine the innocence or guilt of the defendant** based upon the evidence that will be introduced in the trial of the case."

Moore did not testify at the guilt phase of trial, but did elect to personally address the jury, pursuant to S.C.Code Ann. § 16-3-28 (1985 & Supp. 2002).[1] Moore advised the jury that he was nervous and didn't know what to say. He then stated, "All I know is my life is in jeopardy here a

[1] Pursuant to S.C. Code Ann § 16-3-28, "Notwithstanding any other provision of law, in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument."

second time." The state's objection was sustained and Moore was advised to "limit yourself to the testimony and evidence. . . they are to determine the guilt or innocence sir." Moore then proceeded, "The state is seeking the death penalty on me, which means my very life is at stake." The court once again admonished Moore that the jury was simply determining guilt or innocence at this point and to limit himself to that. The court took a brief recess to allow Moore to speak with his attorney, after which the court advised him as follows:

> Now, Mr. Moore, I want you to understand that you certainly have the right to make the closing argument to the jury. That's provided by for law. But, once again, you have to do it within the confines of the testimony and evidence that has been presented. You cannot go beyond that. You cannot, since you elected not to take the stand, you cannot testify. . . . You may not testify. You gave that right up. You can comment on the facts, what the evidence has revealed in this case. **Insofar as mentioning punishment, you are not to mention that, because we are not about that right now.** And if there are any violations of what I am laying out at this time, you are going to stand over here. Then I am going to stop your argument. And then we will proceed into the charge on the law.

(Emphasis supplied). Moore succinctly concluded his argument; the jury convicted him of all counts. Moore now asserts the trial court committed reversible error in precluding him from commenting on the fact that his life was at stake. We disagree.

We have previously recognized that a capital defendant's right to personally address the jury applies at both the guilt-or-innocence and sentencing phases of trial. State v. Hall, 312 S.C. 95, 439 S.E.2d 278 (1994); State v. Rodgers, 270 S.C. 285, 242 S.E.2d 215 (1978). However, we have not specifically addressed the parameters of that right, particularly as it pertains to the guilt phase of a capital trial. We find that allowing the

defendant to stress to the jury that his life is at stake during the guilt phase of trial would mislead the jury to believe that it was permitted to consider punishment at the guilt phase of trial. This simply is not so; this phase of a capital trial is limited solely to the determination of guilt or innocence.

Our holding is consistent with our recent opinion in Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001). In Franklin v. Catoe, supra, we found the defendant did not knowingly waive his statutory right to personally address the guilt phase jury. However, we found Franklin had demonstrated no prejudice from denial of this right, stating, "this error occurred during the guilt phase, where the jury is confined to determining whether Franklin committed the crime, not whether he deserved the death penalty. Had Franklin been apprised of his right to address the jury during closing, and had he chosen to do so, he would have been arguing for his innocence, not pleading for his life." 346 S.C. at 573, 552 S.E.2d at 724. It is patent from this language in Franklin that a guilt phase closing argument pursuant to § 16-3-28 does not encompass the right to stress that the defendant is "on trial for his life."

Further, as noted previously, the trial court here specifically instructed the jury that it was not permitted to consider punishment at the guilt-or-innocence stage, but that, if Moore were found guilty, there would be a second, sentencing phase of trial at which his punishment would be determined. We find the trial court properly limited Moore's argument. See Hoeffner v. The Citadel, 311 S.C. 361, 429 S.E.2d 190 (1993) (noting that arguments which invite the jury to base its verdict on considerations not relevant to the merits of the case are improper); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997) (trial judge is allowed discretion in dealing with the range and propriety of closing argument to the jury, and rulings on such matters will not be disturbed absent an abuse of discretion).

2. SENTENCING PHASE CLOSING

At the sentencing phase of trial, prior to closing arguments, the court advised Moore that he once again had the right to "have a closing argument regarding the sentence imposed. . . . and, once again, the statement that you

would make to the jury would have to be confined to the evidence that has been presented and to the issues concerning the sentence imposed." Moore advised the trial court that he would not address the sentencing phase jury.

Moore now asserts his waiver of the right to make a closing argument to the sentencing jury was involuntary due to the trial court's admonition to him that "once again, the statement that you would make to the jury would have to be confined to the evidence that has been presented and to the issues concerning the sentence imposed." Essentially, Moore asserts this limitation prevented him the opportunity to make a closing argument asking for mercy and/or expressing feelings of remorse, such that his waiver of the right to address the sentencing phase jury was not knowing and voluntary.

This argument is procedurally barred. At trial, Moore did not assert that the trial judge's comments prohibited him from asking for mercy and/or expressing feelings of remorse; he simply advised the court that he did not intend to address the sentencing phase jury. His failure to raise this contention to the trial judge precludes review of the issue on appeal. State v. Perez, 334 S.C. 563, 514 S.E.2d 754 (1999); State v. Williams, 303 S.C. 410, 401 S.E.2d 168 (1991)(issue must be raised to and ruled upon by trial judge to be preserved for appellate review).

Moreover, to the extent the trial court's comment could feasibly be viewed as limiting Moore's ability to express remorse to the sentencing phase jury, the matter is more appropriately addressed in a post conviction relief (PCR) action. As noted above, the only comment made by the trial court was that Moore could address the sentencing jury as to "the issues concerning the sentence to be imposed." This statement arguably encompasses the right to argue remorse and mercy. There is no further explanation of what this sentence means, nor any objection to it. On the present record, it is simply impossible to determine precisely what the trial court meant by this statement, or what Moore understood it to mean. In the PCR context, however, a court could analyze all the facts surrounding the trial to determine if Moore knowingly and intelligently waived his rights under section 16-3-28. See Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001)(noting that PCR process is specifically designed to allow for an inquiry into the relevant facts

surrounding the adequacy of a defendant's information and/or waiver of rights). Accordingly, given the lack of objection and failure to raise the present issue at trial, Moore's remedy, if any, is through PCR.

CONCLUSION

Moore's convictions and sentences are affirmed. The death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the jury's finding of aggravating circumstances is supported by the evidence. Further, the death penalty is not excessive or disproportionate to the penalty imposed in similar capital cases. See State v. Simpson, 325 S.C. 37, 479 S.E.2d 57, *cert. denied*, 520 U.S. 1277 (1996); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996), *cert. denied*, 520 U.S. 1123 (1997); State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991), *cert. denied*, 502 U.S. 1103 (1992); State v. Patterson, 285 S.C. 5, 327 S.E.2d 650 (1984), *cert. denied*, 471 U.S. 1036 (1985).

AFFIRMED.

TOAL, C.J., BURNETT, PLEICONES, JJ., and Acting Justice Thomas L. Hughston, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Steven Dukes, Appellant,

v.

Thomas E. Redmond and
Florence County Board of
Canvassers, Respondents.

ON WRIT OF CERTIORARI
TO THE STATE ELECTION COMMISSION

Opinion No. 25787
Heard February 3, 2004 - Filed March 1, 2004

REVERSED

Samuel W. Howell, IV, of Howell & Linkous, LLC, of Charleston, for appellant.

Henry M. Anderson, Jr., of Anderson Law Firm, of Florence, for respondent Thomas E. Redmond.

Charles Blake, of Florence, for Respondent Florence County Board of Canvassers.

Mr. Russell W. Barrett, of Florence, pro se, for respondent Florence County Election Commission.

PER CURIAM: This is an election protest challenging the 2002 mayoral election for the City of Johnsonville. Appellant Dukes lost the election to respondent Redmond by a three-vote margin. Dukes protested, claiming nine voters were non-residents and therefore ineligible to vote in the municipal election under S.C. Code Ann. § 7-5-610 (Supp. 2003).[1] The Florence County Board of Canvassers (Board)[2] found Dukes's protest was procedurally barred and, in any event, only one voter had voted illegally[3] which did not affect the result of the election. Dukes's protest was denied. We reverse.

ISSUES

1. Is Dukes's protest procedurally barred?

2. Were two voters whose residence is outside the city limits ineligible to vote in the mayoral election?

DISCUSSION

1. Procedural bar

The Board found Dukes's protest was not timely because he should have discovered before the election that the contested voters were not properly included on the voter registration list. Dukes contends this was error

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[1]This section includes the requirement that an eligible voter "has resided within the corporate limits of any incorporated municipality in this State for thirty days previous to any municipal election."

[2]The City of Johnsonville transferred authority over its municipal elections to the county election commission pursuant to S.C. Code Ann. § 5-15-145 (Supp. 2003).

[3]Jared Decamps testified at the hearing that he voted in the mayoral election although he had moved outside the city two or three years before the election.

because his protest was based on after-discovered evidence pursuant to S.C. Code Ann. § 7-13-810 (Supp. 2003). We agree.

Section 7-13-810 provides in pertinent part:

> A candidate may protest an election in which he is a candidate pursuant to 7-17-30 when the protest is based in whole or in part on evidence discovered after the election. This evidence may include, but is not limited to, after-discovered evidence of voters who have voted in a precinct or for a district office other than the one in which they are entitled by law to vote.[4]

(emphasis added). The evidence presented by Dukes that voters included on the voter registration list were not in fact city residents qualifies as after-discovered evidence under this section. Dukes's protest therefore is not procedurally barred.

2. Ineligible voters

Ricky and Danette Foshee voted in the mayoral election and testified at the protest hearing. They are husband and wife and reside together. The Foshees own two contiguous lots, one in the city on which they pay city taxes, and one outside the city on which they do not pay city taxes. Their actual residence is located on the back lot which is outside the city and comprises about four-fifths of the total property. The front lot, which is in the city, borders on the road and is about fifty feet deep. The Foshees' driveway extends from the road to the residence on the back lot. The Board

[4]This section was amended in 1996 after our decision in Hill v. South Carolina Election Comm'n, 304 S.C. 150, 403 S.E.2d 309 (1991); s*ee also* Greene v. South Carolina Election Comm'n, 314 S.C. 449, 445 S.E.2d 451 (1994). In Hill, we held that discrepancies between the district where a voter actually resided and the voter's district designation on the voter registration list could have been discovered prior to the election and did not constitute after-discovered evidence.

found that because the Foshees' contiguous lots had a single residential use, the Foshees were city residents. Dukes contends this was error.

