# The Supreme Court of South Carolina

In the Matter of Joseph
Kenneth Rentiers, Deceased.

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ORDER

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Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Disciplinary Counsel seeks an order appointing an attorney to assume responsibility for Mr. Rentiers' client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Rentiers may have maintained.

IT IS ORDERED that Morris Rosen, Esquire, is hereby appointed to assume responsibility for Mr. Rentiers' client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Rentiers may have maintained. Mr. Rosen shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Rentiers' clients and may make disbursements from Mr. Rentiers' trust, escrow, and/or

operating account(s) as are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Joseph Kenneth Rentiers, Esquire, shall serve as notice to the bank or other financial institution that Morris Rosen, 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 Morris Rosen, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Rentiers' mail and the authority to direct that Mr. Rentiers' mail be delivered to Mr. Rosen's office.

S/Jean H. Toal C.J.

Columbia, South Carolina

July 9, 2001

# OPINIONS

**OF**

# THE SUPREME COURT

**AND**

# COURT OF APPEALS

**OF**

# SOUTH CAROLINA

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**July 16, 2001**

**ADVANCE SHEET NO. 25**

**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**

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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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J. Kirkland Grant, Respondent,

v.

City of Folly Beach, Petitioner.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal From Charleston County
John L. Breeden, Jr., Circuit Court Judge

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Opinion No. 25317
Heard February 7, 2001 - Filed July 16, 2001

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**REVERSED**

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Phillip S. Ferderigos and James E. Reeves, of Barnwell, Whaley, Patterson & Helms, L.L.C., and Otis B. Peeples, Jr., of Peeples & Stringer, of Charleston, for petitioner.

Melinda A. Lucka, of Charleston, for respondent.

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**JUSTICE MOORE:** This case involves an order by petitioner's (City's) Building Official requiring respondent Grant to evacuate all residential occupants and remove all kitchen improvements in the downstairs level of a building Grant owns in City. After a hearing, City's Zoning Board of Adjustment (Board) denied Grant's request to overturn the Building Official's order and the circuit court affirmed. In an unpublished opinion, the Court of Appeals affirmed in part and reversed in part. We granted City's petition for a writ of certiorari and now reverse.

## FACTS

In 1993, Grant purchased a two-story building located within City. At that time, the building contained three apartments on the second floor. Three units (A, B, and C) were located on the ground floor. Unit A had a bath, kitchen, wall heater, and air conditioner. Unit C contained a kitchen. The previous owner had rented the three second floor apartments, lived in Unit C, and rented Unit A to residential tenants.

Before purchasing the property, Grant requested a written opinion from City's Building Official regarding whether an ice cream shop could be located in the lower level of the building. By letter, City's then Building Official, Forrest Tucker, responded:

> . . . regarding your desire to situate an ice cream shop in the lower level . . .
>
> . . . my initial concern focussed [sic] on locating a commercial activity below the base flood elevation (BFE) in what appears to be a residential structure. I have reviewed the matter with the Atlanta office of FEMA and jointly, we have concluded that your venture does not appear to violate any of our community regulations. Since less than 75% of this structure is devoted to residential use, it is classified as a non-residential structure. Accordingly, properly flood proofed uses below the BFE would

be allowed.

> As to whether you must properly flood proof the lower level in concert with all requirements for new construction, the answer is "no" provided your renovations do not exceed 50% of the structure's pre-improvement value. As long as you do not exceed the 50% threshold, you may locate your ice cream shop in the lower level without complying with the mandatory flood proofing provisions of new construction.

After he purchased the property, Grant received building permits from City and made improvements to the ground floor units. One of the permits describes "Downstairs Apt. #1" as the location of the job. Grant added bathrooms to Units B and C and upgraded the kitchen sink in Unit C. A tenant installed a kitchen in Unit B. Grant did not locate an ice cream store in the building. From June 1994 to June 1995, he rented the units to commercial tenants.

By letter dated January 3, 1996, Tom Hall, City's current Building Official, notified Grant as follows:

> The building . . . is a post FIRM building and the down stairs [sic] may not be used for any occupancy other than commercial. The commercial tenants may not use the downstairs as a commercial live-in.
>
> Consequently, you have until Monday, January 8th at noon to evacuate all residential occupants and by February 3, 1996 the owner of the building must show a plan to remove all the kitchen improvements downstairs. The bath-rooms [sic], which are is [sic] allowed in commercial space may remain.[1]

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[1]City has consistently agreed Grant may use the lower level of his building for commercial purposes.

Grant appealed the notice. At the Board hearing, Hall testified he had seen residents living in the three downstairs units. According to Hall, City's zoning/flood ordinance precludes living space, plumbing, and electrical connections for residential purposes below the base flood elevation (BFE). Hall further testified the letter from the former Building Official approving the downstairs units for use as an ice cream shop was in error.

Grant testified he wanted Unit A to remain residential and Units B and C to be designated for commercial purposes. He stated he did not believe the kitchens in Units B and C should have to be removed because he was told an ice cream store, which he asserts requires a kitchen, could be placed in those locations. Grant admitted he bought the property without reading City's flood regulations.

In its written order, the Board concluded:

> [Grant's] request to overturn the order of the Building Official with respect to evacuation of the tenants and removal of the kitchens is hereby denied. All tenants must be evacuated and all kitchens, for all purposes - - residential and commercial, must be removed.

## ISSUES

1. Did the Court of Appeals err in holding South Carolina Code Ann. § 6-7-760 (1977) requires the Board to file a transcript with the clerk of the circuit court?

2. Did the Court of Appeals err in remanding this matter to the Board to hear evidence on Grant's estoppel claims?

## DISCUSSION

1. Failure to file transcript

The Court of Appeals remanded this case for reconstruction of the record because the Board failed to file with the circuit court a transcript of the hearing as required under § 6-7-760. City claims this was error.

Section 6-7-760 provides in relevant part:

> Upon the filing of such an appeal [from the board of adjustment], the clerk of the circuit court shall give immediate notice thereof to the secretary of the board and within thirty days from the time of such notice the board shall cause to be filed with the clerk a duly certified copy of the proceedings had before . . . . the board of adjustment, including a transcript of the evidence heard before it, if any, and the decision of the board.[2]

(emphasis added).

The Court of Appeals held this section requires that a transcript be filed if evidence was heard before the Board. City asserts that a transcript must be filed only if one has been prepared at the Board's discretion. In construing this statute, City contends the phrase "if any" modifies the noun "transcript," not the phrase "of the evidence heard before it." We agree with City's proposed construction of § 6-7-760.

The cardinal rule of statutory construction is for the Court to ascertain and effectuate the intent of the legislature. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996). If a statute's language is plain and unambiguous, and conveys a clear and definite

[2]Section 6-7-760 has been repealed and recodified with similar language at S.C. Code Ann. § 6-29-830 (Supp. 2000).

meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning. Miller v. Doe, 312 S.C. 444, 441 S.E.2d 319 (1994). Where a statute is ambiguous, however, we must construe the terms of the statute according to settled rules of construction. Lester v. South Carolina Workers' Compensation Comm'n, 334 S.C. 557, 514 S.E.2d 751, (1999). It is well-settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result. Joiner v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (2000).

We find the language of § 6-7-760 ambiguous and, under our rules of statutory construction, determine it should not be construed to mandate the preparation of a transcript. Under S.C. Code Ann. § 6-7-740 (1977),[3] the legislature has instructed that the Board "shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record." In specifying the Board's duties at the time of the hearing, the legislature has imposed no requirement that a verbatim recording be made. Any party wishing to appeal a decision of the Board has access to the record provided under § 6-7-740. Reading § 6-7-760 together with § 6-7-740, as we must, we conclude the legislature intended that preparation of a transcript remains within the Board's discretion.

We find the Court of Appeals erred in holding a transcript must be filed when there is an appeal to the circuit court. In light of this conclusion, the remand for reconstruction of the record ordered by the Court of Appeals is unnecessary.

## 2. Estoppel

In affirming the Board's decision, the circuit court rejected Grant's assertion that City was estopped to order the exclusion of residential tenants

[3]Now recodified as S.C. Code Ann. § 6-29-790 (Supp. 2000).

and the removal of kitchens. On appeal of the circuit court's order, the Court of Appeals remanded to the Board to "hear evidence on and consider Grant's estoppel claim." City argues this was error. We agree. Because we find the record adequate to review this issue, remand is not necessary and we affirm on the merits as follows.

Grant agrees City's ordinance precludes residential tenants from living in the ground floor units of his building. He claims, however, that City should be estopped from precluding residential use of Unit A because City officials issued building permits allowing residential use of that unit. Grant further claims City issued building permits for kitchens in Units B and C and rendered a written opinion allowing kitchens in those units.

As a general rule, estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy. South Carolina Dep't of Soc. Servs. v. Parker, 275 S.C. 176, 268 S.E.2d 282 (1980). This does not mean that estoppel cannot apply against a government agency. Landing Dev. Corp. v. City of Myrtle Beach, 285 S.C. 216, 329 S.E.2d 423 (1985). To prove estoppel against the government, the relying party must prove (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position. Midlands Utility, Inc. v. South Carolina Dep't of Health and Envtl. Control, 298 S.C. 66, 378 S.E.2d 256 (1989). Because we find Grant failed to meet the first element of estoppel, we affirm the circuit court's order.

Two pertinent cases address the first element of estoppel. In Abbeville Arms v. City of Abbeville, 273 S.C. 491, 257 S.E.2d 716 (1979), Abbeville Arms obtained an option to purchase real property with the intent to construct a multi-family housing project on property zoned R-6 High Density Residential. After it reviewed the Abbeville zoning ordinance, the official zoning map, and obtained a letter from the zoning administrator, Abbeville Arms applied for a building permit. Five days later, the city council adopted a resolution stating that, through inadvertence and neglect, the official zoning map was defective and the subject property was actually zoned R-8 Medium

Density Residential, thereby prohibiting the housing project.

In discussing the first element of estoppel, we noted Abbeville Arms had checked the zoning ordinance, including the official zoning map, which indicated the property was zoned R-6 High Density Residential. Through correspondence with the City zoning administrator, Abbeville Arms confirmed the zoning for its project. We concluded "it is clear that the defect [on the zoning map] was latent and that respondent lacked knowledge and the means of knowledge as to its existence." Id. at 494, 257 S.E.2d at 718. We held the city was estopped to deny Abbeville Arms a building permit.

Landing Dev. Corp. v. City of Myrtle Beach, *supra*, involved the development of condominium units for short-term rentals in a district zoned for "one, two and multi-family dwellings including . . . condominiums . . . for permanent occupancy." The zoning ordinance did not define "permanent occupancy" and there was no law equating "permanent occupancy" with occupancy by a permanent resident. When asked if rentals were permitted in the district, the Director of Zoning and Housing for Myrtle Beach indicated they were and eventually issued business licenses to permit short-term rentals. The Director later informed respondents that short-term rentals were not permitted.

In concluding Myrtle Beach was estopped from denying business licenses for short-term rentals, we held:

> [r]espondents lacked the knowledge or means to know that short-term vacation rentals were prohibited in the A-3 District. The only definitive source of information concerning the interpretation and enforcement of the ordinance was [the Director].

285 S.C. at 220, 329 S.E.2d at 425.

In this case, City issued a building permit for work in "Downstairs Apt. #1." Assuming the permit's reference to an "apartment" misled Grant into

believing residential use was permitted in Unit A, issuance of the permit does not estop City from enforcing its zoning/flood ordinance which precludes residential use of the downstairs floor. Grant could have easily ascertained the flood limitations on his building by reviewing the zoning/flood ordinance. Unlike the developers in Landing Dev. Corp. and Abbeville Arms, Grant had the means but failed to obtain this information. Accordingly, we conclude City is not estopped from excluding residential use of Unit A.

