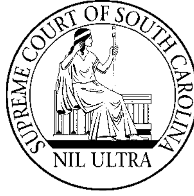

The Supreme Court of South Carolina

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NOTICE

IN THE MATTER OF RICHARD F. COLVIN, PETITIONER

On June 12, 1995, Petitioner was indefinitely suspended from the practice of law. In the Matter of Colvin, 318 S.C. 457, 458 S.E.2d 430 (1995). By Order of the Court dated August 4, 1995, the opinion was amended to make the effective date of the suspension retroactive to July 28, 1993, the date of his interim suspension. He has now filed a petition to be reinstated.

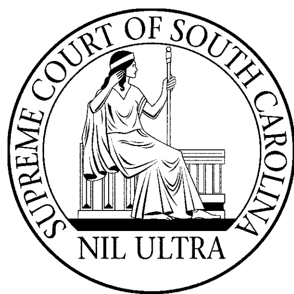
Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than November 5, 2001.

Columbia, South Carolina

September 5, 2001



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

September 10, 2001

ADVANCE SHEET NO. 33

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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The Supreme Court of South Carolina

Levone Graves, Appellant,

v.

County of Marion and
Marion County Council, Respondents.

ORDER

A Petition for Rehearing was granted on June 19, 2001. The attached opinions are substituted for the opinions filed on May 14, 2001.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

s/George T. Gregory, Jr. A.J.

Columbia, South Carolina
September 4, 2001

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Levone Graves, Appellant,

v.

County of Marion and
Marion County Council, Respondents.

____

Appeal From Marion County
Hicks B. Harwell, Circuit Court Judge

____

Opinion No. 25291
Heard February 21, 2001 - Refiled September 4, 2001

____

AFFIRMED

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Brenda Reddix-Smalls and Eleazer R. Carter, of Reddix-Smalls & Carter Law Firm, of Columbia, for appellant.

Timothy H. Pogue, of Marion, and J. Leeds Barroll, IV, of Columbia, for respondents.

____

JUSTICE MOORE: This is an appeal from an appellate decision of the circuit court, upholding a ruling of the Marion County Council regarding the salary of appellant Levone Graves, a Marion County magistrate. We affirm.

FACTS

In 1982, Marion County entered into an agreement with the City of Mullins to provide a county magistrate to serve as municipal judge for the purpose of holding municipal court at least once a week. The agreement provided the city would pay the county a monthly fee, adjustable from time to time, of $416.68 for these services. The agreement further provided, "It is suggested that the County may wish to compensate the magistrate and secretary for the extra work load imposed by the additional duties to the extent of $333.34 for Magistrate monthly and $83.34 for secretarial assistance monthly."

On October 7, 1982, then Chief Justice Woodrow Lewis signed an order acknowledging the agreement and ordering that

> commencing October 1, 1982, any magistrate in Marion County may be assigned to service as the municipal judge for the municipality of Mullins. . . .
>
> The magistrate assigned to serve as municipal judge shall retain the powers, duties and jurisdiction conferred upon magistrates. The magistrate shall not be compensated for his service by the municipality.

The Chief Justice's order does not explicitly approve the agreement between Marion County and the City of Mullins, nor does it address whether the

county may separately compensate the magistrate for his municipal duties.[1]

In 1990, Judge Graves was appointed as full-time magistrate for Marion County and was assigned to serve as municipal judge for the City of Mullins. Judge Graves received his salary in the form of a single bi-weekly check from Marion County. On March 16, 1998, the City of Mullins terminated its agreement with Marion County. The county subsequently reduced Judge Graves's salary by some $9,000, from $32,353 annually to approximately $23,000 annually.

The Marion County Council conducted a hearing on Judge Graves's Petition for Magisterial Base Salary and Retroactive Compensation. Judge Graves argued the county's reduction of his salary violated S.C. Code Ann. § 22-8-40(I) (1976)[2] which provided:

> A magistrate who is receiving a salary greater than provided for his position under the provisions of this chapter must not be reduced in salary during his tenure in office. Tenure in office continues at the expiration of a term if the incumbent magistrate is reappointed.