The issue of a voter's residence when his actual dwelling is on the part of his property outside the voting district is a novel one. We agree with the decision of the New York court in In re: Davy, 281 A.D. 137 (N.Y. App. Div. 1952), that a person's residence is the part of his property on which the dwelling is actually located. Because the Foshees' actual residence is outside the city limits, they were not eligible to vote in the mayoral election.

This Court will employ every reasonable presumption to sustain a contested election; we will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful. George v. Municipal Election Comm'n of City of Charleston, 335 S.C. 182, 516 S.E.2d 206 (1999). Because three votes, including the Foshees' two votes, were cast illegally, and the margin of victory was only three votes, the result of this election is rendered doubtful. The denial of Dukes's protest is therefore

REVERSED.

TOAL, C.J., MOORE, BURNETT, PLEICONES, JJ., and Acting Justice Alexander S. Macaulay.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joseph Wilson, Respondent,

v.

Charles Rivers, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25788
Heard November 18, 2003 - Filed March 1, 2004

REVERSED

John L. McDonald, Jr., of Clawson & Staubes, LLC, of Charleston, for petitioner.

Francis X. McCann, of Charleston, for respondent.

JUSTICE MOORE: We granted certiorari to review the Court of Appeals' decision[1] affirming the trial court's exclusion of petitioner's expert on biomechanics. We reverse.

ISSUE

Did the Court of Appeals err by affirming the trial court's exclusion of the videotaped deposition of petitioner's biomechanics expert?

FACTS

Respondent was a passenger in a car stopped at a red light. A car driven by petitioner struck respondent's car from behind. At the time of impact, respondent, who was sitting in the front passenger seat, was wearing his seat belt and was leaning forward to retrieve his keys from the floorboard.

Respondent initially did not seek medical treatment because he did not believe he was injured. Subsequently, he began experiencing pain and soreness in his lower back. He maintained he did not have a prior medical history of back injuries or problems. Respondent was treated for several months by his general practitioner before it was discovered he had a herniated disc. He was then treated by Dr. Stephen Rawe, a neurosurgeon, and by Dr. Jeffrey Wingate, an orthopedist who specializes in reconstructive surgery of the spine. When their initial treatment failed, surgery was performed to remove the disc and a metal cage was inserted in its place.

Both Dr. Rawe and Dr. Wingate testified it was their opinion the ruptured disc resulted from the collision. Both stated respondent's position during the collision made him more vulnerable to injury. Dr. Rawe testified, however, that it was his opinion respondent suffered from degenerative disc disease prior to the accident.

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[1] Wilson v. Rivers, 350 S.C. 536, 567 S.E.2d 482 (Ct. App. 2002).

Petitioner's expert, Dr. Barry F. Jeffries, a radiologist, testified respondent's herniated disc was not caused by the accident. Dr. Jeffries opined the herniation was a result of degenerative disc disease that predated the accident and that the herniation could have been caused by "occupational or lifestyle habits."

Petitioner sought to introduce the videotaped deposition of Dr. Richard Harding as an expert in the field of biomechanics.[2] Respondent objected and Dr. Harding's testimony was proffered.

After Dr. Harding received his medical degree from the University of London, he worked as a family practice physician in the British Royal Air Force. While in the Air Force, he obtained his Ph.D. in human physiology and was appointed as a consultant in aerospace medicine. Since 1995, he has been working as a consultant at Biodynamics Research Corporation (BRC). BRC provides consulting services in the field of biomechanics and, specifically, in the study of vehicle impacts.

Dr. Harding further testified he is a qualified biomechanic because he has a strong background in aerospace medicine, which is founded in biomechanics, and because he has a background in physiology. Dr. Harding testified he had expertise in the application of physics to an understanding of the human response to impacts or events.

Dr. Harding testified he co-authored a published paper entitled "The Biomechanics of Whiplash," and a chapter, which at the time of the deposition was not published, on the same subject. He stated he has attended two traffic accident reconstruction conferences. He further stated he has conducted over 800 impact and injury causation analyses, and has been qualified as an expert in the field of biomechanics in other states.

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[2]Biomechanics is the application of mechanics to the interaction of biological systems with their external environment. When investigating an accident, biomechanical analysis can be used to reconstruct a victim's motion and relate it to his injuries.

In the instant case, Dr. Harding reviewed the depositions of respondent's physicians, Dr. Jeffries, and respondent. He also reviewed the pleadings and answers to interrogatories, photographs of the vehicles, the accident report, and the repair cost estimates of both vehicles. He also reviewed respondent's medical records.

A review of the materials, combined with his knowledge of independent testing by Consumer Reports and the Insurance Institute for Highway Safety on the types of vehicles involved, led Dr. Harding to conclude the delta V[3] on the vehicle in which respondent was a passenger, was no greater than five miles per hour and the impact came from directly behind. Dr. Harding stated the force was not of sufficient magnitude or direction to cause respondent's herniated disc.

To determine what happened during the accident, Dr. Harding stated he relied upon the impact analysis, which gave him a magnitude of the impact and the direction, and he also relied upon respondent's description of how he was positioned during the impact. Dr. Harding stated the fact respondent was leaned over would increase his risk of musculoskeletal injury in his neck and his risk of developing a muscle strain from top to bottom in his back, but would not increase his risk of having a herniated disc. To have a herniated disc, he stated, there has to be a combination of top-to-bottom loading associated with some rotation at the same time. Dr. Harding concluded the forces as they occurred in the accident were not appropriate to produce a herniated disc. He believed other activities which respondent engaged in after the accident could have caused his injury, such as sneezing, moving a cabinet, or working on his vehicle.

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[3]Dr. Harding described the delta V, or the impact-related change in velocity, as the difference between a vehicle's velocity before an accident and its velocity as a consequence of the accident. He stated the higher the delta V, the more likely an injury will occur because the change in velocity occurs over a very short period of time and imposes accelerations and therefore force on the individuals in the vehicle. He compared respondent's vehicle's delta V of 5 to being hit by a bumper car at an amusement park.

The trial court concluded Dr. Harding was qualified regarding medical matters, but not regarding biomechanics. The court excluded the testimony pursuant to Rule 403, SCRE, because the testimony would be confusing to the jury. A majority of the Court of Appeals found there was evidence to support the trial court's decision.

Judge Shuler, in a well-reasoned dissent, found there was no evidence to support the trial court's ruling that Dr. Harding's proposed testimony would be confusing to the jury. Judge Shuler found the exclusion of Dr. Harding's testimony prejudiced petitioner, who offered it to support his defense that the low-speed, low-impact accident could not have caused respondent's back injury, the major dispute at trial.

DISCUSSION

Petitioner argues the Court of Appeals erred by affirming the trial court's decision to exclude Dr. Harding's expert testimony.

The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject. Lee v. Seuss, 318 S.C. 283, 457 S.E.2d 344 (1995) (finding trial court erred by finding plastic reconstructive surgeon unqualified to give expert opinion in field of family practice because limited exposure of surgeon to field of family practice merely goes to weight of testimony and not its admissibility).

Rule 702, SCRE, provides that a witness qualified as an expert may testify when scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. However, even if an expert's testimony is admissible under the rules, the trial court may exclude the testimony if its probative value is outweighed by the danger of, among other things, unfair prejudice, confusion of the issues, or misleading the jury. Rule 403, SCRE.

The trial court abused its discretion by not qualifying Dr. Harding as an expert in biomechanics. *See* Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002) (trial court's ruling to exclude or admit expert testimony will not be

disturbed on appeal absent clear abuse of discretion). Dr. Harding's specialized knowledge would assist the jury to determine the facts in issue. Further, he was better qualified than the jury to evaluate the force of a moving vehicle on the human body. *See id.* (for court to find witness competent to testify as expert, witness must be better qualified than jury to form opinion on particular subject of testimony).

Although Dr. Harding did not have a degree in biomechanics, he was a medical doctor with a doctorate in human physiology and training in biomechanics and he had been qualified as an expert in the field of biomechanics in other states. Any defects in the amount of his education and experience, if any, go to the weight of his testimony and not its admissibility. *See* Lee v. Seuss, *supra* (generally, defects in amount and quality of education and experience go to weight of expert's testimony and not its admissibility). Dr. Harding was qualified to render an opinion on the forces created by an impact and on the general effects on the human body caused by such forces and, because Dr. Harding is a medical doctor, an opinion regarding the cause of respondent's particular medical problems. *See, e.g.,* Smelser v. Norfolk Southern Ry. Co., 105 F.3d 299 (6th Cir. 1997)[4] (biomechanics expert qualified to render opinion on forces generated in rear-end collision and to speak generally about types of injuries forces would generate, but because not medical doctor, testimony about plaintiff's specific injuries were beyond expertise); Dorsett v. American Isuzu Motors, Inc., 805 F. Supp. 1212 (E.D. Pa. 1992) (expert qualified to opine plaintiff injured when head came in contact with vehicle roof during rollover accident where expert testified work in Navy related to biomechanics, specifically to cause of skull fractures, and where lectured on biomechanics of vehicle impact); Ma'ele v. Arrington, 45 P.3d 557 (Wash. App. 2002) (biomechanical engineer, who taught at medical school and conducted federally funded research on low-speed collisions, properly testified as expert witness that maximum force that could have impacted plaintiff's body does not cause injuries).

[4]*Cert. denied*, 522 U.S. 817 (1997).

Further, the court erred by finding Dr. Harding's testimony should be excluded under Rule 403 because it would be confusing to the jury. Contrary to the findings of the Court of Appeals, Dr. Harding did not solely rely on the damage to the car in reaching his conclusion. Dr. Harding considered depositions, medical records, photographs, impact tests, and the accident report in reaching his conclusion. Additionally, Dr. Harding's conclusion was based on his reliance upon respondent's description of how he was positioned during the impact, *i.e.* leaning over to retrieve his keys from the floorboard. Dr. Harding discussed in detail what injuries would occur as a result of this position. Further, Dr. Harding fully explained the method he used to reach his conclusion and did not contradict himself. Accordingly, the Court of Appeals erred by affirming the trial court's decision to exclude Dr. Harding's testimony because it was confusing.

Furthermore, the probative value of Dr. Harding's testimony outweighs any prejudicial effect to respondent. Dr. Harding would have testified the low-impact collision, as it occurred, could not have caused respondent's back injury. Whether respondent's injury occurred due to a pre-existing degenerative disc disease or due to the accident was the major issue at trial. Therefore, we reverse the opinion of the Court of Appeals.[5]

REVERSED.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.