Further, the building permits issued by City for Units B and C describe the work to be done as "plumbing," "HVAC," and "additional wiring for electrical circuits." There is no reference to kitchens. By issuing these permits, City did not approve their installation. Although City agrees it is bound by its former Building Official's written opinion approving Grant's downstairs units for an ice cream shop, that opinion does not approve installation of a kitchen. Town of Sullivan's Island v. Byrum, 306 S.C. 539, 413 S.E.2d 325 (Ct. App. 1992) (town not estopped from challenging use of garage as apartment where no evidence of any statement or conduct by town that reasonably misled homeowner into believing garage apartment was a permitted use). We conclude City is not estopped from prohibiting kitchens in the downstairs level of Grant's building.[4]

The Board's decision is supported by the evidence. Accordingly, the order of the circuit court upholding the Board's order is affirmed. Bannum, Inc., v. City of Columbia, 335 S.C. 202, 516 S.E.2d 439 (1999) (appellate court will not disturb the findings of the Board of Adjustment unless such

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[4]In addition, Grant testified a tenant added the kitchen in Unit B. Since Grant did not detrimentally change his position based on the issuance of building permits for Unit B, he has failed to meet the third element of estoppel as to this unit. See Midlands Utility, Inc., v. South Carolina Dep't of Health and Envtl. Control, *supra* (in order to establish estoppel, party claiming estoppel must prejudicially change position in reliance upon government conduct).

findings or decision resulted from board action which is arbitrary, an abuse of discretion, illegal, or in excess of lawfully delegated authority); Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995) (Supreme Court will not reverse circuit court's affirmance of zoning board unless board's findings of fact have no evidentiary support or board commits an error of law).[5] The Court of Appeals' decision is

**REVERSED.**

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

**BURNETT, J., concurring in part and dissenting in part in a separate opinion.**

[5]The circuit court did not address Grant's vested right and waiver claims and these issues are not before us.

**JUSTICE BURNETT:** (concurring in part and dissenting in part). I concur in part and dissent in part. I concur with the majority regarding Grant's estoppel claim. I respectfully dissent, however, from the majority's conclusion which allows a zoning board to produce a transcript of a hearing solely at its own discretion.

> In relevant part, South Carolina Code Ann. § 6-7-760 (1977) provides:
>
> Upon the filing of such an appeal [from the board of adjustment], the clerk of the circuit court shall give immediate notice thereof to the secretary of the board and within thirty days from the time of such notice the board shall cause to be filed with the clerk a duly certified copy of the proceedings had before . . . . the board of adjustment, including a transcript of the evidence heard before it, if any, and the decision of the board.[6]

(Underline added).

"If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). However, where the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. The Lite House, Inc., v. J.C. Roy, Co., 309 S.C. 50, 419 S.E.2d 817 (Ct. App. 1992).

A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. Roche v. Young Bros., Inc., of Florence, 332 S.C. 75, 504 S.E.2d 311 (1998).

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[6]Section 6-7-760 has been repealed and recodified with similar language at § 6-29-830 (Supp. 2000).

"Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." Bennett v. Sullivan's Island Bd. of Adjustment, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993). In giving effect to legislative intent, the court is constrained to avoid an absurd result. South Carolina Tax Comm'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 447 S.E.2d 843 (1994).

The majority and I agree that Section 6-7-760 is ambiguous. As noted by the majority, "if any" arguably modifies the noun "transcript;" alternatively, "if any" modifies the phrase, "evidence heard before it."

In my opinion, the most reasonable interpretation of § 6-7-760 is that the legislature intended to require a zoning board to prepare and file a transcript with the circuit court whenever evidence was presented before it and its decision is appealed. Requiring a zoning board to file a transcript **if** it prepares one leaves the production of a verbatim transcript at the discretion of the zoning board, a result I find the legislature could not have intended. My interpretation is entirely consistent with § 6-7-740 which requires zoning boards to keep public records of its hearings and other official actions. In compliance with this section, zoning boards can record evidentiary proceedings then transcribe the recording if a decision is appealed.[7]

Because of my interpretation of § 6-7-760, I necessarily must address City's question whether the Court of Appeals erred by concluding the circuit court should have remanded this matter to the Board for rehearing after Grant encountered hostility while attempting to reconstruct the record.

At the initial hearing before the circuit court, the parties agreed the tape recording from the Board hearing was of poor quality and could not be transcribed. Accordingly, Grant moved to either reconstruct the record or hold a new hearing. The circuit court allowed Grant to reconstruct the record

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[7]Under my interpretation, zoning boards need not employ full-time court reporters.

by stipulation, affidavit, or transcript.

At the second hearing, Grant's attorney stated:

> . . . it was a bit difficult to supplement the record, Your Honor. I guess one explanation might be that these were not friendly witnesses, in that I did not get return phone calls from people I really wanted to get affidavits from, since I could not require them [to] call me back or cooperate.

City's attorney responded:

> Your Honor, [Grant's attorney] – I don't think she meant to imply this, but I just want to present to the Court that we have been very cooperative in trying to reach a stipulation. She talked about not [sic] able to reach people. I do not believe those people were city employees, and I do not believe she meant to imply that [City's attorney] or I somehow, you know, caused the problem.

Grant's attorney replied:

> It is correct that I did not imply that they were not cooperative at all. They have been, but, nonetheless, Your Honor, the record is still incomplete.

Grant reconstructed the record with an affidavit from his property manager.

The record does not support the Court of Appeals' conclusion Grant was "prohibited in obtaining affidavits" and "encountered a hostile environment" in attempting to reconstruct the record. The record indicates the circuit court gave Grant the opportunity to reconstruct the record from the Board hearing through stipulation, affidavits, or transcript. Although she initially suggested otherwise, Grant's counsel agreed City's employees were cooperative.

The circuit court properly allowed Grant to reconstruct the record. See Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 418 S.E.2d 319 (Ct. App. 1992) (holding trial court did not err in granting property owner's request to reconstruct the record of zoning proceeding where portions of original tape of hearing were incapable of being transcribed and loss of vital portions of record appeared to have been through no fault of zoning board); see also China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968) (where portions of stenographic notes of trial proceeding were lost before being transcribed, not error for trial judge to consider affidavit of trial counsel and court reporter in determining what transpired). Because Grant failed to take advantage of the opportunity to reconstruct the record by obtaining a stipulation with City's attorney, deposing witnesses, and/or filing his own and his attorney's[8] affidavits, he is not entitled to a new hearing.[9]

I would affirm in part and reverse in part the Court of Appeals' opinion.

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[8]A different attorney represented Grant on appeal.

[9]Section 6-9-840 (Supp. 2000) specifically provides that if the circuit court judge "determines that the certified record is insufficient for review, the matter may be remanded to the zoning board of appeals for rehearing." This section became effective in May 1999. See Act No. 355, 1994 S.C. Acts 4036. The predecessor to this section, § 6-7-780, did not have a provision for remand.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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The State, Petitioner,

v.

Derrick Bernard Woods, Respondent.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal From York County
Thomas W. Cooper, Jr., Circuit Court Judge

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Opinion No. 25318
Heard April 3, 2001 - Filed July 16, 2001

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**AFFIRMED**

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Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, and Assistant Attorney General Toyya Brawley Gray, all of Columbia; and Solicitor Thomas E. Pope, of York, for petitioner.

Deputy Chief Attorney Joseph L. Savitz, III, of South Carolina Office of Appellate Defense, of Columbia, for respondent.

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**JUSTICE PLEICONES**: We granted certiorari to review a decision of the Court of Appeals granting respondent a new trial. The Court of Appeals held respondent was entitled to a new trial because a seated juror failed to disclose that she had worked as a volunteer victims' advocate in the prosecuting office. State v. Woods, 338 S.C. 561, 527 S.E.2d 128 (Ct. App. 2000). We affirm.

## FACTUAL/PROCEDURAL BACKGROUND

In August of 1998 respondent was convicted of possession with intent to distribute (PWID) crack cocaine and PWID within proximity of a park.

After the jury returned its verdict, but before the court imposed sentence, defense counsel moved for a new trial on the basis of after-discovered evidence. The after-discovered evidence consisted of information, made known to respondent after the trial, that a juror ("Juror B") had for three years worked as a volunteer victims' advocate in the solicitor's office which prosecuted the case. The court held an evidentiary hearing to consider the motion. At the hearing, Juror B testified that she had worked as a volunteer victims' advocate in the solicitor's office "off and on for about a good three years" ending in 1998. Juror B added that her job did not entail significant interaction with the attorneys employed in the solicitor's office.

The trial court denied the motion for a new trial, finding respondent had failed to show Juror B intentionally concealed information. The court further found Juror B had not been biased in favor of the State. Respondent appealed. The Court of Appeals, citing State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982), reversed the trial court's denial of respondent's motion for a new trial because "the juror did not justify her failure to disclose" the information sought during *voir dire*. We granted the State's petition for

certiorari to review the Court of Appeals' decision.

During *voir dire*, the court asked potential jurors the following questions:

Question 1:

> Now you can tell me are you friends or casual acquaintances with any of them [i.e., the attorneys involved in the trial] or business associates or social acquaintances with any of them, that would also include having been represented by any of them in the past[?] [I]f so please stand.

Question 2:

> Ladies and gentlemen, are any of you contributors to or supporters of any organization which has as its primary function the promotion of law enforcement or protection of victims' rights such as MADD, SADD, CAVE, or the like[?] [I]f so please stand.

Several jurors responded affirmatively to the questions above. However, Juror B did not respond to either question. Juror B was subsequently seated as a juror in the case. When Juror B's name was drawn, respondent had one peremptory challenge remaining.

Juror B testified that she did not recall the judge asking Question 2, and that she would have responded had she heard the question. She qualified her response by stating, "it just didn't synchronize if I heard it, but I'm not doubting that it hadn't been said but it just didn't synchronize because I came into court with a clear mind." She testified that she responded affirmatively to a similar question when asked on *voir dire* at a subsequent trial during the same term of court.

Juror B gave conflicting testimony regarding Question 1. Initially, she admitted hearing the question, but said she did not think it applied to her. She then said she could not recall the question being asked. When

respondent's attorney read the question from the transcript, she replied that the question "didn't phase [sic] [her]," implying that she heard the question, but chose not to respond.

## ISSUE

Did the Court of Appeals err in reversing the trial court's denial of respondent's motion for a new trial based on after-discovered evidence?

## ANALYSIS

All criminal defendants have the right to a trial by an impartial jury. U.S. CONST. amends. VI and XIV; S.C. CONST. art. I, § 14. To protect both parties' right to an impartial jury, the trial judge must ask potential jurors whether they are aware of any bias or prejudice against a party. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). "Through the judge, parties have a right to question jurors on their *voir dire* examination not only for the purpose of showing grounds for a challenge for cause, but also, within reasonable limits, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge." Gulledge, 277 S.C. at 370, 287 S.E.2d at 490.

When a juror conceals information inquired into during *voir dire*, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986). Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn. State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991).

In Kelly, we stated that the first inquiry in the juror disqualification

analysis is whether the juror intentionally concealed the information during *voir dire*. Kelly, 331 S.C. at 146, 502 S.E.2d at 106-07. However, in Kelly we did not precisely define what constitutes an intentional concealment.

We hold that intentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.

Necessarily, whether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis.

Other jurisdictions have recognized similar distinctions between intentional and unintentional juror concealment. For example, the Missouri Supreme Court distinguished intentional from unintentional concealment as follows:

> Intentional nondisclosure occurs: 1) where there exists no reasonable inability to comprehend the information solicited by the question asked of the prospective juror, and 2) where it develops that the prospective juror actually remembers the experience or that it was of such significance that his purported forgetfulness is unreasonable.
> Unintentional nondisclosure exists where, for example, the experience forgotten was insignificant or remote in time, or where the venireman reasonably misunderstands the question posed.

Williams by and through Wilford v. Barnes Hosp., 736 S.W.2d 33, 36 (Mo. 1987).

The State argues that because respondent has not shown that he was prejudiced by Juror B's responses, the Court of Appeals' decision was erroneous. We disagree. The test pronounced in Thompson v. O'Rourke, supra, makes clear that where a juror's response to *voir dire* amounts to an intentional concealment, the movant need only show that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. Where the juror's failure to disclose information is "without justification," i.e., intentional, the juror's bias will be inferred. Conversely, where the failure to disclose is innocent, no inference of bias can be drawn. See Savage, 306 S.C. at 8, 409 S.E.2d at 810. See also Doyle v. Kennedy Heating & Service, Inc., 33 S.W.3d 199, 201 (Mo. Ct. App. 2000) ("If a juror intentionally withholds material information requested on *voir dire*, bias and prejudice are inferred from such concealment. . . . Only where a juror's intentional nondisclosure does not involve a material issue, or where the nondisclosure is *unintentional*, should the trial court inquire into prejudice." (Emphasis in original)).

Applying this analysis to the instant case, we find the concealment was intentional. Questions 1 and 2 were reasonably comprehensible and should have elicited a positive response from Juror B. Juror B worked as a volunteer victims' advocate for a period of three years in the solicitor's office which prosecuted the case. There is no question she remembered the experience.

Question 1 unambiguously sought a response from any juror having a business association with any of the attorneys trying the case. Despite her prior three year relationship with the prosecuting attorney's office, Juror B did not respond. Her contention that she did not hear the question when asked, or that if she heard the question, she did not realize it applied to her, cannot excuse her failure to respond.

Similarly, her failure to respond in the affirmative to Question 2 amounted to an intentional concealment. Juror B had for three years performed volunteer work for an organization whose primary function was the protection of victims' rights. She offered inconsistent explanations for

her failure to respond, alternately contending that she did not hear the question and that she failed to comprehend its application to her position as victims' advocate. The question was reasonably comprehensible. Its application to Juror B was clear. This finding is further supported by the fact that Juror B responded affirmatively to a similar question on *voir dire* at a later trial during the same term of court.

Having found that Juror B intentionally concealed information on *voir dire*, we must determine if the information concealed would have supported a challenge for cause or would have been a material factor in the use of respondent's peremptory challenges. See Thompson v. O'Rourke, supra. A juror should be disqualified by the court if it appears to the court the juror is not indifferent in the case. The decision to strike a juror for cause is within the sound discretion of the trial judge. Abofreka v. Alston Tobacco Co., 288 S.C. 122, 341 S.E.2d 622 (1986).

Because Juror B did not respond to any of the questions asked during *voir dire*, any potential biases she might have had toward the State were not discovered until after the trial. No motion to disqualify Juror B was made, thus there is no discretionary ruling by the trial judge for this Court to review. However, we need not decide whether her relationship with the solicitor's office would support a challenge for cause because we find her failure to disclose the relationship prevented the respondent's intelligent exercise of his peremptory challenges.

When Juror B's name was selected from the venire, respondent had one peremptory challenge remaining. Respondent's trial counsel stated that had he known of Juror B's relationship with the solicitor's office, he would have used a peremptory challenge to remove her from the jury. Nothing in the record refutes this assertion. It is reasonable to conclude that a juror's previous three year relationship as a victims' advocate with the prosecuting solicitor's office would be a material factor in the use of a criminal defendant's peremptory challenges.

## CONCLUSION

Because Juror B failed to respond to questions on *voir dire* which clearly applied to her, and because her concealment deprived respondent of information material to his intelligent use of peremptory challenges, we AFFIRM the decision of the Court of Appeals.

**TOAL, C.J., WALLER, J., and Acting Justice George T. Gregory, Jr., concur. BURNETT, J., dissenting in a separate opinion.**

**JUSTICE BURNETT:** I respectfully dissent. While Juror B did not respond to two *voir dire* questions, the record does not support the majority's conclusion that she intentionally concealed information from the parties. Accordingly, I would reverse the decision of the Court of Appeals granting respondent a new trial. State v. Woods, 338 S.C. 561, 527 S.E.2d 128 (Ct. App. 2000).

During *voir dire*, the trial judge asked the following question (Question 1):

> Now can you tell me are you friends or casual acquaintances with any of them [i.e., the attorneys involved in the trial] or business associates of social acquaintances with any of them . . .?
>
> No juror responded.
>
> The trial judge later inquired (Question 2):
>
> Ladies and gentlemen, are any of you contributors to or supporters of any organization which has as its primary function the promotion of law enforcement or protection of victim's rights such as MADD, SADD, CAVE, or the like. . .?

At the new trial hearing, the trial judge informed Juror B the parties were interested in her participation as a victim advocate with the Solicitor's Office. Juror B stated she had volunteered as a victim advocate with the Solicitor's Office. When defense counsel referred generally to the *voir dire*, Juror B stated: "I may have misunderstood or didn't hear [the trial judge] but he didn't mention anything about an advocate that I heard. You know, being an advocate you're not eligible and so forth, not for this particular trial."

Defense counsel then questioned Juror B specifically about her responses to the *voir dire* questions. At first, Juror B agreed she heard the trial judge ask Question 1, but did not believe it applied to her as a victim's

advocate. Thereafter, she stated she did not recall Question 1 being asked. Finally, after defense counsel showed her the transcript from the *voir dire*, Juror B stated:

> Yes. Well see, that wouldn't, that didn't phase [sic] me. I was under the impression that you were talking about, you know, the victim or you all because I don't have anything to do with. Like I never spoken to you.

Regarding whether she recalled the trial judge asking Question 2, Juror B responded:

> No, if I had I would have stepped up. I heard some things on the second time that they called me to be a juror and then I stood up. . . I don't know. It just didn't synchronize if I heard it, but I'm not doubting that it hadn't been said but it just didn't synchronize because I came into court with a clear mind. And I have no problems. I cannot associate one thing with another. And I had no association with that at all.

Finding Juror B did not intentionally refuse to respond to the *voir dire* questions, the trial judge denied respondent's motion for a new trial.

A trial judge's denial of a new trial motion will not be disturbed on review absent an abuse of discretion. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). Where a juror fails to respond to *voir dire* questions:

> [A new trial] is required only when the court finds the [intentionally] concealed information would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. The inquiry must focus on the character of the concealed information, not on the mere fact that a concealment occurred.

Id. at 146, S.E.2d at 106 (brackets in original) quoting Thompson v.

O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986).

The question before the Court is whether Juror B intentionally concealed the fact that she had volunteered as a victim advocate with the Solicitor's Office. Juror B's responses to defense counsel's inquiries do not suggest that she intentionally refused to inform the parties about her victim advocate experience. Juror B's response that Question 1 "didn't phase [sic] her" did not necessarily imply, as the majority assumes, that she intentionally chose to conceal information. Her response just as easily implies that she did not believe an affirmative response was required because, although she had worked in conjunction with the Solicitor's Office, she did not know the prosecutor involved with the trial. Juror B had justification for not responding to the question. Compare State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991) (trial judge did not err by refusing to grant mistrial where juror refused to disclose relationship as result of an honest mistake) with State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982) (trial judge should have granted mistrial where juror failed to provide any justification for failing to disclose relationship with witness). Further, as she acknowledged, Juror B's failure to respond to Question 2 was due to her inattentiveness, not to an intentional refusal to respond to the inquiry. State v. Savage, supra.

I concur with the majority's assertion that whether a juror's failure to respond to a particular *voir dire* question is "a fact intensive determination which must be made on a case by case basis." Where a decision rests on a "fact intensive determination," the Court should defer to the trial judge's assessment of the juror's credibility. State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000) (trial judge is in the best position to determine the credibility of the jurors). Here, the trial judge had the opportunity to assess Juror B's candor and he determined she did not intentionally conceal information from the parties. I would affirm the trial judge's refusal to grant a new trial. State v. Loftis, 232 S.C. 35, 100 S.E.2d 671 (1957) (refusing to interfere with the discretion of a trial judge in matters involving the jury because trial judge has opportunity to consider credibility of jurors).

# The Supreme Court of South Carolina

In the Matter of James
A. Cheek, Respondent.

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O R D E R

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Respondent pled guilty to one count of willful failure to make and file a state income tax return in violation of S.C. Code Ann. § 12-54-40(b)(6)(c) (Supp. 1994). The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR, and to appoint an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that the petition is granted and respondent is temporarily suspended from the practice of law in this State until further order of this Court.

IT IS FURTHER ORDERED that H. Spencer King, 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 accounts respondent may maintain. Mr. King shall take action as required by

Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. King may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts 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 H. Spencer King, 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 H. Spencer King, 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. King's office.

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

Columbia, South Carolina
July 5, 2001

# The South Carolina Court of Appeals

Lora Cunningham, a minor, by Guardian ad Litem Linda A. Grice, Appellant,

v.

Helping Hands, Inc. and City of Aiken Department of Public Safety, Respondents.

The Honorable Henry F. Floyd
Aiken County
Trial Court Case No. 1997-CP-02-0660

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ORDER DENYING PETITION FOR REHEARING

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PER CURIAM: We withdraw our original opinion and substitute the attached opinion. After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

s/ Kaye G. Hearn, C. J.

s/ Jasper M. Cureton, J.

s/ M. D. Shuler, J.

June 27, 2001
Columbia, South Carolina
Filed July 10, 2001.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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Lora Cunningham, a minor by Guardian ad Litem, Linda A. Grice,

Appellant,

v.

Helping Hands, Inc., and City of Aiken Department of Public Safety,

Respondents.

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Appeal From Aiken County
Henry F. Floyd, Circuit Court Judge

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Opinion No. 3345
Heard March 7, 2001 - Filed May 21, 2001
Refiled July 10, 2001

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**AFFIRMED IN PART AND REVERSED AND REMANDED IN PART**

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Jefferson D. Turnipseed, Michael B. Hart and Ilene Stacey King, all of Turnipseed & Associates, of Columbia, for appellant.

Andrew F. Lindemann and William H. Davidson, II, both of Davidson, Morrison & Lindemann; and Thomas C. Salane, of Turner, Padget, Graham & Laney, all of Columbia, for respondent.

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**HEARN, C.J.**: Lora Cunningham appeals an order granting summary judgment to Helping Hands, Inc. (Helping Hands) and the City of Aiken Department of Public Safety (the Department) based on the trial court's findings that Cunningham assumed the risk of her injuries and that her negligence exceeded that of the two defendants as a matter of law. We affirm the grant of summary judgment as to the Department and reverse and remand with respect to Helping Hands.

## FACTS

Helping Hands is a charitable corporation operating a home for abused and neglected children in Aiken, South Carolina. At the time of her injury, Cunningham was fifteen years old. She was residing at Helping Hands as a ward of the Department of Social Services (DSS) and the Continuum of Care for Emotionally Disturbed Children. Helping Hands was aware that Cunningham had been evaluated for oppositional defiant disorder and had been prescribed Prozac and Ritalin.

On September 8, 1996, Lt. Frank Conoly, a public safety officer with the Department, brought a fire truck to Helping Hands' premises to visit the children and let them see and climb onto the truck. When Conoly arrived, two members of the Helping Hands staff, John Heos and Lanita Battle, brought between six and ten teenagers to the fire truck.

At the conclusion of his visit, Conoly told the teenagers he was leaving and to stand clear of the fire truck. He walked around the truck and checked to make sure all the children were off and standing clear. He then got into the truck and started to leave. As the truck began to move, Cunningham jumped onto the passenger side running board of the vehicle. As the truck drove away, Cunningham became frightened, either jumped or slipped from the truck, and fell under the rear wheels.

No staff members were outside with the teenagers when Cunningham jumped back onto the truck. Heos had gone inside the cottage to help another child with a sprained ankle, and Battle had gone inside to use the restroom and while there had answered the telephone. Heos was inside the

cottage watching the children through a window when the fire truck began to move.

Cunningham's Guardian ad Litem brought this personal injury action against Helping Hands and the Department. She contends Helping Hands breached its duty of care and supervision of Cunningham. Likewise, she contends the Department was negligent through the acts of its agents, officers, and employees, including the acts of Conoly. Helping Hands answered alleging general denials, limited immunity, assumption of risk, and comparative negligence. Similarly, the Department answered alleging general denials, limited immunity, assumption of risk, and comparative negligence.