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[5]Although Dr. Harding is an expert in biomechanics, the trial court has not addressed the question whether the underlying science of biomechanics is reliable to determine what injuries could have been caused by this particular accident. *See* State v. Council, 335 S.C. 1, 515 S.E.2d 508, *cert. denied* 528 U.S. 1050 (1999) (to determine whether underlying science of expert's testimony is reliable, court will look at several factors, including: (1) publications and peer review of technique; (2) prior application of method to type of evidence involved in case; (3) quality control procedures used to ensure reliability; and (4) consistency of method with recognized scientific laws and procedures).

The Supreme Court of South Carolina

RE: Amendment to the Rules of the Board of Law Examiners

ORDER

Effective September 1, 2003, this Court made extensive amendments to Rule 402, SCACR, relating to admission to practice law. One change established new deadlines for bar examination applicants requesting special accommodations. Rule 402(d)(3), SCACR. The Board of Law Examiners requests permission to amend its rules to reflect the new deadlines.

The Board's motion is granted. Accordingly, Section B.2(c) of the Rules of the Board of Law Examiners (contained in Appendix A to Part IV of the South Carolina Appellate Court Rules) is amended to read: "An applicant must submit a written request for special testing accommodations on forms prescribed by the Board no later than November 1st for the February examination and April 1st for the July examination. This filing deadline may be extended upon good cause as determined by the Chairman of the Board."

In addition, Section B.3(b) of the Rules of the Board of Law Examiners (contained in Appendix A to Part IV of the South Carolina Appellate Court Rules) is amended to read: "At the request of a blind or sight impaired applicant, the Board may provide the examination in braille or in large print; provided, the request is made no later than November 1st for the February exam and April 1st for the July exam."

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/Costa M. Pleicones J.

Columbia, South Carolina

February 20, 2004

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mark W. Ellis, individually, and in the right of American Survey, Inc.,

Appellant,

v.

Eric J. Davidson, L. Russell Bennett, Jarrel L. Wigger, Mark W. Weeks, Kelly Davis, American Survey, Inc., Davidson and Bennett, Absolute Survey, Inc., jointly and severally,

Respondents.

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

Opinion No. 3748
Heard February 11, 2004 – Filed March 1, 2004

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Cynthia B. Castengera, of Newland, NC and D. Dusty Rhoades, of Charleston, for Appellant.

M. Dawes Cooke, Jr. and K. Michael Barfield, both of Charleston, for Respondents.

ANDERSON, J.: Mark W. Ellis, individually and on behalf of American Survey, Inc., appeals from the trial judge's grant of partial summary judgment to Respondents. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL BACKGROUND

In the spring of 1998, Ellis, a licensed surveyor, decided to start his own residential surveying company. Ellis contacted Rusty Bennett, a partner at the law firm of Davidson & Bennett (the Firm) because he needed an investor. Ellis had performed prior survey work for the Firm. According to Ellis, Bennett agreed to invest in the company and stated:

> That he would handle all of the legal paperwork and make sure that the company was set up properly and that [Ellis's] rights were protected. . . . [Bennett] said he would cover all legal advice involving [Ellis] and the company, for [Ellis] not to worry about anything other than producing surveys.

Ellis believed that, in having the Firm invest in the business, he would be able to perform work for the Firm and have the Firm set up the surveying company in such a way that he was protected from liability. After Bennett invested, the business ownership was: Bennett – 60%; Ellis – 40%; the 1000 shares of common stock would be divided proportionally, with no restrictions placed upon them; Bennett would "set up" the surveying company; and Ellis would be employed by the surveying company. Other than proposed business plans, no written contracts or documents memorialize the agreement between Ellis and Bennett. The parties created American Survey, Inc. (American). Bennett set up the company and arranged for American to lease space in a building he owned. At some point, Bennett's law partner in the Firm, Eric Davidson, became a shareholder in American. Ellis claimed that, in January of 1999, he "was told [the new percentage of ownership] was one-third, one-third, one-third." Bennett professed he "believe[d] . . . the

agreement . . . was that [he and Davidson] would hold 65 percent of the shares and [Ellis] would have 35 percent of the shares."[1]

Several months later, Bennett retired from the practice of law and sold his interest in the Firm and the Firm's businesses (including American) to his three partners: Davidson, Jarrell Wigger, and Mark Weeks (hereinafter, "the Firm"). After Bennett's retirement, the Firm instructed Ellis not to sign a new lease with Bennett. The Firm met with Ellis after discovering Bennett never filed American's corporate papers. In fact, Bennett never kept corporate minutes, records, or by-laws for American. Ellis testified the members of the Firm told him they were acting as attorneys for the corporation, and that he should sign the papers as instructed.

Ellis and the Firm soon disagreed over the way Ellis operated American. At a meeting in March of 1999, Ellis told the Firm he wanted to buy out their interest in American. After offers and counteroffers were made and rejected, the parties came to a verbal agreement about the buyout. The agreement was put into writing, and Ellis and Davidson faxed revisions back and forth. While admitting the buyout negotiations were "a matter strictly of business," Ellis stated the Firm did not advise him to obtain separate counsel, and that he thought the Firm acted as attorneys on behalf of both American and himself. The agreement was not finalized, as Ellis wanted a written commitment from the Firm that American would still continue to be used as the Firm's chief surveying company. In order to force a decision, Ellis informed the Firm that he would close American's doors and terminate its employees if the Firm did not agree to his terms. The Firm then decided to close American themselves. They arrived at American with deputy sheriffs, terminated the employees, and changed the locks.

At approximately the same time Ellis and the Firm were in the midst of buyout discussions, the Firm decided to form a new surveying company. Members of the Firm testified the new company, Absolute Survey Inc. (Absolute), would be run by Kelly Davis and would perform surveying for

[1] While Ellis and Bennett disagree over the series of events leading to Davidson's participation in American, it is clear Davidson was involved early in American's formation.

the Firm after Ellis bought their interests in American. Ellis declared that, while he was aware of Absolute's formation, he did not realize it would be a competing surveying company.

On behalf of American and in his individual capacity, Ellis filed an amended complaint against the Firm (including the lawyers in their individual capacities), American, Absolute, and Davis. Ellis alleged various causes of action, including breach of fiduciary duty, legal malpractice, conversion, and civil conspiracy. The Firm and the lawyers in their individual capacities answered, counterclaimed, and moved for summary judgment. Additionally, the Firm asked for summary judgment for Davis as to all claims against him.

The Circuit judge granted the Firm's summary judgment motion as to the causes of action for legal malpractice and breach of fiduciary duty. The judge denied the motion for summary judgment as to the remaining causes of action. Further, the judge granted summary judgment in Davis's favor as to all causes of action against him. The judge denied Ellis's subsequent motion for reconsideration.

ISSUES

I. Did the trial judge err in classifying the relationship that existed between the parties?

II. Did the trial judge err in "discounting" the expert witness affidavit?

III. Did the trial judge err in dismissing Kelly Davis as a party?

STANDARD OF REVIEW

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. Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 584 S.E.2d 375 (2003); Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002); Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003); Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Sauner v. Public Serv. Auth., 354 S.C. 397, 581 S.E.2d 161 (2003); Hendricks v. Clemson Univ., 353 S.C. 449, 578 S.E.2d 711 (2003); McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998); see also Laurens Emergency Med. Specialists, 355 S.C. at 108, 584 S.E.2d at 377 (stating that in reviewing summary judgment motion, facts and circumstances must be viewed in light most favorable to non-moving party). If triable issues exist, those issues must go to the jury. Baril v. Aiken Reg'l Med. Ctrs., 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

Summary judgment is appropriate where 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 judgment as a matter of law. Russell v. Wachovia Bank, N.A., 353 S.C. 208, 578 S.E.2d 329 (2003); Regions Bank, 354 S.C. at 659, 582 S.E.2d at 438; Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001); Rule 56(c), SCRCP. All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Schmidt v. Courtney, Op. No. 3719 (S.C. Ct. App. filed December 22, 2003) (Shearouse Adv. Sh. No. 1 at 66); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); see also Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) ("On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.").

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000); Bayle, 344 S.C. at 120, 542 S.E.2d at 738. Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Hedgepath, 348 S.C. at 355, 559 S.E.2d at 336; Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997).

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, 354 S.C. at 659, 582 S.E.2d at 438; Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001). 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. Regions Bank, 354 S.C. at 660, 582 S.E.2d at 438. 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); Peterson v. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999); Rule 56(c), SCRCP. The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001).

LAW/ANALYSIS

I. Relationship Between the Parties

A. Fiduciary Duty

Ellis argues the trial judge erred in finding there was no evidence of a fiduciary duty between the Firm and Ellis and/or American. We agree.

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003); Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003); Steele v. Victory Sav. Bank, 295 S.C. 290, 368 S.E.2d 91 (Ct. App. 1988). A fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence. Hendricks v. Clemson Univ., 353 S.C. 449, 578 S.E.2d 711 (2003); O'Shea v. Lesser, 308 S.C. 10, 416 S.E.2d 629 (1992); SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990); Regions Bank, 354 S.C. at 670, 582 S.E.2d at 444; Steele, 295 S.C. at 293, 368 S.E.2d at 93. A relationship must be more than casual to equal a fiduciary relationship. Regions Bank, 354 S.C. at 670, 582 S.E.2d at 444; Steele, 295 S.C. at 293, 368 S.E.2d at 93.

As a general rule, a fiduciary relationship cannot be created by the unilateral action of one party. Regions Bank, 354 S.C. at 670, 582 S.E.2d at 444; Brown v. Pearson, 326 S.C. 409, 483 S.E.2d 477 (Ct. App. 1997). To establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will act not in his own behalf but in the interest of the party so reposing. Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 340 S.E.2d 786 (1986). The evidence must show the entrusted party actually accepted or induced the confidence placed in him. Regions Bank, 354 S.C. at 671, 582 S.E.2d at 444; State v. Parris, 353 S.C. 582, 578 S.E.2d 736 (Ct. App. 2003); Brown, 326 S.C. at 423, 483 S.E.2d at 484.

We find there are genuine issues of material fact as to whether a fiduciary duty existed between the Firm and Ellis, in his individual and representative capacities. There is evidence that Ellis relied upon the Firm's legal expertise and reposed a "trust and confidence" in the Firm in their joint business dealings. The Firm had always tendered legal advice to Ellis, even after American was set up. For example, Davidson instructed Ellis to speak to Wigger about an American employee who was injured in the course of his employment.