Both Helping Hands and the Department moved for summary judgment on the ground that Cunningham's actions were the sole cause of her injuries or otherwise barred recovery as a matter of law. The trial court granted these motions, finding as a matter of law that Cunningham assumed the risk of injury and that even if assumption of risk was not a complete bar, the negligence of Cunningham was greater than that of Helping Hands and the Department combined as a matter of law. Cunningham made a motion to alter or amend the order which the trial court denied. This appeal followed.

## SCOPE OF REVIEW

On appeal from an order granting summary judgment, we must consider the evidence in the light most favorable to the nonmoving party. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997). Summary judgment should be granted only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Café Assocs. v. Gerngross, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991). "Assumption of risk is peculiarly a question for the jury, and only in very rare cases should a trial judge direct a nonsuit or direct a verdict in favor of a defendant on this ground, but there are rare cases in which this should be done." Singleton v. McLeod, 193 S.C. 378, 386, 8 S.E.2d 908, 911-12 (1940); see also Small v. Pioneer Mach., Inc., 316 S.C. 479, 489, 450 S.E.2d 609, 615 (Ct. App. 1994) ("The defenses of contributory negligence and assumption of risk ordinarily present questions of fact for the jury and only rarely become questions of law for the court to determine.").

## ANALYSIS

### I. Assumption of Risk

Cunningham argues the trial court erred in granting the motions for summary judgment because a question of fact exists with respect to whether she assumed the risk of her injury. We agree as to Helping Hands and disagree as to the Department because we find Helping Hands owed a higher duty to Cunningham than did the Department.

This case is governed by the common law defense of assumption of risk because it accrued before the issuance of our supreme court's decision in Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 508 S.E.2d 565 (1998). The defense of assumption of risk has four elements: "(1) the plaintiff must have knowledge of the facts constituting a dangerous condition; (2) the plaintiff must know the condition is dangerous; (3) the plaintiff must appreciate the nature and extent of the danger; and (4) the plaintiff must voluntarily expose himself to the danger." Id. at 78-79, 508 S.E.2d at 569; see also Senn v. Sun Printing Co., 295 S.C. 169, 173, 367 S.E.2d 456, 458 (Ct. App. 1988) ("The doctrine is predicated on the factual situation of a defendant's acts alone creating the danger and causing the accident, with the plaintiff's act being that of voluntarily exposing himself to such an obvious danger with appreciation thereof which resulted in the injury.").

*A. Helping Hands*

The trial court found that Helping Hands owed Cunningham a "nonspecific, generalized duty to supervise and monitor teenagers committed to its care" and held that an adult is not required to keep a constant and unremitting watch over a child, citing Dennis by Evans v. Timmons, 313 S.C. 338, 437 S.E.2d 138 (Ct. App. 1993). We do not agree that the principles articulated in Dennis define the scope of the duty Helping Hands owed to Cunningham.

In Dennis, a child was injured with a screwdriver while playing on a neighbor's property. The screwdriver had been inadvertently left underneath a mobile home, and as the child and his playmates tossed it around, it struck him in the eye. This court upheld the grant of a directed verdict in favor of the landowners, holding that (1) a screwdriver is not always a dangerous

instrumentality and (2) although a property owner may owe a heightened duty to children beyond that owed to adult licensees or trespassers where a dangerous instrumentality is involved, the landowners had no legal duty to supervise continuously children playing in their yard. Without evidence that the landowners furnished or negligently permitted access to the screwdriver, the directed verdict was proper.

Because we find the facts in Dennis so widely different from those presented here, we do not find Dennis controlling. We cannot equate the duty owed by a landowner to a neighbor's child with that owed by a licensed group home to children placed under its care and supervision.

By regulation, group homes are licensed to provide programs of care "which include adequate protection, supervision and maintenance of children in care; safe physical facilities; and opportunities for appropriate learning experiences for the children and which allow for the healthy physical and mental growth of the children in care and are directed toward the development of well-adjusted, independent, responsible individuals." 27 S.C. Code Ann. Regs. 114-590(A)(1) (1976). Therefore, Helping Hands had a specific duty to supervise Cunningham and the other children living there. Its personnel manual states that clients are to be supervised at all times by Helping Hands staff, and further, "staff are expected to only take breaks when it will not interfere with the daily routine of the children, supervision or activities of the children." Employees of facilities like Helping Hands are required by law to be familiar with their procedural manuals. 27 S.C. Code Ann. Regs. 114-590(C)(ii) (1976). Lanita Battle, the counselor on duty when Cunningham was injured, admitted that the responsibilities of a Helping Hands Teen Counselor included client safety and supervision at all times.[1] Moreover, Helping Hands' staff knew that

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[1]The following testimony by Battle shows her understanding of the duty undertaken by Helping Hands with respect to its wards:

> Q. Now would you agree that one of your job duties is the safety of the children in your care?
>
> A. Yes.
>
> Q. And are you given any instruction, particularly in what you are supposed to do to provide for the safety of the children in your care?

Cunningham suffered from oppositional defiant disorder and therefore might not obey a warning to stand clear of the fire truck. In addition, Heos acknowledged in his deposition that he had seen Cunningham jump in front of the fire truck on at least one prior occasion. Thus, we disagree with the trial judge's characterization of Helping Hands' duty as "general" and "nonspecific."

"Where a duty to protect exists, a Defendant cannot claim that the victim's injury was the result of assumption of risk or contributory negligence if the victim's conduct was within the foreseeable risk to be protected." F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts 94 (2d ed. 1997). South Carolina courts have previously recognized that assumption of risk cannot be a defense in cases where a defendant has a duty to prevent a patient from committing suicide and the patient commits suicide. Hoeffner v. The Citadel, 311 S.C. 361, 367, 429 S.E.2d 190, 193 (1993); Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 74, 393 S.E.2d 914, 917 (1990). We believe this principle is applicable here because Helping Hands had a duty to supervise Cunningham at all times and its breach of that duty may have caused her injury.[2]

We find Helping Hands' duty to Cunningham is similar to that present in Grooms v. Marlboro County School District, 307 S.C. 310, 414 S.E.2d 802 (Ct. App. 1992). In Grooms, the parents of a mentally disabled fifteen-year-old student sued the school district for injuries he sustained while under the supervision of the school janitor. Because the child had been a discipline problem at school, he had been instructed to skip class and report to

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A. We are supposed to monitor the children.

Q. What does that mean exactly?

A. To know their whereabouts at all times.

[2]At least one other jurisdiction has adopted a similar approach and held that if a defendant has a clearly defined legal duty to supervise a plaintiff in order to prevent the type of harm suffered, the doctrine of assumption of risk will not bar recovery. Lucas v. Fresno Unified Sch. Dist., 18 Cal. Rptr. 2d 79, 83 (Ct. App. 1993) (holding school district could not assert defense of assumption of risk against child injured in dirt clod fight at recess in light of the school district's statutory duty to supervise).

the janitor when he thought he might cause trouble in the classroom. While under the janitor's supervision, the child wrestled with another student and injured his head. In reversing summary judgment, this court held that a genuine issue of material fact existed as to whether the school district was grossly negligent in the exercise of its duty to supervise students. We believe a similar question of fact exists here.

Helping Hands had knowledge of Cunningham's disorder and a duty to prevent her from harming herself and others as a result of that disorder. Cunningham was placed under Helping Hands' care, and by regulation and its own policies, Helping Hands had a duty to supervise her at all times. Even if there is evidence that Cunningham assumed the risk of her injury, that evidence is not sufficient to warrant judgment as a matter of law given Helping Hands' duty to supervise its charges. We therefore hold a jury question exists as to whether Helping Hands' failure to supervise resulted in Cunningham's injury.

*B. The Department*

We concur with the grant of summary judgment to the Department. Cunningham admitted she jumped on the side of the fire truck as she heard Conoly start it. She admitted she decided to wait until the truck was moving to jump off. Cunningham did not deny that Conoly warned everyone to stand clear of the truck; she only testified that she did not remember such a warning. In response to the question whether Conoly knew she was still on the truck when he pulled away, Cunningham stated, "I knew that he didn't know we were on the truck."

Absent an enhanced duty to supervise and protect, the Department was entitled to summary judgment based upon Cunningham's assumption of risk because even when the evidence is viewed in the light most favorable to Cunningham, she knew of the condition, knew it was dangerous, appreciated the nature and extent of that danger, and she still chose to expose herself to that danger. See Davenport, 333 S.C. at 79, 508 S.E.2d at 569. Accordingly, we affirm the grant of summary judgment to the Department.

**II. Comparative Negligence**

In granting summary judgment, the trial court also found: "Even if the facts constituting an assumption of risk were merged into and subsumed by,

the doctrine of comparative negligence, I would still be constrained to view Cunningham's negligence as greater than the combined negligence of the defendants as a matter of law." Cunningham argues the trial court erred in making this finding because it failed to view the facts in the light most favorable to her and because a jury should have determined each party's degree of negligence. We agree as to Helping Hands.[3]

A plaintiff in a negligence action may recover damages if his or her own negligence is not greater than that of the defendant. Nelson v. Concrete Supply Co., 303 S.C. 243, 399 S.E.2d 783 (1991). The assignment of respective degrees of negligence attributable to the plaintiff and the defendant is a question of fact for the jury if conflicting inferences may arise. Brown v. Smalls, 325 S.C. 547, 481 S.E.2d 444 (Ct. App. 1997); see also Reiland v. Southland Equip. Servs., Inc., 330 S.C. 617, 639-40, 500 S.E.2d 145, 157 (Ct. App. 1998) ("[A]pportionment of negligence, which determines both whether a plaintiff is barred from recovery or can recover some of his damages and the proportion of damages to which he is entitled, is usually a function of the jury.").

Based on Helping Hands' duty to supervise Cunningham, and its staff's knowledge of her propensity to disobey authority, together with the circumstances surrounding Cunningham's accident and injury, we hold the trial court erred in finding Cunningham's negligence greater than the negligence of Helping Hands as a matter of law. The apportionment of negligence to each party should have been a question for the jury.

For the foregoing reasons, the order of the trial court is

**AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.**

**CURETON and SHULER, JJ., concur.**

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[3]We need not reach this issue as to the Department because we find that the trial judge correctly granted the Department's motion for summary judgment based on Cunningham's assumption of risk.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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Edward W. Crafton,

Appellant,

v.

Wilbur B. Brown,

Respondent.

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Appeal From Florence County
W. Haigh Porter, Special Referee

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Opinion No. 3366
Heard June 5, 2001 - Filed July 9, 2001

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**REVERSED AND REMANDED**

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Stuart W. Snow, of Dusenbury, Snow & McGee, of Florence, for appellant.

E. Leroy Nettles, Sr., of Nettles, Turbeville & Reddeck, of Lake City, for respondent.

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**GOOLSBY, J.:** In this action to enforce a guaranty on a promissory note, Edward Crafton appeals the special referee's ruling on the admissibility of parol evidence to alter or amend the guaranty. Crafton also argues the referee erred in finding there was no mutual assent or meeting of the minds on the guaranty and the guaranty was not supported by consideration. We reverse and remand.

## FACTUAL BACKGROUND

In January 1988, John Wellman and Wilbur Brown traveled to Dahlonega, Georgia, to present an investment proposal for a plastic reclamation and recycling business to Edward Crafton.[1] Crafton was a wealthy man, and Wellman and Brown hoped he would bankroll the project.

Crafton liked their proposal and over the next year and a half, made several large loans to Wellman. In 1989, Crafton permitted Wellman to consolidate these loans into a single note and defer payment until August 1994 or until Wellman Industries made an initial public offering of its stock. Accordingly, Wellman signed a promissory note for $2,395,484.00 on August 18, 1989. At the same time, Brown executed a guaranty for $500,000.00. When the note came due in 1994, Wellman defaulted.

In 1996, Crafton filed this action to collect on Brown's guaranty. Brown defended, arguing the note was part of a larger collateral oral agreement in which Crafton allegedly pledged to loan Wellman an additional twenty to twenty-five million dollars. Brown contended that the guaranty was conditioned upon the loaning of the money by Crafton to Wellman, and that Crafton's failure to loan the money invalidated the guaranty. Brown further asserted Crafton's failure to loan additional money resulted in a failure of consideration for the guaranty.

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[1] Wilbur Brown was involved intimately with organizational efforts and he served as both a consultant to Wellman and the corporation and from time to time loaned his own money to Wellman and Wellman Industries in these efforts.

At trial, Brown sought to prove through the admission of parol evidence that a collateral contract existed. Crafton objected, arguing the guaranty was unambiguous on its face and parol evidence was not admissible to vary its terms. The referee ruled, however, that the parol evidence of a larger agreement was admissible. Based upon the parol evidence admitted at trial, the referee found that the guaranty was unenforceable because there was no meeting of the minds of the parties at the time the guaranty was executed and the guaranty was not supported by consideration. Crafton appeals.

## LAW/ANALYSIS

### Standard of Review

A guaranty is a "promise to answer for the payment of some debt or the performance of some duty in case of the failure of another person who is himself in the first instance, liable to such payment or performance."[2] An action to collect on a guaranty is an action at law.[3] In an action at law, an appellate court will correct errors of law but must defer to the trial court's factual findings and affirm unless there is no evidence reasonably supporting those findings.[4]

### Parol Evidence

Crafton first asserts the referee erred in admitting parol evidence to vary the terms of the guaranty because the guaranty was unambiguous. We agree.

"The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of

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[2] J. L. Mott Iron Works v. Clark, 87 S.C. 199, 203, 69 S.E. 227, 228 (1910).

[3] Twelfth RMA Partners, L.P. v. National Safe Corp., 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999).

[4] Crary v. Djebelli, 329 S.C. 385, 496 S.E.2d 21 (1998).

a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument."[5] "[W]here the terms of [a] written guaranty agreement are clear and complete, extrinsic evidence of agreements or understandings contemporaneous with or prior to its execution cannot be used to contradict, explain, or vary its terms, in the absence of fraud, accident, or mistake in its procurement."[6]

The promissory note stated:

> For value received, the undersigned Maker promises to pay to the order of EDWARD W. CRAFTON ("Holder"), on August 31, 1994, at such place as Holder may reasonably designate in writing, the principal sum of TWO MILLION THREE HUNDRED NINETY-FIVE THOUSAND FOUR HUNDRED EIGHTY-FOUR ($2,395,484.00) DOLLARS ("Principal Sum"), with interest thereon until paid at the simple interest rate of ten percent (10%) per annum computed on the basis of a 360 day year.
>
> Upon the closing of a public offering of all or any part of any class of securities issued by J.G. Wellman Industries, Inc. pursuant to an effective registration statement under the Securities Act of 1933, as amended, the entire Principal Sum and accrued interest thereon shall become due and payable without further notice.

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[5] Gilliland v. Elmwood Properties, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990).

[6] Pee Dee State Bank v. National Fiber Corp., 287 S.C. 640, 643, 340 S.E.2d 569, 570-71 (Ct. App. 1986).

The guaranty stated:

> In the consideration of the credit extended on a Promissory Note dated August 18, 1989 from John G. Wellman to Edward Crafton ("Holder") in the amount of Two Million Three Hundred Ninety-Five Thousand Four Hundred Eighty-Four and 00/100 ($2,395,484.00), I guarantee the payment of Five Hundred Thousand and 00/100 ($500,000.00) Dollars of the above referenced note.

The guaranty explicitly recites that it is in consideration of the credit extended in the amount of $2,395,484.00. In view of the clear and unambiguous nature of the language of the guaranty and the recitation of its consideration as the $2,395,484.00 promissory note, we conclude the referee improperly admitted parol evidence.

Brown cites Iseman v. Hobbs[7] in support of his argument that parol evidence was properly admitted in this case. In Iseman, this court held parol evidence was admissible when the language of consideration was not contractual. The Iseman court explained:

> [I]f the consideration recited is an act or forbearance, as distinguished from a promise or covenant, it may be shown that it did not take place and that therefore the writing is gratuitous and unenforceable. On the other hand, if a promise or covenant is recited as having been made as consideration, this recital cannot be contradicted, explained, or varied by extrinsic evidence. In the present case, the phrase "for value received" is not a recital of a promise or covenant, but a recital that an act (i.e., the receipt of value) has occurred.

[7] 290 S.C. 482, 483, 351 S.E.2d 351, 352 (Ct. App. 1986).

> Contradiction of the fact of receipt would in no way alter the contractual terms of the note.[8]

Brown sought to introduce evidence that the promissory note and guaranty were part of a larger contract to loan between twenty and twenty-five million dollars, not that the consideration recited was never paid over.[9] This is precisely the evidence the parol evidence rule seeks to bar.[10] Accordingly, the referee erred when he admitted parol evidence to alter the terms of the guaranty.

Mutual Assent/Meeting of the Minds

Crafton next argues that the referee erred in finding there was no mutual assent at the time the guaranty was executed. Crafton argues mutual assent was proved because he accepted the guaranty contemporaneously with the execution of the note. We agree.

"A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement is contemporaneous with the guaranty, . . . the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract."[11] Because the guaranty and

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[8] Id. at 484, 351 S.E.2d at 352-53 (emphasis added).

[9] The parties agreed that Crafton loaned Wellman $2,395,484.00.

[10] See Ray v. South Carolina Nat'l Bank, Inc., 281 S.C. 170, 174, 314 S.E.2d 359, 361 (Ct. App. 1984) ("An oral agreement between the parties, made contemporaneously with the execution of the note or prior thereto, relating to [a] condition not expressed in the note is incompetent to change the contract as represented on the face of the note.").

[11] Hudepohl Brewing Co. v. Bannister, 45 F. Supp. 201, 203 (D.S.C. 1943) (emphasis added).

promissory note were executed simultaneously, there was no need for further evidence of a meeting of the minds.

We find it irrelevant that Crafton did not think anything of the guaranty at the time it was executed. Crafton primarily relied on the promissory note and looked to Wellman for payment under the note. Brown's guaranty only assumed importance after Wellman's default.[12]

Consideration

Crafton next argues that the referee erred in finding a lack of consideration to support the guaranty. We agree.

In finding the guaranty was without consideration, the referee's order noted Brown "did not get anything as a result of delivering the document." This was error, however, because Crafton was not required to show that Brown received a benefit under the guaranty.

Generally, when a guaranty is executed at the same time as the note, the consideration for the note functions as consideration for the guaranty.[13] Moreover, "it is not necessary that the guarantor derive any benefit from either the principal contract or the guaranty" as long as there is a benefit to the obligor or a detriment to the creditor.[14]

In the present case, Wellman received a benefit from the note because he was able to defer repayment of the $2,395,484.00 loan until 1994 or until the closing of Wellman Industries' initial public offering. An agreement to extend

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[12] See 38A C.J.S. Guaranty § 12b (1996) (stating notice of acceptance of a guaranty is not required when the principal contract is contemporaneous with the guaranty).

[13] Id. § 27.

[14] Id. § 29.

the debtor's payment date is sufficient consideration for a guaranty by a third person.[15]

Brown himself testified Wellman received a benefit from the "long maturity on the note" because it gave him "a year or two to operate at a profit and then carry [the company] to an initial public offering . . . ." Brown also stated "[t]he purpose of the guarantee was to clean up the balance sheet of J.G. Wellman Industries" and his signature on the guaranty "enhanced" the cleaning-up process. Thus, we find sufficient consideration to support the guaranty.

## CONCLUSION

We find that the referee erred in admitting parol evidence of a collateral agreement between the parties to alter the guaranty. We further find that the guaranty is unambiguous, that there was a meeting of the minds between the parties, and that the guaranty was supported by valid consideration. Accordingly, we reverse the judgment for Brown and remand for the entry of judgment for Crafton.

**REVERSED AND REMANDED.**

**HEARN, C.J. and CONNOR, J., concur.**

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[15] Hope Petty Motors v. Hyatt, 310 S.C. 171, 425 S.E.2d 786; see also 38A C.J.S. Guaranty § 30 (stating a creditor's agreement to extend the time for payment of a debt is sufficient consideration for a guaranty).

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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The State,

Appellant,

v.

James E. Henderson, III,

Respondent.

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

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Opinion No. 3367
Heard May 8, 2001 - Filed July 9, 2001

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**AFFIRMED**

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Leon E. Stavrinakis, of Charleston, for appellant.

Stephen P. Groves, Sr., of Charleston; and Reese I. Joye, of N. Charleston, for respondent.

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**HEARN, C.J.**: The State appeals the circuit court's reversal of James E. Henderson, III's municipal court conviction for first offense driving under the influence (DUI) and illegal possession of legal liquor. We affirm.

## FACTS AND PROCEDURAL HISTORY

In January 1996, a police officer arrested Henderson, a college student, and charged him with first offense DUI and illegal possession of legal liquor.

At Henderson's trial, the State sought to elicit testimony from the Datamaster test operator that he read Henderson the "right to refuse" warning and advised him of his right to an additional test.[1] Henderson moved to suppress any evidence indicating he had the right to have an independent test to determine his blood-alcohol level.

Citing City of Columbia v. Wilson, 324 S.C. 459, 478 S.E.2d 88 (Ct. App. 1996), Henderson offered to stipulate that "the test was performed pursuant to SLED procedures and that he was advised of his statutory rights." As part of the objection, Henderson requested the trial judge have the "additional tests" language redacted from the SLED report. The State refused the requested stipulation but offered to redact the portions in question from the SLED report before it was admitted into evidence. The trial judge ruled the objectionable portion of the SLED report could be read into the record, but that it would be redacted before admission.

The jury found Henderson guilty on both counts. He was sentenced to 30 days in jail suspended to campus confinement for 15 weekends. Henderson appealed to the circuit court and was granted a new trial based on Wilson.

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[1] In accordance with S.C. Code Ann. § 56-5-2950 (Supp. 2000), the South Carolina Law Enforcement Division Breathalyzer Operator's Test Report (the SLED report) contains an implied consent warning which a BA Operator is required to give to all persons for whom he or she is administering a BA Test.

## SCOPE OF REVIEW

In criminal appeals from magistrate or municipal court, the circuit court does not conduct a de novo review, but instead reviews for preserved error raised to it by appropriate exception. S.C. Code Ann. § 14-25-105 (Supp. 2000); S.C. Code Ann. § 18-3-70 (Supp. 2000); City of Columbia v. Felder, 274 S.C. 12, 13, 260 S.E.2d 453, 454 (1979). In reviewing criminal cases, this court may review errors of law only. State v. Culter, 261 S.C. 140, 147, 199 S.E.2d 61, 65 (1973); State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997).

## DISCUSSION

The State contends the circuit court judge erred in finding that the municipal court improperly permitted the State to circumvent Henderson's offer to stipulate. We disagree.

In Wilson, this court considered a question strikingly similar to that presented here, to wit: whether the circuit court judge erred in reversing the municipal court conviction because the municipal court judge denied Wilson's motion to redact identical language on the Datamaster form. Because Wilson, unlike Henderson, did not offer to stipulate that the test was performed pursuant to SLED procedures or that he was advised of his statutory rights, the city was required to lay a foundation for admission of the results. Thus, reversal was not warranted in Wilson.

Here, however, Henderson offered to stipulate that the proper procedures were followed and that he was advised of his statutory rights. The State refused to stipulate to these facts, although it consented to redacting the language from the report that was admitted into evidence. The municipal court judge inexplicably ruled that the language would be redacted from the report but that the Datamaster operator could read the entire report to the jury. The officer recited the implied consent warning as follows to the jury:

> I must now tell you that the arresting officer has directed me to give you a breath test. I am trained and certified by the South Carolina Law Enforcement Division, SLED, to give this test. You have the right to refuse to take this test. If you refuse to take this test your privilege to drive in South Carolina must be suspended or denied for 90 days. You have the right to additional independent tests. Whether you take this breath test or not you will be given reasonable assistance in contacting a qualified person of your own choosing to conduct any additional tests. You will have to pay for additional tests.