We rule that genuine issues of material fact exist as to whether the Firm breached a fiduciary duty in its treatment of Ellis, both in his individual and representative capacities. We disagree with the judge's finding that any such duty ended with the formation of American. Bennett was integral to the process of structuring and incorporating American. When asked who "had the responsibility of handling all of the legal work with the formation of American," Bennett responded: "That would have been me or our firm." According to Ellis, even after American was set up and Bennett left the Firm, the remaining members of the Firm told Ellis they were acting as American's attorneys. When queried regarding whether he or the Firm gave advice to Ellis personally or to American, Weeks answered: "American Survey." The Firm instructed Ellis about: (1) breaking American's lease in Bennett's building and (2) following their advice in signing papers to properly incorporate American. In fact, when the parties were engaged in buyout negotiations, Ellis testified he did not obtain separate counsel because he believed the Firm acted as attorneys for both himself and American.

We conclude genuine issues of material fact exist as to whether there was a fiduciary duty and, if so, whether such duty was breached. Accordingly, the trial judge erred in granting summary judgment on this issue.

B. Attorney-Client Relationship

Ellis contends the trial judge erred in finding there was insufficient evidence of an attorney-client relationship between the Firm and Ellis and/or American. We agree.

Our courts have recognized the attorney-client relationship is, by its very nature, a fiduciary one. Hendricks v. Clemson Univ., 353 S.C. 449, 578 S.E.2d 711 (2003); Weatherford v. Price, 340 S.C. 572, 532 S.E.2d 310 (Ct. App. 2000); see also Hotz v. Minyard, 304 S.C. 225, 403 S.E.2d 634 (1991) (noting that attorney-client relationship is by nature a fiduciary one); De Pass v. Piedmont Interstate Fair Ass'n, 217 S.C. 38, 59 S.E.2d 495 (1950) (stating that a fiduciary relationship always exists between attorney and client). The relationship between an attorney and a client is highly fiduciary in its nature

and of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith. Weatherford, 340 S.C. at 582, 532 S.E.2d at 315; 7 Am. Jur. 2d Attorneys at Law § 137 (1997).

In the instant case, the Firm was intricately involved in American's business—from the time of its formation until the Firm's lockout of the company. Bennett drafted the initial incorporation papers for American and, after Bennett left the Firm, the remaining Firm attorneys re-drafted and filed American's corporate papers. The following colloquy occurred during Ellis's deposition:

> Q Can you think of any other personal legal advice that they have given you?
>
> A Yes. At our second meeting at Davidson and Bennett, the missing corporate books showed up that were at the James Island office the whole time, and Eric stated that Jerry would be going over with me the corporate books and what needed to be taken care of.
>
> Jerry opened up the books sitting there at the table across from me and said, none of this stuff ha[s] been done, all of the forms are blank. That I could get sued personally. Mark Weeks jumped up and said, we are one station wagon loaded full of kids with a soccer mom going through an intersection and having one of our vehicles hit her, and that I could be sued personally and they could take everything that I own.
>
> Jerry flipped open the book and said, you need to sign here and we get our ass off—you need to sign here, you need to sign here. I am sitting there going, shit, I had no idea, Rusty was supposed to be taking care of this.
>
> At the same time they are going, this company is a "C" corp., Rusty put the screws to us, we should have been a "S" corp. Rusty made it a "C" corp. to protect his ass. That is the only reason Rusty did it. He didn't give a shit about you, Mark. He has this thing as a "C" corp.
>
> Sign here, sign here, take care of this. I am thinking, the signatures I am putting on these blank sheets of paper, if you

look, you will see they are not only blank, but they are not dated, was to protect me from getting sued. This is what they are telling me sitting in that office--

Q Who told you--

A --they are protecting my rights.

Q Who told you that?

A Mark Weeks, Jerry Wigger and Eric Davidson, sitting in there.

Q What did you sign?

A I signed every piece of paper they threw in front [of] me that they said would cause me to get sued by some soccer mom loaded up full of kids.

Q What were the papers that you signed?

A I signed a bunch of papers. I couldn't tell you the exact one. I tell you how quick it went, you need to sign here, flip, flip, you need to sign here, flip, flip, and sign here and sign here, and this is going to protect you, Mark, this is going to stop that soccer mom loaded full of kids from suing you personally.

Q You mean by making sure that the corporation was duly incorporated, is that what they were telling you?

A What they told me, what Jerry Wigger told me, in particular, as I was told from Eric, that he was a business attorney for the group, was that a corporation has to act as a corporation. It cannot act as just some little fly by night, oh, yeah, we filed some paperwork with the State, therefore, we have this corporate veil, we are impenetrable personally by it.

> Jerry said that is what he did all day long is pierce the corporate veil in order to go after personal assets, personal, private assets, and that he was protecting me by me signing these documents.

After American was properly formed, the Firm advised Ellis on at least one Workers' Compensation matter and acted in American's interest in negotiating a new lease for American's offices. In addition, the Firm did not advise Ellis to obtain outside counsel during the buyout negotiations.

We conclude there was ample evidence presented to overcome summary judgment on this matter. Concomitantly, the trial judge erred in finding there was insufficient evidence of an attorney-client relationship.

C. Legal Malpractice

Ellis maintains the trial judge erred in finding there was no evidence of legal malpractice. We agree.

In order to prevail in a legal malpractice action, the plaintiff must prove four elements:

> (1) the existence of an attorney-client relationship;
> (2) a breach of duty by the attorney;
> (3) damage to the client; and
> (4) proximate causation of the client's damages by the breach.

Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 472 S.E.2d 612 (1996); Sims v. Hall, Op. No. 3703 (S.C. Ct. App. filed December 8, 2003) (Shearouse Adv. Sh. No. 43 at 60); Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002); Henkel v. Winn, 346 S.C. 14, 550 S.E.2d 577 (Ct. App. 2001); McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998).

Viewing the evidence in the light most favorable to Ellis and American, we find there was sufficient evidence presented on the issue of legal

malpractice to survive the Firm's motion for summary judgment. Factual issues exist as to the (1) buyout negotiations; (2) subsequent lockout of the American offices; and (3) Firm's formation of a rival surveying company, Absolute, in the midst of these buyout negotiations. We disagree with the trial judge's finding that no evidence exists as to damages. The damages Ellis and American suffered in this case flowed from the improper formation of American. The Firm did not perform several functions, including: issuing stock certificates, holding an organizational meeting, writing by-laws, drafting an employment contract for Ellis, and preparing documentation that Ellis loaned personal equipment to American. If the Firm had drafted these documents, the rights and responsibilities of the parties could have been clearly laid out. For example, stock restrictions could have been implemented, corporate governance could have been set out, a right of first refusal in transferring company stock could have been included, and the procedure for valuing and selling American could have been devised and agreed upon by the parties. As a result of the Firm's poor drafting, Ellis was not apprised of the proper procedures and methods for governing American. He was later literally and figuratively shut out of American's operation. Further, as there was no documentation of equipment loaned to American, Ellis lost several pieces of personal property when the Firm effected a lockout of the company. Finally, genuine issues of material fact exist as to whether these damages were proximately caused by the Firm's improper formation of American.

II. Affidavit from Expert Witness

Ellis asserts the trial judge erred in "discounting" an affidavit from an expert witness. We agree.

The admission or exclusion of expert testimony is a matter within the sound discretion of the trial court. Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998); Burroughs v. Worsham, 352 S.C. 382, 574 S.E.2d 215 (Ct. App. 2002); Means v. Gates, 348 S.C. 161, 558 S.E.2d 921 (Ct. App. 2001). A trial court's decision to admit or exclude expert testimony will not be disturbed on appeal absent an abuse of discretion. Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002); Fields v. Regional Med. Ctr. Orangeburg, 354

S.C. 445, 581 S.E.2d 489 (Ct. App. 2003); State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (Ct. App. 2003); Burroughs, 352 S.C. at 390, 574 S.E.2d at 219. An abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support. Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987); Fields, 354 S.C. at 451, 581 S.E.2d at 492; Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); see also Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001) (stating that abuse of discretion occurs where trial court is controlled by error of law or where trial court's order is based on factual conclusions without evidentiary support). A court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair. Fields, 354 S.C. at 451, 581 S.E.2d at 492; Grubbs, 353 S.C. at 379, 577 S.E.2d at 496; Means, 348 S.C. at 166, 558 S.E.2d at 924.

In order for this Court to reverse a judgment for an alleged error in the exclusion of evidence, the complaining party must prove both the error of the ruling and resulting prejudice. Fields, 354 S.C. at 451, 581 S.E.2d at 492; Means, 348 S.C. at 166, 558 S.E.2d at 924; see also Lee v. Suess, 318 S.C. 283, 457 S.E.2d 344 (1995) (admission of expert testimony is within sound discretion of trial judge and will not be overruled absent finding of abuse of discretion and prejudice to complaining party); Stevens v. Allen, 336 S.C. 439, 448, 520 S.E.2d 625, 629 (Ct. App. 1999), aff'd, 342 S.C. 47, 536 S.E.2d 663 (2000) ("For this Court to reverse a case based on the admission of evidence, both error and prejudice must be shown."); Potomac Leasing Co. v. Bone, 294 S.C. 494, 497, 366 S.E.2d 26, 28 (Ct. App. 1988) ("Before the Court of Appeals will reverse a judgment for an alleged error in the exclusion of evidence, the appellant must show prejudice.").

Rule 702, SCRE, articulates guidelines for the admissibility of expert testimony. Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. For a court to find a witness competent to testify as an expert, the witness must be better qualified than the

fact finder to form an opinion on the particular subject of the testimony. Mizell, 351 S.C. at 406, 570 S.E.2d at 183; Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 487 S.E.2d 596 (1997); Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204 (Ct. App. 2003); see also Fields, 354 S.C. at 452, 581 S.E.2d at 492 (to be competent as expert, witness must have acquired, by reason of study or experience, or both, such knowledge and skill in a business, profession, or science that he is better qualified than the fact finder to form an opinion).