Given the offer to stipulate by Henderson's counsel, there was no plausible reason why this language should have been read to the jury. Unlike the situation in Wilson, the State was not required to lay a foundation for the Datamaster test results. While we recognize that a stipulation usually involves the consent of all parties, the State's consent was not necessary here, where, by statute, "a person's . . . failure to request additional blood or urine tests is not admissible against the person in the criminal trial." § 56-5-2950(a). It was thus error for the municipal court judge to allow it to come before the jury.

Contrary to the State's argument, we are not persuaded that a different result is required by either State v. Anderson, 318 S.C. 395, 458 S.E.2d 56 (Ct. App. 1995) or State v. Hamilton, 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1997). In Anderson, the defendant was found guilty of driving under suspension (DUS), DUI, and violating the Habitual Traffic Offender Act. At trial, the defendant offered to stipulate to the jurisdiction of the court, but the solicitor refused. On appeal, Anderson argued the trial court erred in denying his motion to sever the habitual traffic offender charge from the DUS and DUI charges. While the dissent would have required the trial court to grant the motion, the majority held it could not reach the issue since it had not been preserved. Accordingly, Anderson cannot be read to hold that the State should not accept an offer to stipulate under the circumstances presented in this case.

Hamilton is equally unavailing to the State's position. There, this court held that the State was not required to stipulate, as requested by the defense, to Hamilton's prior burglary convictions because the previous burglaries were an element of the crime for which Hamilton was charged. We did not hold that a stipulation could never be required, however.

The facts presented in this case are distinguishable from those in either Anderson or Hamilton. Here, a specific legislative enactment proscribes the admission of a person's failure to request additional blood or urine tests. Wilson held there was no error in refusing to redact language concerning independent testing on the Datamaster form where the defendant did not offer to stipulate that proper procedures were followed and that he was advised of his statutory rights. The logical extension of Wilson's holding is that where the defendant does offer to so stipulate, it is error to permit the State to introduce evidence which is barred by § 56-5-2950(a).

For the foregoing reasons, the circuit court judge's decision to reverse Henderson's conviction is hereby

**AFFIRMED.**

**CURETON and CONNOR, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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LouAnne Fiddes Kocaya,

Respondent,

v.

David Joseph Kocaya,

Appellant.

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Appeal from Horry County
Lisa Kinon, Family Court Judge

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Opinion No. 3368
Submitted June 4, 2001 - Filed July 9, 2001

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**REVERSED AND REMANDED**

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David Joseph Kocaya, pro se, of Ridgeland, for appellant.

LouAnne Fiddes Kocaya, pro se, of Myrtle Beach, for respondent.

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**GOOLSBY, J.:** David Joseph Kocaya, a prisoner held within the Ridgeland Correctional Institution in Ridgeland, South Carolina, appeals the family court's denial of his request for an order of transportation requiring the South Carolina Department of Corrections to transport him from Jasper County to Horry County so that he could attend the final hearing in the divorce action that he had brought against his wife LouAnne Fiddes Kocaya. We reverse and remand.[1]

## FACTS

Kocaya, acting pro se, filed the complaint in this action on October 12, 1999. By his complaint, he seeks a divorce from his wife on the ground of separation for a period of one year. Soon after filing the complaint, the family court coordinator advised Kocaya that he would "need to submit an order of transportation for the judge's signature" in advance of the date that the court set for the final hearing "[i]f you are still incarcerated." Several months later, the family court coordinator served notice on Kocaya that the family court would hold a final hearing on April 3, 2000. A letter from the family court coordinator suggested that Kocaya, who was still incarcerated, send her a proposed order of transportation and she would "in turn have the [o]rder . . . signed and sent to the [i]nstitution." When forwarded Kocaya's proposed order and his request that the family court sign it, the family court denied Kocaya's request, telling him in a letter dated March 28, 2000:

> Please be advised there is no requirement that the South Carolina Department of Corrections be responsible for the transportation of [a] plaintiff who is incarcerated for an appearance at a final hearing and that I therefore respectfully decline to execute your [proposed] [o]rder of [t]ransport.

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[1] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

> If you will be released prior to your case being struck from the docket under the 270-day rule you may request a final hearing through the [f]amily [c]ourt [c]oordinator to coordinate with your release date.

Kocaya was not released prior to the expiration of 270 days from October 12, 1999, the date he filed his complaint. In fact, he remains incarcerated within the Ridgeland facility. Presumably, the family court dismissed his action because it was not brought to trial within 270 days from the date of filing.[2]

## LAW/ANALYSIS

Kocaya appeals, contending that the family court erred in refusing to order him transported from prison to the family court so that he could prosecute his divorce action. We agree in this instance.

It is fundamental that "[p]risoners have a constitutional right of access to the courts."[3] The family court's refusal to order Kocaya brought to Horry County denied him this right of access.

Although no statute expressly requires the Department of Corrections to transport prisoners to courts for them to prosecute civil actions, the Department's director is responsible for the "proper care . . . and management of the prisoners confined" within the prison system.[4] These responsibilities

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[2] FC ADMIN-5 (S.C. Sup. Ct. filed June 5, 1992). We deem the family court's denial of Kocaya's request for an order of transportation appealable because it affects a substantial right and, when combined with the 270-day rule, serves to discontinue the action. See S.C. Code Ann. § 14-3-330(2) (1976 & 2000); Jean Hoefer Toal, et al., Appellate Practice in South Carolina 94 (1999).

[3] Bounds v. Smith, 430 U.S. 817, 821 (1977); see also 72 C.J.S. Prisons § 106 (1987).

[4] S.C. Code Ann. § 24-1-130 (Supp. 2000).

include, we think, the duty to transport a prisoner to court, whether criminal or civil, when directed to do so by court order.

In South Carolina, a family court is not without authority to order a prisoner transported from the prisoner's place of confinement to the family court to prosecute a bona fide domestic action. South Carolina Code sections 20-7-420(28) and (29) give the family court that authority when it empowers the family court "[to] send process and any other mandates in any matter in which it has jurisdiction into any county of the State for service or execution" and "[t]o compel the attendance of witnesses."[5]

We therefore hold that the family court erred in refusing to order Kocaya transported from Jasper County to Horry County to attend the final hearing on his action for divorce where it failed to consider other alternatives for providing Kocaya meaningful access to the court. The effect of the family court's refusal in this instance, when coupled with the 270-day rule, was to deny a prisoner, a party to a bona fide civil action, meaningful access to this State's courts to prosecute the action.[6] Kocaya's action is reinstated and the order from which he took this appeal is

**REVERSED AND REMANDED.**

**CONNOR and HUFF, JJ., concur.**

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[5] S.C. Code Ann. §§ 20-7-420(28) and (29) (1985 & Supp. 2000).

[6] See Wantuch v. Davis, 39 Cal. Rptr. 2d 47 (Ct. App. 1995) (outlining methods a court could use to secure a prisoner access to the courts, including having the prisoner transferred to the court).

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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The State,

Respondent,

v.

Don L. Hughes,

Appellant.

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Appeal From Orangeburg County
Luke N. Brown, Jr., Special Circuit Court Judge

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Opinion No. 3369
Heard June 6, 2001 - Filed July 9, 2001

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**REVERSED IN PART AND REMANDED**

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Deputy Chief Attorney Joseph L. Savitz, III,and Assistant Appellate Defender Eleanor Duffy Cleary, both of SC Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan and Assistant Attorney General Melody J. Brown, all of Columbia; and Solicitor Walter M. Bailey, of Summerville, for respondent.

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**HEARN, C.J.**: Don L. Hughes appeals from his conviction for two counts of criminal sexual conduct with a minor in the second degree. He contends the trial court erred in (1) failing to permit defense counsel to inspect notes used by a key prosecution witness to refresh her memory before trial and (2) failing to make the notes part of the record for appeal. We reverse the trial court's ruling with respect to the notes and remand for an evidentiary hearing to determine whether a new trial is necessary.

## FACTS AND PROCEDURAL HISTORY

Hughes was indicted for two counts of criminal sexual conduct with a minor in the second degree. His alleged victim was a female relative. A medical examination of the child did not show any conclusive evidence of physical abuse. Therefore, the State sought to prove its case using testimonial evidence.

During trial, the State called Crystal Tuck as an expert in child sexual abuse treatment and counseling. She testified the victim's behavior was consistent with child sexual abuse. On cross-examination, Hughes asked if Tuck had reviewed her notes before testifying. Tuck responded she had used her notes to refresh her memory. Hughes then sought to inspect the notes pursuant to Rule 612, SCRE. The trial court refused to require Tuck to submit those notes because they were in Columbia and the trial was being held in Orangeburg. The trial court also refused to require Tuck to submit the notes prior to the end of the trial so Hughes could proffer them.

The jury convicted Hughes of two counts of criminal sexual conduct with a minor in the second degree, and he was sentenced to two consecutive twenty year sentences. Hughes appeals.

## DISCUSSION

Hughes argues the trial court erred in not requiring Tuck to produce the notes she used to refresh her memory for trial. He maintains defense counsel should have been permitted to inspect the notes, or at least to proffer them.

Hughes's access to Tuck's notes was governed by Rule 612, SCRE, stating in part:

> If a witness uses a writing to refresh memory for the purpose of testifying, either–
>
> (1) while testifying, or
>
> (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,
>
> an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

Under the plain language of this rule, the trial court has discretion to allow or refuse examination by an adverse party of writings used by a witness prior to trial to refresh his or her memory. An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. Ledford v. Pennsylvania Life Ins. Co., 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976). Moreover, our supreme court has held:

> When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred. Where a court is clothed with discretion, but rules as a matter of law, the appealing party is entitled to have the matter reconsidered and passed on as a discretionary matter.

Fontaine v. Peitz, 291 S.C. 536, 538-39, 354 S.E.2d 565, 566-67 (1987) (citations omitted).

In making a determination based on Rule 612(2), the trial court must be guided by the interests of justice. To decide whether production of a writing is necessary in the interests of justice, the trial court should balance the interests

of the party seeking production against the burden of requiring production. See 28 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 6185 (1993).[1]

Here, Tuck's testimony on cross-examination demonstrates she relied on her notes to refresh her memory before trial. Initially, the trial court was inclined to admit the notes, but after discovering the notes were in Columbia rather than in Orangeburg, it refused to require their submission for inspection or proffer. The trial court apparently believed it was powerless to order Tuck to produce anything that was not in the courtroom.[2] This was an error of law because the rule's language is not limited to materials located inside the courtroom. See Rule 612, SCRE. Therefore, the trial court erred in failing to exercise its discretion. See Fontaine, 291 S.C. at 538-39, 354 S.E.2d at 566-67; State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("It is apparent here the sentencing judge did not exercise any discretion but based his ruling on an erroneous view of the law. It is an equal abuse of discretion to

[1] In determining the interests of the party seeking production, other courts have looked to the following factors: (1) the importance of the witness's testimony; (2) the extent of the witness's reliance on the notes; (3) the extent to which the writings might reveal a credibility problem; (4) whether credibility could be challenged some other way; and (5) whether there is evidence of a plan to use writings to influence the witness's testimony and then resist production. Wright & Gold, supra. To assess the burden of production, courts have looked to: (1) the extent of the materials sought; (2) whether such materials are privileged or attorney work product; (3) public policy; (4) conduct of the party seeking production; and (5) whether production would unduly delay the proceedings. Id.

[2] In denying Hughes's requests to view the notes, the trial court stated, "But I'm also just saying she doesn't have them here, and therefore, I can't require her to produce them."

refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.").[3]

Accordingly, we reverse the trial court's refusal to order Tuck to submit her notes and remand for an evidentiary hearing to determine whether Hughes was entitled to access to the notes as outlined in Rule 612.[4] If the trial court finds production of the notes was necessary in the interests of justice, and the denial of such access significantly impaired Hughes's defense, it shall grant a new trial.