At the summary judgment hearing, Ellis presented an expert affidavit from Gregory Adams, a University of South Carolina law school professor and expert on legal ethics. Adams concluded the Firm "incompetently set up" American and failed to properly advise Ellis about several important matters while forming the company. Adams opined there was an attorney-client relationship between the parties, and that this relationship was subsequently breached by the Firm's actions. Adams noted the Firm engaged in transactions which conflicted with their responsibilities to Ellis and American. The trial judge ruled:

> [Adams's] affidavit . . . cannot create the requisite factual issue because it is based on factual assumptions about advice provided to Plaintiff Ellis, which assumptions are not supported by the record in this case. . . . [A]s the record establishes that the only potential legal advice provided to Ellis was with regard to formation of the corporation and obtaining worker's compensation insurance, Dr. Adams' affidavit does not change this Court's conclusion that no attorney-client relationship existed between Ellis and the Defendants that resulted in any damages alleged in this action.

The record supports Adams's conclusions in the affidavit, and, when considered in conjunction with Ellis's testimony, presented a genuine issue of material fact about the questions of breach of fiduciary duty, the existence of an attorney-client relationship, and legal malpractice. As the affidavit was crucial to proving the Firm breached a fiduciary duty in their attorney-client relationship with Ellis and American, Ellis, in his individual and representative capacities, was prejudiced by the court's ruling. See Hall v.

Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002) (explaining the client in a legal malpractice action must generally establish the standard of care by expert testimony).

The trial judge abused his discretion in failing to give efficacy to the expert witness affidavit. Because this resulted in prejudice to Ellis and American, it was error.

III. Dismissal of Davis

Ellis argues the trial judge erred in dismissing Kelly Davis from the lawsuit. We disagree.

In the complaint, Ellis and American included Kelly Davis, the surveyor for Absolute, as a party in this action on the grounds of civil conspiracy and conversion. The trial judge granted Davis's motion for summary judgment as to all causes of action raised against him. We agree with the trial judge's ruling on this issue.

A. Civil Conspiracy

A civil conspiracy consists of three elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) which causes the plaintiff special damage. Lawson v. South Carolina Dep't of Corrections, 340 S.C. 346, 532 S.E.2d 259 (2000); Robertson v. First Union Nat'l Bank, 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002); Lee v. Chesterfield Gen. Hosp., Inc., 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986). Ellis did not prove Davis engaged in a civil conspiracy with the Firm in order to purposely injure either Ellis or American. We find no genuine issue of material fact exists in the allegations levied against Davis. Ellis proved only that Davis was involved with the Firm in the formation of Absolute, not that he undertook this enterprise for the purpose of injuring either Ellis or American. Because Ellis could not establish the second element of civil conspiracy, the trial judge did not err in granting summary judgment in Davis's favor.

B. Conversion

Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). Davis is not liable for Absolute's alleged conversion of American's property. Absolute is a corporation. Davis may use the disputed equipment but only in his capacity as a surveyor employed by Absolute. Ellis and American have not alleged that Davis personally gained from the property in question. They aver only that Absolute has benefited from it. Even if Davis had believed the property belonged to Ellis or American, he would have had no authority to dispose of it without the approval of the corporation. In the Appellants' brief, Ellis and American assert: "Davis is the responsible party at Absolute." However, Davis is a surveyor for Absolute. He is an employee of the corporation and a minority shareholder. This does not make him personally liable to Ellis and American for property that Absolute, as a corporation, has allegedly converted. The judge properly granted summary judgment to Davis.

CONCLUSION

Based upon the foregoing, the trial judge's order granting the Firm's motion for partial summary judgment[2] is

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.[3]

HEARN, C.J., and GOOLSBY, J., concur.

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[2] On remand, the Circuit Court will evaluate all issues separately and distinctly in regard to Mark W. Ellis, individually, and American Survey, Inc.

[3] Ellis alleges the trial judge erred in granting summary judgment while there were outstanding motions and discovery in this case. However, as we are reversing and remanding this case on several issues, we need not reach this one.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cynthia P. Goldston, Personal Representative of the Estate of Neil Bryan Goldston, Sr., Appellant,

v.

State Farm Mutual Automobile Insurance Company, Respondent.

Appeal from Horry County
Gene M. Connell, Jr., Special Referee

Opinion No. 3749
Heard January 13, 2004 – Filed March 1, 2004

AFFIRMED AS MODIFIED

Neil D. Wright, of Myrtle Beach, for Appellant.

Linda Weeks Gangi, of Conway, for Respondent.

HEARN, C.J.: Cynthia P. Goldston, as personal representative to the estate of Neil Bryan Goldston, Sr., appeals the special referee's ruling

in favor of State Farm Mutual Automobile Insurance Company in this declaratory judgment action concerning State Farm's obligation to pay underinsured motorist coverage benefits. We affirm, as modified.

FACTS

The facts in this case are undisputed. On August 22, 1991, Rickie D. Johnson was driving a pickup truck along a highway in Georgetown County, South Carolina. The truck ran off the highway and struck Neil Bryan Goldston, Sr., who died from injuries sustained in the collision. Johnson was involved in repossessing three vehicles on behalf of his employer, American Lenders Service Company of Charleston, Inc., at the time of the accident.

The truck driven by Johnson was insured under a policy issued by the South Carolina Insurance Company. This policy contained liability limits of $100,000 per person. At the time of the accident, the truck was titled under the name "S.C. Auto Sales & Recovery, by A.M Sprague, V.P." S.C. Auto Sales and Recovery is not, and never has been, a registered corporation, partnership, or other legal entity.

In 1974, Sprague formed a South Carolina corporation under the name of Southern Recovery Service, Inc., for the operation of a "collateral recovery" or repossession business. By amendment to the articles of incorporation, the business was renamed to South Carolina Auto Recovery Services, Inc. Sprague was the sole owner and stockholder of this corporation.

In September 1979, Sprague acquired a franchise from American Lenders Service Company of Odessa, Texas ("American of Texas") for the operation of a collateral recovery business under the name American Lenders Service Company of Charleston. From this time forward, the business of South Carolina Auto Recovery Services, Inc. was conducted under the name of American Lenders Service Company of Charleston. In 1984, Sprague and his wife, Linda, created a new South Carolina corporation under the name of American Lenders Service Company of Charleston, Inc. ("American of

Charleston"). They are the company's sole owners, officers, and directors, and Sprague is an employee. All of the operating assets of South Carolina Auto Recovery Service, Inc. were transferred to American of Charleston, and South Carolina Auto Recovery Service, Inc. was dissolved in June 1985.

Although the Spragues have conducted their business under the name of American of Charleston since 1979, the trucks used to perform their repossession business were both titled and insured under the name of S.C. Auto Sales & Recovery. Even trucks purchased after the incorporation of American of Charleston were titled and insured under the name of S.C. Auto Sales & Recovery.

American of Charleston paid the purchase price of the truck Mr. Johnson was driving at the time of the accident as well as all of the insurance, taxes, gas, upkeep, and registration expenses. The truck is listed as an asset on American of Charleston's financial statements, and American of Charleston claimed depreciation of the truck on its income tax returns. Furthermore, the truck was used to repossess vehicles on behalf of American of Charleston, and was being so used at the time of the accident.

Appellant, the decedent's personal representative, commenced wrongful death and survival actions against the driver of the truck, the Spragues d/b/a S. C. Auto Sales and Recovery, American of Charleston, American of Texas, and General Motors Acceptance Corporation d/b/a GMAC Financial Services. All parties answered denying liability for Goldston's death.

The parties reached a settlement in which the Appellant received $700,000. The liability insurance carrier on the truck involved in the accident, South Carolina Insurance Company, paid its limits of $100,000. The remainder of the settlement was paid by National American Insurance Company ("National"). American of Charleston maintained an insurance policy with National consisting of a commercial general liability coverage, commercial auto coverage, and commercial inland marine coverage, which contained limits of $1,000,000. American of Texas, the franchisor of American of Charleston, maintained an additional commercial policy with

National, which had essentially the same commercial general liability coverage, commercial auto coverage, and commercial inland marine coverage as the policy issued by National to American of Charleston. This policy also contained limits of $1,000,000.

State Farm, the Respondent, issued an automobile insurance liability policy to the decedent, Goldston, which contained underinsured motorist coverage in the amount of $50,000 per person. State Farm consented to the settlement agreement described above, which ended both the wrongful death and survival claims against all defendants, while agreeing to preserve Appellant's claim to the underinsured motorist benefits under the State Farm policy. State Farm also stipulated that the damages recoverable in the actions brought by Appellant exceeded $150,000.

Appellant commenced this declaratory judgment action by filing a complaint seeking to determine whether State Farm was under an obligation to pay the underinsured motorist benefits contained in the policy issued to the decedent. By agreement of the parties, the matter was referred to a special referee. After two hearings, the special referee issued an order dismissing the action.

The referee's order states the issue to be decided was whether the commercial auto coverage or the commercial general liability coverage under the National policies issued to American of Charleston and American of Texas constitute "'applicable bodily injury liability and property damage liability insurance policies or bonds that apply to the bodily injury suffered by [the decedent].'"

The significance of this question lies in the fact that if the policies constituted liability policies applicable to the decedent, then by definition, the vehicle driven by Johnson could not be underinsured because these policies would provide coverage in excess of the $150,000 in damages stipulated to by the parties. Therefore, Appellant would not be entitled to collect the $50,000 in underinsured benefits provided for in State Farm's policy.

The special referee proceeded to make several conclusions of law, all of which Appellant argues were in error. First, the referee determined that the status of the at-fault vehicle, for purposes of the insurance policies issued by National to American of Charleston and American of Texas, was that of a "non-owned" vehicle or, in the alternative, a "hired auto." By making this determination, the referee concluded that the commercial auto coverage, as defined in the garage coverage form under the policies issued by National, provided applicable coverage to satisfy Appellant's claims.

The second conclusion of law asserted that, regardless of how the court characterized the at-fault vehicle under the National policies, coverage existed to pay Appellant's claims because at the time of the accident the vehicle was being used for garage operations. Thus, the special referee concluded the vehicle, and by necessity the accident, were covered under the commercial auto coverage section of the National policies. In fact, the referee went on to state that because the "clear and unambiguous language of the policy provides coverage for garage operations," and because the driver of the truck was performing garage operations at the time of the accident, clearly the National policies provided coverage.

The special referee's third conclusion of law was that coverage was also available for Appellant's claims under the commercial general liability coverage section of the National policies. Specifically, after interpreting the pertinent provisions of the policies, the referee held that because there were no applicable exclusions placing the acts of the at-fault driver outside the policy, coverage was available under the commercial general liability coverage section of the policy.

Appellant's motion for reconsideration of the referee's rulings was denied.

ISSUES

I. Did the referee err in excluding certain facts from his order of dismissal contained in the parties' stipulation of facts and relevant to the issues being ruled upon?

II. Did the referee err by concluding that the truck operated by Johnson at the time of the accident was a "non-owned auto" or, in the alternative, a "hired auto" for purposes of the commercial auto coverage section of the insurance policies issued by National to American of Charleston and American of Texas?

III. Did the referee err in concluding that the commercial auto coverage section of the insurance policies issued to American of Charleston and American of Texas provided liability insurance to pay the claims of Appellant because Johnson was involved in garage operations at the time of the accident?

IV. Did the referee err in concluding that the commercial general liability coverage section of the policies issued to American of Charleston and American of Texas provided coverage to pay the claims of Appellant?

V. Did the referee err in failing to conclude that there was a gap in coverage between the at-fault vehicle and the policies issued to American of Charleston and American of Texas?

VI. Assuming coverage existed under the policies issued by National to American of Charleston and American of Texas, did the referee err nevertheless in failing to conclude that these policies should not be taken into consideration when determining whether the vehicle was underinsured for purposes of receiving underinsured motorist benefits?

STANDARD OF REVIEW

Because declaratory judgment actions are neither legal nor equitable, the standard of review depends on the nature of the underlying issues. Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003) (citations omitted). When the purpose of the underlying dispute is to determine if coverage exists under an insurance

policy, the action is one at law. Horry County v. Ins. Reserve Fund, 344 S.C. 493, 497, 544 S.E.2d 637, 639-640 (Ct. App. 2001) (citing State Farm Mut. Auto. Ins. Co. v. Calcutt, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000)). In an action at law, tried without a jury, the appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, "'[w]hen an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts.'" In re Estate of Boynton, 355 S.C. 299, 301, 584 S.E.2d 154, 155 (Ct. App. 2003) (quoting WDW Props. v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000)). In such a situation, the appellate court does not have to defer to the trial court's findings. Id. at 301-02, 584 S.E.2d at 155 (citations omitted).

LAW/ANALYSIS

I. Stipulation of Facts

Appellant argues the special referee erred in selecting facts from the stipulation of facts submitted by the parties because his order dismissing the case did not contain facts Appellant feels were pertinent to the issue under consideration. We disagree.

Although the referee premised the original order dismissing the case by noting the parties "entered into the following Stipulations of Facts," this assertion was corrected in the referee's order ruling on Appellant's motion for reconsideration. In the later order, the referee corrected his previous assertion by noting that the facts in the original order were taken from the parties' stipulation of facts. The referee stated that the original order should have begun with the assertion that "[t]he parties entered into a Stipulation of Facts prior to the hearing in the above-captioned action and this Court deemed the following facts salient to its decision."

Thus, because the referee corrected any possible error in his order on Appellant's motion for reconsideration, we find this argument to be without merit.

II. Status of the At-Fault Vehicle

Appellant argues the referee erred in his determination that the at-fault vehicle was either a "non-owned auto" or a "hired auto" under the commercial auto coverage section of the insurance policies. We agree.

The commercial auto coverage sections in the National policies issued to American of Charleston and American of Texas provide, in pertinent part, that the policies supply liability coverage in the amount of $1,000,000. The policies explain that the coverage will only apply to "those 'autos' shown as covered 'autos'. 'Autos' are shown as covered 'autos' by the entry of one or more of the symbols from the COVERED AUTOS Section of the Garage Coverage Form next to the name of the coverage." Beside the coverage section titled liability in the American of Charleston and American of Texas policies appear the symbols 28 and 29.

The definitions for symbols 28 and 29 are located in Section I of the garage coverage form contained in the commercial auto coverage section of the policies. Section I begins with a disclaimer which provides, in pertinent part, that "[t]he symbols entered next to a coverage on the Declarations designate the only 'autos' that are covered 'autos'." Following this disclaimer, section I goes on to define the available symbols, including 28 and 29. The following definition is located next to symbol 28: "HIRED 'AUTOS' ONLY. Only those 'autos' you lease, hire, rent or borrow. This does not include any 'auto' you lease, hire, rent or borrow from any of your employees or partners or members of their households." The definition next to symbol 29 provides: "NON-OWNED 'AUTOS' USED IN YOUR GARAGE BUSINESS. Any 'auto' you do not own, lease, hire, rent or borrow used in connection with your garage business described in the Declarations. This includes 'autos' owned by your employees or partners or members of their households while used in your garage business."

Before making the determination that the at-fault vehicle was either a hired auto or non-owned auto, the special referee stated that while "[a]t first blush, one could believe that this Court's job was to determine the legal owner of the vehicle driven by Rickie Johnson in order to determine

coverage. That is not the case. The Court must determine for purposes of the insurance policies what the status is of the vehicle driven by Rickie Johnson." We disagree with this statement. We believe that legal ownership is exactly what this court must determine before we can rule on whether the vehicle was a covered auto.

As clearly stated in the policy language in the excerpt above, the only autos covered under the policy are those falling within the purview of symbols 28 and 29. Symbol 28 refers to hired autos as autos "you lease, hire, rent or borrow." Similarly, symbol 29 encompasses only those autos that are not owned. Therefore, to determine whether coverage exists, this court must examine the ownership status of the at-fault vehicle.

"Though a certificate of title constitutes prima facie evidence of ownership for purposes of insurance coverage, this presumption can be rebutted by evidence establishing someone other than the titleholder is the true holder." Pennell v. Foster, 388 S.C. 9, 15, 524 S.E.2d 630, 633 (Ct. App. 1999) (citing Tollison v. Reaves, 277 S.C. 443, 445, 289 S.E.2d 163, 164 (1982)). Although in this case, the at-fault vehicle was titled and insured under the name of S.C. Auto Sales & Recovery, the evidence clearly established that American of Charleston was its true owner. American of Charleston paid the purchase price of the truck, as well as all insurance, taxes, gas, and required maintenance. American of Charleston also maintained possession of the truck and controlled the determination of how and when it would be utilized. American of Charleston listed the truck as an asset on its financial statements and claimed depreciation of the truck on the company's tax returns. Finally, at the time of the incident, the truck was being utilized to repossess three vehicles on behalf of American of Charleston.

We find these additional facts adequate to rebut the prima facie evidence of ownership established by the title alone. Therefore, we hold that American of Charleston was the legal owner of the truck at the time of the incident. Accordingly, because American of Charleston owned the truck at the time of the incident, it was neither a hired auto – because it was not leased, hired, rented, or borrowed – nor a non-owned auto under the policy

issued by National to American of Charleston. As such, we find the vehicle was not a covered auto under the commercial auto coverage section of the policy.

III. Commercial auto coverage

The special referee held that regardless of how the vehicle was characterized – as either a hired auto, non-owned auto, or owned auto – coverage existed because the vehicle was being used for garage operations at the time of the accident. Appellant argues this ruling was in error. We affirm the special referee on alternate grounds.

Insurance contracts are subject to "the general rules of contract construction." Hansen ex rel. Hansen v. United Auto. Ass'n, 350 S.C. 62, 68, 565 S.E.2d 114, 116 (Ct. App. 2002) (citing Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 421, 392 S.E.2d 460, 461 (1990)). The primary purpose of all rules of contract construction is to determine the intent of the parties. Id. (citation omitted). "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (citation omitted).

"'[A] contract is ambiguous only when it may fairly and reasonably be understood in more ways than one.'" Hansen, 350 S.C. at 68, 565 S.E.2d at 117 (quoting Universal Underwriters Ins. Co. v. Metro. Prop. & Life Ins. Co., 298 S.C. 404, 407, 380 S.E.2d 858, 860 (Ct. App. 1989)). "Where language used in an insurance contract is ambiguous, or where it is capable of two reasonable interpretations, that construction which is most favorable to the insured will be adopted." Id. (quoting Poston v. Nat'l Fid. Life Ins. Co., 303 S.C. 182, 187, 399 S.E.2d 770, 772 (1990)).

The schedule of coverages and covered autos contained in the commercial auto coverage section of the National policies provides:

> This policy provides only those coverages where a charge is shown in the premium column below. Each

> of these coverages will apply only to those 'autos' shown as covered 'autos'. 'Autos' are shown as covered 'autos' for a particular coverage by the entry of one or more of the symbols from the COVERED AUTOS Section of the Garage Coverage Form next to the name of the coverage. Entry of a symbol next to LIABILITY provides coverage for 'garage operations'."

(emphasis added).

After considering this provision of the policies, the special referee reasoned that because symbols 28 and 29 appear beside the coverage titled liability, coverage also existed for garage operations. Section VI of the garage coverage form contained in the commercial auto coverage section of the policies defines garage operations as follows:

> "Garage operations" means the ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations. "Garage operations" includes the ownership, maintenance or use of the "autos" indicated in SECTION I of this Coverage Form as covered "autos". "Garage operations" also include all operations necessary or incidental to a garage business.

(emphasis added).

The special referee considered the language contained in this definition along with the appearance of symbols 28 and 29 on the declarations page, and stated that "there can be no question but that there is liability coverage for garage operations which includes all operations necessary or incidental to a garage business." The referee concluded that because the at-fault driver was engaged in repossessions when the accident occurred, he was performing tasks necessary and/or incidental to American of

Charleston's garage business. In fact, the referee stated, "The clear and unambiguous language of the policy provides coverage for garage operations. [The at-fault driver] was performing garage operations at the time [the decedent] was killed; thus, coverage is provided by the [National] policies."

To add support to this statement, the referee examined Section II of the garage coverage form contained in the commercial auto coverage section of the National policies, which explains the liability coverage under that section. First, the form defines who an insured is for covered autos. The form then defines who an insured is other than for covered autos, stating, "'insureds' for 'garage operations' other than covered 'autos,'" include American of Charleston or American of Texas and their "partners, employees, directors or shareholders but only while acting within the scope of their duties." (emphasis added). Because the at-fault driver was an employee of American of Charleston, the referee concluded that he was an insured for purposes of the policy and that it did not matter whether the at-fault vehicle was a covered auto or not.

Finally, the referee examined the general insuring agreement, which provided that National "will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from 'garage operations.'"