**REVERSED IN PART AND REMANDED.**

**CONNOR, J., concurs.**

**GOOLSBY, J., dissents in a separate opinion.**

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[3] Because it appears the trial court failed to exercise its discretion, we do not address whether it was necessary in the interests of justice to order the notes produced. Additionally, we note that the failure to exercise discretion distinguishes the instant case from cases in other jurisdictions affirming the trial court's discretionary decision not to require production of writings used to refresh the witness's memory before trial. See e.g., State v. Griffin, 525 S.E.2d 793, 808 (N.C. Ct. App. 2000) (upholding trial court's discretionary decision to exclude writing locked in witness's car); State v. Byrd, 519 N.E.2d 852, 855-56 (Ohio Ct. App. 1987) (finding court did not abuse its discretion in refusing to require production of writing where prosecutor represented that the whereabouts of the writing were unknown and a search would interfere with an expeditious trial).

[4] We do not find the record in this case contains overwhelming evidence of Hughes's guilt; therefore, we do not find the error harmless as suggested by the State. See, e.g., State v. Jones, 343 S.C. 562, 575-76, 541 S.E.2d 813, 820 (2001) (finding error not harmless "given the extent to which the State's case depended upon the credibility of an admitted accomplice and the defense theory which sought to convince the jury that the accomplice acted alone").

**GOOLSBY, J.** (dissenting): I respectfully dissent.

The majority finds that the trial court failed to exercise its discretion when ruling that an expert witness in child sexual abuse treatment and counseling need not give the defendant during trial the notes used by her before trial to refresh her memory. I disagree. The way I read the record, the trial court did exercise its discretion in fact and committed no abuse of discretion when it did so.

On the question of whether the court exercised its discretion, the court and counsel, outside the presence of a cloistered, waiting jury, engaged in a lengthy discussion about the notes in question. The court focused on their not being readily available, even asking defense counsel whether counsel had asked the witness to produce them. The court denied defense counsel's request to have the witness produce the notes because "she doesn't have the notes with her and therefore I can't require her to produce them," i.e., the notes were not readily available.

There is no doubt in my mind that the court, presided over by an experienced trial judge, knew that the question of whether to order the notes produced was one addressed to its sound discretion. Indeed, the solicitor expressly reminded the court early on in the discussion that followed defense counsel's objection and before the court ruled that the question was one addressed to the court's discretion. Then we have this interesting exchange that came about immediately after the court ruled:

> SOLICITOR MURPHY: Your Honor, I just want to, for the record, and I'm following the point, is that in your discretion you're determining that it's not necessary for the interest of justice?
>
> THE COURT: It's not necessary to send her to try to get them, or try to get them faxed here so they can look at them. If

that's what your question is, that's correct.

(Emphasis added).

In other words, the court determined in the exercise of its discretion that the interest of justice did not require it either to have the witness leave the courthouse to retrieve her notes or to have someone else to send them electronically to the court for inspection. I do not think this exchange can be reasonably read any other way than that.

In sum, what the court said is no different than had the court declared, knowing full well that a jury was waiting in the jury room and after having inquired whether counsel had made any effort prior to trial to secure them, "If the witness had the notes with her, I would make her produce them. Because she doesn't, I'm not going to send her after them or have someone look for them and then fax them." To me that is a manifest exercise of discretion, especially when one considers all the circumstances that attended the court's ruling. True, the trial court did not trim its decision with the magic words "in the exercise of my discretion," but then, it did not have to. Everyone present knew what the court was doing.

Which brings me to this problem. It concerns whether the error now employed as a ground for the reversal of Hughes' conviction was ever presented to the trial court for it to consider. Nowhere in the record did defense counsel ever claim the court did not exercise its discretion.[5] Indeed, neither of the two appellant briefs filed by appellate defense with this court even raises or argues the issue![6] One brief addresses simply the question of abuse of discretion while

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[5] See Jean Hoefer Toal, et al., Appellate Practice in South Carolina 66 (1999) ("The first step in preserving an issue for appellate review is to actually raise it to the lower court.").

[6] Id. at 84 ("Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal. . . . However, where an issue is not specifically set out in the statement of the issues, the appellate court may

the other ignores the issue of discretion altogether, seemingly arguing the court had no discretion at all regarding the production of the notes. The majority supplies this ground for reversal on it own, which is something this court cannot properly do.[7]

On the question of whether the trial court abused its discretion, I believe the location of the documents at that point in the trial was a proper matter for the court to consider.[8] Moreover, it is clear that Hughes was aware that the witness was going to testify but stated that he could not get in touch with her prior to trial.[9] He did, however, receive a copy of her statement. Had Hughes wanted to insure that the witness would bring all of the relevant

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nevertheless consider the issue if it is reasonably clear from appellant's arguments."); see also Rule 208(b)(1)(B), SCACR (same).

[7] See Shayne of Miami, Inc. v. Greybow, Inc., 232 S.C. 161, 168, 101 S.E.2d 486, 490 (1957) ("[I]t is not the function of an appellate court to supply a ground for reversal."); see also Connolly v. People's Life Ins. Co., 299 S.C. 348, 352, 384 S.E.2d 738, 740 (1989) ("We have held that the Court of Appeals may not decide an issue neither presented to the circuit court nor raised by proper exception on appeal.").

[8] See State v. Griffin, 525 S.E.2d 793 (N.C. Ct. App. 2000) (finding no abuse of discretion in denying defendant's request to examine notes when trial court found notes were in witness's locked car); Ohio v. Byrd, 519 N.E.2d 852 (Ohio Ct. App. 1987) (noting that in exercising discretion under Rule 612, one of the factors the court should consider is any potential disruption of the orderly proceedings); see also State v. Hamilton, 276 S.C. 173, 276 S.E.2d 784 (1981) (pre-rule case finding error in refusing to allow defendant to examine notes when they were in court and available for review).

[9] See Kilbarger v. Anchor Hocking Glass Co., 697 N.E.2d 1080 (Ohio Ct. App. 1997) (finding no abuse of discretion under Rule 612 where party failed to conduct adequate discovery prior to trial).

documents, he could have subpoenaed her to do so.[10] As to Hughes' argument that the relevant material could have been faxed to the court, there was no evidence that the documents were readily obtainable by anyone wherever they were.

In any case, I am satisfied that, looking at the record as a whole and given the evidence, any error the trial court may have committed in not ordering the witness to produce her notes was an error that was harmless beyond a reasonable doubt.

I would affirm.

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[10] See Rule 13, SCRCrimP (providing for the issuance and service of subpoenas).

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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Charles W. Bailey,

Respondent,

v.

Ralph W. Segars, Jr.,

Appellant.

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Appeal From Darlington County
Paul M. Burch, Circuit Court Judge

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Opinion No. 3370
Heard December 13, 2000 - Filed July 16, 2001

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**AFFIRMED**

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

Charles E. Carpenter, Jr., and S. Elizabeth Brosnan, both of Richardson, Plowden, Carpenter & Robinson, of Columbia; and Paul V. Cannarella, of Hartsville, for respondent.

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**STILWELL, J.**: This case involves an automobile-pedestrian collision resulting in a jury verdict in favor of Bailey. Segars appeals, and we affirm.

## FACTS

On October 8, 1996, at approximately 6:45 a.m., Charles Bailey was driving westbound toward Hartsville on Highway 151. The highway has four lanes, with two lanes running in each direction, and is separated by a paved median. Bailey was in the left lane, the one closest to the median, returning home from a hospital where he had visited his father. His wife Doris followed him in another car. Tropical storm Josephine had just passed through the area, and it was dark, rainy, windy, and visibility was poor.

That morning there were two accidents. Tamara Sabari was traveling eastbound toward Darlington when she lost control of her car, crossed the median, and collided with a tractor-trailer in the left lane of westbound traffic. Her car came to rest diagonally in the left lane. Bailey saw Sabari standing in the median waving her hands and pulled his white Chevrolet Suburban into the median two to three car lengths ahead of Sabari's car. Bailey left his headlights on but did not turn on his emergency lights. He proceeded to walk back toward Sabari carrying a flashlight.

Like Sabari, Segars was traveling east toward Darlington in the left lane on his way to work. Segars saw headlights and what he thought was an accident some distance ahead[1] but remained in the left lane because he was concerned about the amount of water in the right lane creating the potential for hydroplaning. As Bailey walked toward Sabari, a car traveling westbound in the left lane swerved into the median to avoid hitting Sabari's car. Bailey turned to

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[1] Segars testified inconclusively about the distance but, regardless of the actual distance, it is clear he saw an accident on the road ahead of him. One other witness also testified he saw what appeared to be an accident on the road ahead of him.

avoid being hit by that car and ran into the left lane of eastbound traffic, where Segars struck him with his car.

The force of the accident sent Bailey 100 to 150 feet down the road. He suffered a broken leg, broken neck, broken ribs, and collapsed lungs. Bailey did not know what hit him and has no recollection of the accident.

The force of the collision dented Segars's front bumper, damaged the hood, crushed the windshield, and buckled the car's roof. Segars testified that whatever hit his car appeared so quickly he had no time to respond. Thinking he had hit some flying debris, Segars did not stop immediately but continued driving. He eventually stopped at a gas station two miles down the road because rain was coming into his car through the shattered windshield and he was bleeding. He returned to the accident scene ten to twenty minutes later and saw Bailey lying on the road.

Bailey's expert witness testified that in a vehicle-pedestrian collision the greater the speed of the vehicle the higher the pedestrian's point of impact thereon. Based on the damage to Segars's car, the expert witness concluded Segars was driving between forty and sixty miles per hour at the time of impact. The posted speed limit on Highway 151 was fifty-five miles per hour, and Segars testified he was driving forty to forty-five miles per hour. Although Segars testified he slowed down when he saw the lights of Bailey's vehicle, there were no signs of braking before, during, or after impact.

Bailey initially brought this negligence action against Segars, Sabari, Doe No. 1, the driver of the tractor trailer, and Doe No. 2, the driver of the car that swerved into the median. Claims against all defendants other than Segars were resolved prior to trial.

Segars moved for a directed verdict at the close of Bailey's case and at the close of his own case, arguing Bailey failed to establish actual negligence sufficient to make a finding of proximate cause. The trial court denied these motions. The jury rendered a verdict finding Segars 55% negligent, Bailey 45% negligent, and awarded Bailey $525,000 in damages. The award was initially

reduced by 45% to $288,750 and later to $263,750 because of a settlement with one of the other defendants. Segars's motion for judgment notwithstanding the verdict (JNOV) was denied.

## DISCUSSION

### I. Preservation of Error

As a threshold issue, Bailey argues Segars's issues on appeal are procedurally barred because they were not ruled upon by the trial court, and no Rule 59(e), SCRCP motion was filed. The arguments Segars made for the directed verdict motions, as well as the court's denial of the motions, are included in the record on appeal. Further, Segars raised several grounds in the motion for JNOV, a hearing was held, and the motion was denied in a form order, stating, "Post trial motion by Defendant are [sic] denied." Bailey contends because the trial judge did not explicitly rule on the issues raised in Segars's JNOV motion and because Segars did not make a Rule 59(e) motion to obtain a ruling, the issues Segars raises on appeal are procedurally barred. To support his argument, Bailey cites Vespazianni v. McAlister, 307 S.C. 411, 415 S.E.2d 427 (Ct. App. 1992). In that case, a motion for judgment on the pleadings was granted in a form order with no reason given for the decision. Id. at 412, 415 S.E.2d at 428. The argument on appeal was that the court failed to rule on certain matters. Id. at 413, 415 S.E.2d at 428. In addition to noting the record on appeal did not contain the proceedings before the trial court, we stated if issues were raised to the lower court and not ruled upon, a Rule 59(e), SCRCP motion to amend the judgment was necessary to preserve the issue for appellate review. Id.