Taking all of the above excerpted provisions together, the special referee concluded that coverage existed under the commercial auto coverage section of the National policies because the at-fault driver was an insured and because the decedent's injuries constituted bodily injury, were caused by an accident, and resulted from garage operations.

We agree with the referee's conclusion that coverage existed under the commercial auto coverage section of the National policies. However, we disagree that the policy clearly and unambiguously provided coverage under the facts of this particular case.

As Appellant points out, the special referee's interpretation of the policy provisions at issue renders pointless the designation of specific classes of autos included in the covered autos section of the policy. American of Charleston chose to include only symbols 28 and 29 on the covered autos section of the commercial auto coverage section of the National policies. It had the option of choosing from among eleven possible auto designations, but only chose two, indicating the covered autos under the commercial auto section of the policies would include only hired autos and non-owned autos.

The referee read the last sentence of the garage operations definition together with the definition of insureds for garage operations as preempting the designations of vehicles contained on the garage coverage form in the commercial auto coverage section of the National policies. The last sentence of the garage operations definition states that "'[g]arage operations' also include all operations necessary or incidental to garage business." Further, the policy states that "'insureds'" for 'garage operations' other than covered 'autos,'" includes employees of American of Charleston or American of Texas. The special referee's interpretation of these provisions would have the policy providing coverage for any accident involving garage operations no matter what designation of auto was involved. Thus, even though American of Charleston only chose to include hired autos and non-owned autos on the garage coverage form, if an accident involving garage operations occurred with a vehicle not falling within these designations, it would still be covered as garage operations under the commercial auto section of the National policies.

Because we find that the policy language limiting coverage to non-owned and hired autos materially conflicts with the policy language defining garage operations and insureds for garage operations, we find that the policy provisions are open to more than one reasonable interpretation. Accordingly, we conclude that the policy provisions at issue are ambiguous. Hansen, 350 S.C. at 68, 565 S.E.2d at 117. Therefore, based on the premise that ambiguous or conflicting terms in an insurance contract should be construed in favor of the insured and strictly against the insurer, we affirm the special referee in finding the commercial auto liability coverage section of the National policies provided coverage for Appellant's claims. Diamond

State Ins. Co. v. Homestead Indus., Inc., 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995).

IV. Commercial General Liability Coverage

The special referee ruled that coverage also existed under the commercial general liability coverage section of the policies issued by National to American of Charleston and American of Texas. Appellant maintains this ruling was in error. We agree.

As noted in the discussion of the previous issue, the general insurance agreement provides that National "will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." An "insured," for purposes of the commercial general liability coverage section of the National policies, includes employees acting within the scope of their employment. The referee concluded Johnson was an insured under the commercial general liability coverage section because he was engaged in the repossession of vehicles at the time of the accident and thus, was acting within the scope of his employment.

The commercial general liability coverage section contains an exclusion from coverage, however, which provides, in pertinent part, that coverage does not apply to "'[b]odily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft owned or operated by or rented or loaned to any insured."

The referee found this exclusion did not apply to American of Charleston because Appellant asserted multiple causes of action in the underlying complaint that did not involve the use of an auto, including a cause of action for negligent hiring and supervision. The referee further held that because the cause of action for negligent hiring and supervision did not fall within the exclusion, coverage was provided under the policies. On appeal, State Farm argues that Appellant's causes of action for negligent hiring and supervision as well as negligence in failing to provide the financial resources necessary to safely perform repossession, failing to maintain a

proper fleet of repossession equipment, requiring employees to undertake excessive amounts of work, and requiring employees to mainly work at night fall outside the auto exclusion in the commercial general liability coverage section. We disagree.

In finding Appellant's causes of action did not involve the use of an auto, both the referee's order and State Farm's argument on appeal fail to recognize the specific language contained in the auto exclusion. The exclusion provides, "[t]his insurance does not apply to . . . 'Bodily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment of others of an . . . 'auto'. . . ." The terms bodily injury and property damage are both defined terms in the insurance contract. Bodily injury is defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." Property damage is defined as "(a) [p]hysical injury to tangible property, including all resulting loss of uses of that property; or (b) [l]oss of use of tangible property that is not physically injured." Neither of these definitions limits the application of the auto exclusion only to causes of action that arise out of the use or entrustment of an auto. Rather, these definitions assure the parties that the auto exclusion applies to all bodily injury and property damage arising out of the use or entrustment of an auto. See McPhearson v. Michigan Mut. Ins. Co., 310 S.C. 316, 320, 426 S.E.2d 770, 771 (1993) ("[H]old[ing] that for the purpose of construing an exclusionary clause in a general liability policy, 'arising out of' should be narrowly construed as 'caused by.'"); MGC Mgmt. Of Charleston, Inc. v. Kinghorn Ins. Agency, 336 S.C. 542, 549-50, 520 S.E.2d 820, 824 (Ct. App. 1999) (stating that an automobile exclusion applied to the occurrence itself and not the type of damages, and because the death arose from use of a car, the policy excluded damages emanating from the death). In this case, regardless of what specific cause of action Appellant asserted in the complaint, Appellant was seeking to recover damages for bodily injury. Furthermore, Appellant was seeking damages for bodily injury arising out of the use or entrustment of an auto because decedent's injuries resulted from being struck by an auto driven by an employee of American of Charleston. As a result, we find no applicable coverage under the commercial general liability coverage section of the National policies

because the auto exclusion specifically excluded coverage for decedent's injuries.

V. Gap in Coverage

Appellant asserts the special referee erred in failing to conclude that the at-fault vehicle was not an underinsured vehicle even if liability coverage existed under the National policies. This argument is premised on the idea that coverage under the National policies, if any, constituted excess coverage because it was above and beyond the coverage required under the South Carolina Motor Vehicle Financial Responsibility Act.[1] As such, Appellant asserts there was a gap in coverage due to the deductible contained in the National policies and that the State Farm underinsured motorist benefits should apply to cover that gap. The referee declined to find such a gap in coverage. We agree.

As State Farm correctly points out, the only deductible contained in the National policies is a $25,000 per claim deductible on bodily injury and property damage under the commercial general liability coverage section of the policies. Because we have previously determined that coverage does not exist to cover Appellant's claims under the commercial general liability coverage section, this deductible would be inapplicable.

Furthermore, even though we previously concluded that coverage existed under the commercial auto section of the policies, that section of the policies is not subject to a deductible. As a result, we find that the referee did not err in declining to find a gap in coverage.

VI. Consideration of Other Policies

Appellant asserts that, even assuming coverage existed under the National policies, the referee erred in failing to conclude that these policies should not be taken into consideration when determining whether the vehicle was underinsured for the purpose of receiving underinsured motorist benefits.

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[1] S.C. Code Ann. §§ 56-9-10 to -630 (1991 and Supp. 2003).

Appellant argues that under the compulsory system of automobile liability insurance established by the South Carolina Motor Vehicle Financial Responsibility Act, only "motor vehicle liability polic[ies]," as defined by S.C. Code Ann. § 56-9-20(5) (Supp. 2003)[2] should be taken into consideration when determining whether an insured is entitled to underinsured motorist benefits. We disagree.

Section 56-9-20(5) of the South Carolina Code (Supp. 2003) defines a motor vehicle liability policy, in relevant part, as:

> An owner's or an operator's policy of liability insurance that fulfills all the requirements of §§ 38-77-140 through 38-77-230, certified as provided in § 56-9-550 or 56-9-560 as proof of financial responsibility and issued, except as otherwise provided in § 56-9-560, by an insurance carrier duly authorized to transact business in this State, to or for the benefit of the person or persons named therein as insured, and any other person, as insured, using the vehicle described therein with the express or implied permission of the named insured and subject to the following conditions . . . .

Appellant asserts that the National policies at issue in this case did not constitute motor vehicle liability policies, even if they do provide coverage for decedent's injuries, because the policies did not provide vehicle specific coverage as required by the definition of a motor vehicle liability policy.

In support of this argument, Appellant asks this court to read the definition of "insured motor vehicle," found in the Financial Responsibility Act, together with the definition of "underinsured motor vehicle," found in the automobile insurance chapter[3] of the code, to find that the only relevant

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[2] This code section appears as § 56-9-20(7) in the 1991 Code.

[3] S.C. Code Ann. §§ 38-77-10 to -1160 (2002 and Supp. 2003).

insurance policies, for purposes of underinsured motorist coverage, are motor vehicle liability policies.

Section 56-9-20(1) of the South Carolina Code (Supp. 2003) defines an insured motor vehicle as follows:

> A motor vehicle as to which there is bodily injury liability insurance and property damage liability insurance, meeting all of the requirements of item (7)[4] of this section, or as to which a bond has been given or cash or securities delivered in lieu of such insurance or as to which the owner has qualified as a self-insurer in accordance with the provisions of § 56-9-60 . . . .

Section 38-77-30 (15) of the South Carolina Code (2002 and Supp. 2003) defines an underinsured motor vehicle as:

> [A] motor vehicle as to which there is bodily injury liability insurance or a bond applicable at the time of the accident in an amount of at least that specified in Section 38-77-140 and the amount of the insurance or bond is less than the amount of the insureds' damages.

We decline to limit the definition of underinsured motor vehicle to those with vehicle specific liability insurance. Courts must take a statute as it is drafted and give effect to the legislative intent as expressed in its language. See State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999). A subtle or forced construction of words in a statute for the purpose

[4] Presumably, the South Carolina General Assembly intended to amend this section reference to read "item (5)". In the 1991 Code, item 7 defines motor vehicle liability policy. However, in the 2003 Supplement, item 5 defines motor vehicle liability policy, while item 7 defines nonresident operating privilege.

of expanding the operation of a statute is prohibited. See Moon v. City of Greer, 348 S.C. 184, 188, 558 S.E.2d 527, 530 (Ct. App. 2002). Furthermore, "[t]he lawmaking body's construction of its language by means of definitions of the terms employed should be followed in the interpretation of the act or section to which it relates and is intended to apply." Fruehauf Trailer Co., v. South Carolina Electric & Gas Co., 223 S.C. 320, 325, 75 S.E.2d 688, 690 (1953).

Notably, the definition of an underinsured motor vehicle does not contain the requirement that the applicable insurance meet all the elements of a motor vehicle liability policy as the definition of an insured motor vehicle does. Rather, an underinsured motor vehicle is defined as one to which there is bodily injury liability insurance[5] at the time of the accident and the amount of the insurance is less than the amount of the insured's damages. In this case, there was bodily injury liability insurance at the time of the accident from both the South Carolina Insurance Company policy and, as discussed above, the commercial auto coverage section of the National policies.

Furthermore, the State Farm underinsured motorist coverage contained the following provision: "There is no coverage until the limits of liability of all applicable bodily injury liability and property damage liability insurance policies or bonds that apply to the bodily injury or property damage have been used up by payment of judgments or settlements." An endorsement to the State Farm policy contains a definition of an underinsured motor vehicle almost identical to the definition of an underinsured motor vehicle contained in section 38-77-30 (14). The endorsement states that "a motor vehicle, as to which there is bodily injury liability insurance or bond applicable at the time of the accident in an amount of at least that specified in the Financial Responsibility Act and the amount of insurance or bond is less than the amount of the insured's damages." Because the National policies are applicable bodily injury liability policies, we find the provision in the State Farm policy excluding underinsured motorist coverage until the limits of liability of all applicable bodily injury liability policies have been exhausted

[5] There is no statutory definition for bodily injury liability insurance.

is effective to bar Appellant's claim for underinsured motorist coverage under the State Farm policy.

CONCLUSION

Based on the foregoing, we agree with the Appellant that the special referee erred in concluding the truck operated by Johnson at the time of the accident was a non-owned or hired auto. We further agree with Appellant that the referee erred in concluding that the commercial general liability coverage section of the National policies provided coverage for Appellant's claims. However, because we find that coverage existed under the commercial auto coverage section of the policies, that no gap in coverage existed, and that the National polices should be considered in determining whether the vehicle was underinsured for purposes of receiving underinsured motorist benefits, we affirm the special referee's decision to dismiss the action, as modified by this opinion.

AFFIRMED AS MODIFIED.

HUFF and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Estalita Martin, on behalf of herself and all other similarly situated individuals, Appellant,

v.

Companion HealthCare Corp., and Healthcare Recoveries, Inc., a Delaware Corporation, Respondents.

Appeal From Richland County
L. Henry McKellar, Circuit Court Judge

Opinion No. 3750
Submitted January 12, 2004 – Filed March 1, 2004

AFFIRMED

George H. McMaster, for Appellant.

Carolyn Courville, of Houston, James Theodore Gentry, W. Howard Boyd, Jr., Jennifer E. Johnson,

and Ronald K. Wray, II, all of Greenville, for Respondents.

HEARN, C.J.: Estalita Martin sued both her health maintenance organization, Companion HealthCare, and Healthcare Recoveries, Inc., alleging, among other things, that the amount they collected from her in an exercise of Companion's subrogation right exceeded the cost of her medical bills. The trial court granted the defendants' motions for summary judgment, finding Martin's action was barred by the statute of limitations and the doctrine of voluntary payment. We affirm.

FACTS

Companion is a licensed health maintenance organization that arranges for the provision of health care to its members by entering into contracts with health care providers located throughout South Carolina. Pursuant to these arrangements, Companion compensates physicians, hospitals, clinics, and other entities for health care provided to Companion's members.

Appellant, Estalita Martin, was a member of Companion when, on January 13, 1993, she was injured while riding a motorcycle. Martin brought suit against the other party to the accident. The contract between Companion and Martin gave Companion a subrogation right for amounts it paid to health care providers on Martin's behalf for which she obtained compensation from the at-fault driver in the motorcycle wreck litigation. By letter dated June 4, 1993, Martin's attorney assured Companion that he would "protect [Companion's] right of subrogation upon the settlement of the above matter and upon notification from [his] client that these terms are acceptable."

Through 1995, Companion paid total claims related to Martin's accident in the amount of $13,721.45. After Martin settled her lawsuit

against the at-fault driver, Companion instructed Healthcare Recoveries to pursue a subrogation claim against Martin in the amount of $13,415.45.[1]

Acting on behalf of Companion, Healthcare Recoveries executed a release of Companion's subrogation right, dated August 4, 1995. In consideration for this release, Martin paid $13,415.45 to Healthcare Recoveries on August 8, 1995.

Martin initiated this lawsuit against Companion and Healthcare Recoveries more than four years later, in December 1999. Although the complaint asserts twelve different causes of action, the gravamen of Martin's claims is that Companion could not legally assert its contractual right to subrogation,[2] or in the alternative, that Companion was not entitled to the amount it recovered in subrogation.

Throughout the discovery process, Martin demanded access to Companion's "provider contracts," which Martin asserts would determine how much Companion paid providers for Martin's medical expenses. Companion failed to respond to the request.

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[1] Healthcare Recoveries is in the business of pursuing subrogation claims on behalf of health plans and other health care payers. Healthcare Recoveries does not provide health care services or insurance, or make payments to health care providers. Instead, Healthcare Recoveries merely relieves health plans like Companion of the administrative burden of pursuing and recovering subrogation payments due to them. At all times relevant to this action, Healthcare Recoveries was under contract to handle Companion's subrogation claims in South Carolina. In return for a fee, Healthcare Recoveries acted on Companion's behalf to recover its subrogation amount from Martin.

[2] The court found that health maintenance organizations are entitled to subrogate under South Carolina law, and Martin does not appeal from this ruling.

Companion and Healthcare Recoveries filed motions to dismiss, which the trial court partially converted to motions for summary judgment. The court granted the motions, and Martin appeals.

ISSUES

1. Did the trial court err in converting the defendants' motions to dismiss into motions for summary judgment?

2. Did the trial court err in granting summary judgment when Companion's provider contracts were not produced during discovery?

3. Are Martin's claims barred by the Statute of Limitations?

4. Are Martin's claims barred by the "voluntary payment" doctrine?

LAW/ANALYSIS

I. Propriety of the Motions for Summary Judgment

Martin first argues the trial court erred when it converted the defendants' motions to dismiss into motions for summary judgment. We disagree.

In support of their motions to dismiss based on the statute of limitations and the voluntary payment doctrine, Companion and Healthcare Recoveries submitted affidavits from Rebecca Haberman, the claims examiner who received the check from Martin in exchange for the release of subrogation rights, and David Pankau, the senior vice-president of Companion who detailed the amounts Companion paid on Martin's behalf. Martin filed a memorandum in opposition to the defendants' motions and

provided affidavits from Timothy Schmidt, an auditor for health benefits plans, and from Martin herself.

When a court is considering a motion to dismiss and matters outside the pleadings are presented to and not excluded by the court, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 12(b), SCRCP. See also Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69, 73 (1999) (stating that conversion of a motion to dismiss into a motion for summary judgment is proper when the parties are afforded a reasonable opportunity to respond to such matters).

With respect to Companion's and Healthcare Recoveries' motions to dismiss based upon the statute of limitations and voluntary payment defenses, the trial court considered matters submitted by the parties outside the pleadings. Importantly, Martin had notice that matters outside the pleadings would be considered because she was served with the affidavits two months prior to the motion hearing and was afforded the opportunity to respond. Indeed, Martin took advantage of this opportunity by submitting affidavits of her own to the trial court along with her memorandum opposing the defendants' motions. Thus, we find no error in the trial court's conversion of the defendants' motions to dismiss into motions for summary judgment.

II. Summary Judgment

Martin next argues the trial court should not have granted summary judgment to Companion and Healthcare Recoveries without first permitting her to conduct discovery relating to alleged contracts in which the medical providers who treated Martin may have given Companion year-end rebates. We disagree.

"Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Cunningham ex. rel. Grice v. Helping Hands, Inc., 352 S.C. 485,

491, 575 S.E.2d 549, 552 (2003). When considering a motion for summary judgment, the court views the evidence and all inferences that can be reasonably drawn therefrom in the light most favorable to the nonmoving party. Id.

In this case, the trial court found Companion and Healthcare Recoveries were entitled to summary judgment because Martin's claims were barred by the three-year statute of limitations for causes of action for breach of contract and fraud. S.C. Code Ann. § 15-3-530(1)&(7) (Supp. 2003). Because we agree with this ruling, we find that Martin's inability to discover the provider contracts is irrelevant.

According to the discovery rule, the three-year statute of limitations found in section 15-3-350 begins to run when the underlying cause of action reasonably ought to have been discovered. Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). Thus, the three-year clock starts ticking on the "date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." Bayle v. S.C. Dep't. of Transp., 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001). This determination is objective, rather than subjective. Id. As such, the question is not whether the particular plaintiff in this case actually knew she had a claim. Instead, we approach this inquiry by deciding "whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist." Young v. S.C. Dep't of Corr., 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999).

Here, Martin, through her attorney, received a release of Companion's right to subrogation by paying $13,415.45 to Healthcare Recoveries in August of 1995. At this date, Martin unquestionably knew Companion was seeking subrogation and knew the amount of money Companion was seeking. She did not commence the present case, however, until December of 1999, four years after she had reimbursed Companion.

Despite these uncontested facts, Martin asserts the statute of limitations has not run because there is no evidence that she knew or should have known at the time of payment that Companion and Healthcare Recoveries may have been collecting more than the amount Companion actually paid on her behalf. Martin further argues she should be entitled to review provider contracts between Companion and each of the health care providers who treated her to determine whether the amount she paid Healthcare Recoveries exceeded the amount Companion expended on her.

Notably, during the four-year interim between Martin's payment to Healthcare Recoveries and the filing of the instant cause of action, Martin cannot point to any events, other than her original payment of the claim and a meeting she had with attorneys,[3] that caused her to "discover" this claim. In Dorman v. Campbell, 331 S.C. 179, 184, 500 S.E.2d 786, 789 (Ct. App. 1998), our court explained that the triggering of the statute of limitations is "not when advice of counsel is sought or a full-blown theory of recovery developed," but rather when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that a claim exists.

We agree with the trial court's finding that the very latest Martin knew the facts and circumstances surrounding Companion's subrogation lien was in August of 1995, when she paid $13,415.45 in exchange for a release of Companion's subrogation rights. Therefore, the statute of limitations began to run at that time and expired in August of 1998. Because the complaint in this case was not filed until 1999, the trial court did not err in finding Martin's claims were barred by the statute of limitations.[4]

AFFIRMED.

HOWARD and KITTREDGE, JJ., concur.

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[3] Martin is represented in this action by the same law firm that represented her in the 1995 motorcycle accident litigation.

[4] Because the trial court properly found Martin's action was barred by the statute of limitations, we need not address her other arguments.