Vespazianni is factually distinguishable from the case at hand. Here, we have a complete record containing the motion for JNOV and memorandum in support thereof, the transcript of the hearing on the post-trial motion, and the trial court's order denying the motion. Only the last of these items was available to this court in Vespazianni.

Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not ruled upon. Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998); see also Hubbard v. Rowe, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939) ("In matters of appeal, so far as it appears, all that this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised in the lower Court and passed upon by that Court."). The record on appeal in this case is sufficient for our review.

## II. Directed Verdict and JNOV

Segars argues the trial court erred in failing to grant his motions for directed verdict and JNOV because Bailey failed to prove actionable negligence by Segars proximately caused the accident. We disagree.

> In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. [The appellate court] will reverse the trial court only when there is no evidence to support the ruling below.

Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999); see also Hopson v. Clary, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996) (noting if the evidence taken as a whole is susceptible of only one reasonable inference, no jury issue is created and the directed verdict motion is properly granted).

To establish a cause of action for negligence, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damages proximately resulting from the breach of duty. Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000).

"An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). The duty of care is that standard of conduct the law requires of an actor to protect others against the risk of harm from his actions. Carter v. R.L. Jordan Oil Co., 294 S.C. 435, 444, 365 S.E.2d 324, 329 (Ct. App. 1988), rev'd on other grounds, 299 S.C. 439, 385 S.E.2d 820 (1989). A duty of care arises only with respect to a danger apparent to one in the actor's position before the harm occurs. Carter, 294 S.C. at 444, 365 S.E.2d at 329.

"A breach of duty exists when it is foreseeable that one's conduct may likely injure the person to whom the duty is owed." Vinson v. Hartley, 324 S.C. 389, 400, 477 S.E.2d 715, 720 (Ct. App. 1996). A negligent act or omission proximately causes an injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred. Crolley v. Hutchins, 300 S.C. 355, 357, 387 S.E.2d 716, 717 (Ct. App. 1989).

Negligence is not actionable unless it proximately causes the plaintiff's injuries. Bishop, 331 S.C. at 88, 502 S.E.2d at 83. The court in Bramlette v. Charter-Medical-Columbia stated:

> Proximate cause requires proof of (1) causation in fact and (2) legal cause. Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence. Legal cause is proved by establishing foreseeability. Although foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause, . . . the plaintiff need not prove that the actor should have contemplated the particular event which occurred, . . . . The defendant may be held liable for anything which appears to have been a natural and probable consequence of his negligence. A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence.

302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990) (citations omitted); see also Hubbard v. Taylor, 339 S.C. 582, 589, 529 S.E.2d 549, 552 (Ct. App. 2000) (noting legal cause is proved "if the defendant should have foreseen that his negligence would probably cause injury to someone").

Ordinarily, the question of proximate cause is one of fact for the jury. Vinson, 324 S.C. at 402, 477 S.E.2d at 721. The trial court's sole function regarding the issue is to determine whether particular conclusions are the only reasonable inferences that can be drawn from the evidence. Id. Only in rare or exceptional cases may the issue of proximate cause be decided as a matter of law. Ballou v. Sigma Nu Gen. Fraternity, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct. App. 1986). If there is a fair difference of opinion regarding whose act proximately caused the injury, then the question of proximate cause must be submitted to the jury. Id. at 147-48, 352 S.E.2d at 493. Under South Carolina's doctrine of comparative negligence, a plaintiff may only recover damages if his own negligence is not greater than that of the defendant. Bloom, 339 S.C. at 422, 529 S.E.2d at 712-13. Ordinarily, comparing the plaintiff's negligence with the defendant's is a question of fact for the jury to decide. Id. at 422, 529 S.E.2d at 713.

Viewing the evidence in the light most favorable to Bailey, we conclude the court properly denied Segars's motions for directed verdict and JNOV. First, Segars owed a duty of care to protect others from the risk of harm based on the weather conditions. It was dark, rainy, and windy, due to tropical storm Josephine, and water tended to accumulate in the right lane of Highway 151. Visibility was obviously poor, and even Segars testified the weather conditions were "terrible." Further, Segars saw headlights and what appeared to be an accident on the road ahead of him. Although Segars stated he was keeping a proper lookout, he testified he did not see Bailey's car even though it was a large sport-utility vehicle. The potential for pedestrians and emergency personnel to be near the scene of an accident, and the danger of hitting them, should have been apparent to Segars. Thus, he owed a legal duty of care to Bailey to drive cautiously under these conditions.

Second, viewed in the light most favorable to Bailey, there is evidence that Segars breached his duty of care in one or more ways. First, although Segars testified he was concerned about the amount of water in the right lane, no cars were beside, in front of, or behind him, and he made no effort to slow down or to change lanes. No evidence exists that Segars slowed even after the collision. The expert witness estimated Segars's speed at forty to sixty miles an hour, while Segars himself testified to driving between forty and forty-five. Although the posted speed limit was fifty-five miles per hour, the jury could infer from the evidence that under the circumstances Segars was driving too fast for conditions. Segars appears to argue that the speed of his vehicle was not a proximate cause of the collision because he had a legal right to occupy the portion of the highway on which he was traveling. However, there is sufficient evidence to support a conclusion that Segars's speed contributed to the accident, and we cannot as a matter of law rule out speed as the proximate cause. See Clark v. Cantrell, 332 S.C. 433, 444, 504 S.E.2d 605, 611 (Ct. App. 1998). Additionally, the evidence of Segars's failure to keep a proper lookout under the prevailing circumstances precludes us from denying liability as a matter of law. Segars's failure to reduce his speed and keep a proper lookout, despite his awareness of the weather conditions and the circumstances ahead of him, are evidence of negligence that, in a natural and continuous sequence of events, resulted in the accident.

Finally, on the issue of proximate cause, the evidence is sufficient for the jury to have found that "but for" Segars's failure to reduce his speed, keep a proper lookout, and keep his car under control, he would not have hit Bailey. Segars should have foreseen that someone near the accident could be injured. His admitted concern about the possibility of hydroplaning based upon a previous similar experience is further evidence from which the jury could reasonably have concluded that Segars was driving too fast for conditions. Thus, taken in the light most favorable to Bailey, there is evidence that causation in fact is present in this case.

Evidence of legal cause was also shown, because Bailey's injuries were a natural and probable consequence of Segars's dereliction. Therefore, there being adequate evidence of both causation in fact and legal cause, the jury's

finding that Segars's negligence proximately caused Bailey's injuries is justified.

The question of proximate cause and comparison of the plaintiff's negligence with that of the defendant are generally questions of fact for the jury. The jury found Bailey 45% at fault and Segars 55% at fault. The evidence in this case is not susceptible of only one reasonable inference, and thus, the motions for directed verdict and JNOV were properly denied.

For the foregoing reasons, the judgment of the trial court is

**AFFIRMED.**

**HEARN, C.J., and ANDERSON, J., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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The State,

Appellant,

v.

Curtis Gibbs,

Respondent.

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

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Opinion No. 3371
Submitted April 24, 2001 - Filed July 16, 2001

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**AFFIRMED**

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Deputy Director for Legal Services Teresa A. Knox, Legal Counsel Tommy Evans, Jr., and Legal Counsel J. Benjamin Aplin, all of South Carolina Department of Probation, Parole, and Pardon Services, of Columbia, for appellant.

Assistant Appellate Defender Robert M. Pachak, of SC Office of Appellate Defense, of Columbia, for respondent.

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**PER CURIAM**: The State appeals the trial court's ruling allowing Curtis Gibbs to stay his probationary sentences pending appeal without filing an appeal bond pursuant to Rule 230, SCACR. We affirm.[1]

## FACTS

Gibbs was indicted for driving under suspension, fourth offense, which was later changed to DUS second. He was also indicted for a fraudulent check more than $500. He pled guilty to both charges and was sentenced to six months imprisonment suspended upon two months probation for the DUS charge. He was sentenced to eight years imprisonment suspended upon two years probation on the fraudulent check charge. The State tried to revoke Gibbs's probation shortly thereafter but Gibbs had filed a notice of intent to appeal the guilty pleas. He argued the State could not proceed with the probation revocation because his sentences were stayed pending the conclusion of the appeal. He did not file an appeal bond arguing, pursuant to Rule 230, SCACR, it was not required since his sentences did not involve confinement. The trial court agreed, ruling the sentences were stayed pending the appeal and that Gibbs did not have to file an appeal bond.

## LAW/ANALYSIS

In regard to stays in criminal appeals, our appellate court rules state in pertinent part:

> The service of a notice of appeal by a criminal defendant shall operate as a stay of the execution of the sentence until the appeal is finally disposed of; provided, however, a sentence of confinement shall not be stayed until the defendant has posted bail under S.C. Code Ann. §§ 18-1-80 and -90 (1985).[2]

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

[2] "Pending such appeal the defendant shall still remain in confinement until he give bail in such sum and with such sureties as to the court shall seem

Rule 230(a), SCACR.

Clearly, the rule explains two different procedures that must be followed to stay a sentence that confines the defendant compared to one that does not. For non-confinement sentences, simply serving the notice of intent to appeal stays the execution of the sentence until the appeal has been concluded. For sentences involving confinement, the defendant must post bail in accordance with S.C. Code Ann §§ 18-1-80, -90 (1976 & Supp. 2000).

"When interpreting a statute, our primary role is to ascertain the intent of the legislature." State v. Johnson, 343 S.C. 693, 695, 541 S.E.2d 855, 857 (Ct. App. 2001). When a statute's language is plain and unambiguous and conveys a clear and definite meaning, the appellate court will not look for or impose another meaning. State v. Jihad, 342 S.C. 138, 142, 536 S.E.2d 79, 81 (Ct. App. 2000); see Adkins v. Varn, 312 S.C. 188, 191, 439 S.E.2d 822, 824 (1993) (noting when the statute contains terms which are clear and unambiguous, the court must apply those terms according to their literal meaning); Johnson, 343 S.C. at 695, 541 S.E.2d at 857 (noting "words should be given their plain and ordinary meaning"). This analysis is the same whether the court is interpreting a statute, constitution, or rule of procedure. See J.K. Const., Inc. v. W. Carolina Reg'l Sewer Auth., 336 S.C. 162, 170, 519 S.E.2d 561, 565 (1999) ("In construing a statutory or constitutional provision, the Court must give clear and unambiguous terms their plain and ordinary meaning . . . ."); Whitehead v. State, 310 S.C. 532, 534, 426 S.E.2d 315, 316 (1992) ("Rules of procedure, like statutes, should be given their plain meaning.").

We hold the rules of appellate procedure should be interpreted in like fashion to the analysis undertaken in interpreting all other rules of court

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proper." S.C. Code Ann. § 18-1-80 (1976). "Bail may be allowed to the defendant in all cases in which the appeal is from the trial, conviction, or sentence for a criminal offense. However, bail is not allowed when the defendant has been sentenced to death, life imprisonment, or imprisonment for more than ten years." S.C. Code Ann. § 18-1-90 (1976 & Supp. 2000).

procedure. When the rule contains clear and unambiguous terms, those terms should be given their plain and ordinary meaning.

Here, the State argues Gibbs received sentences of confinement that were "merely suspended" because they were reduced to probation. The State contends the sentences fell under the latter part of Rule 230, SCACR, and thus, maintains that Gibbs had to file an appeal bond to stay the sentences. We disagree.

Rule 230, SCACR, is clear and unambiguous in stating the filing of the notice of intent to appeal stays the execution of sentences that do not confine the defendant. The trial court sentenced Gibbs to two years probation on the fraudulent check charge and two months probation on the DUS charge. The sentences did not require Gibbs to be confined and, therefore, the filing of the notice of intent to appeal alone was sufficient to stay the sentences. Thus, we conclude that Gibbs's sentences were stayed pending appeal without the necessity of an appeal bond being filed.

**AFFIRMED**.

**CURETON, STILWELL, and HOWARD, JJ., concur.**