The council determined the county had not unlawfully reduced Judge

---

[1]The plain language of this order states the magistrate cannot be compensated for his service "by the municipality." The order does not prevent the county from compensating the magistrate for his job of serving the municipality for the county's benefit. Cf. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) (the canon of statutory construction "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius*" holds that "to express or include one thing implies the exclusion of another, or of the alternative.").

[2]Due to a recent amendment, subsection 22-8-40(I) is now subsection (J). The subsection was also amended to address annual increases. This amendment does not affect the issue before the Court.

Graves's salary because the salary "provided for his position under the provisions of this chapter" had not been reduced. Rather, the amount reduced was a stipend Judge Graves received for his service as municipal judge for the City of Mullins. Judge Graves appealed to the circuit court, which affirmed the county council's decision. This appeal follows.

DISCUSSION

Judge Graves argues the circuit court erred by ruling the county did not commit a statutory violation by reducing his salary during his tenure as magistrate. We disagree.

Section 22-8-40(I), provides:

> A magistrate who is receiving a salary greater than provided for his position under the provisions of this chapter must not be reduced in salary during his tenure in office. . . .

This statute was not violated by the county. We agree with the county council's finding that the county had not unlawfully reduced Judge Graves's salary because the salary "provided for his position under the provisions of this chapter," as delineated by section 22-8-40(I) had not been reduced. The word "position" in the statute clearly means the position of magistrate, which would not affect the magistrate's role as municipal judge. See Gilfillin v. Gilfillin, 344 S.C. 407, 544 S.E.2d 829 (2001) (if a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing any rules of statutory interpretation and this Court has no right to look for or impose another meaning); Lester v. South Carolina Workers' Compensation Comm'n, 334 S.C. 557, 514 S.E.2d 751 (1999) (same).

Prior to the reduction, Judge Graves received two salaries for two jobs

encompassed by one paycheck.[3] When the municipal job ended, the county properly eliminated the amount of payment that represented Judge Graves's compensation for his municipal job. The salary, which represented his position as magistrate, was not reduced by the county. It is clear the statute acts to prevent the county from reducing a magistrate's salary; however, it does not prevent the county from eliminating an additional payment for a job the magistrate no longer performs.

Accordingly, the county did not violate section 22-8-40(I) by reducing Judge Graves's salary after his job of municipal judge was eliminated.

AFFIRMED.

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

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[3]This finding is supported by Judge Graves's payment agreements for the three fiscal years prior to the elimination of his municipal job, which show separate sums for county and city work.

JUSTICE BURNETT: I respectfully dissent. I would adhere to this Court's original opinion and hold the county violated S.C. Code Ann. § 22-8-40(I) (1976) when it reduced Judge Graves's salary during his tenure as magistrate.

The majority finds Judge Graves held two distinct and separately compensated judicial positions; thus, the county could eliminate his salary for one of those positions without contravening § 22-8-40(I). As I view the facts of this case, Judge Graves was a full-time magistrate whose duties to the county included serving as municipal judge for the City of Mullins. Therefore, in my view, the county violated § 22-8-40(I) by reducing Judge Graves's salary simply because his duties changed.

Chief Justice Lewis ordered that

> [A]ny magistrate in Marion County may be *assigned* to service as the municipal judge for the municipality of Mullins. . . . The magistrate assigned to serve as municipal judge shall retain the powers, duties and jurisdiction conferred upon magistrates. The magistrate *shall not be compensated for his service by the municipality*.

(emphasis added). As I read the Chief Justice's order, serving as municipal judge was to be a duty assigned to a Marion County magistrate. Moreover, the order explicitly forbids the city to compensate the magistrate. In my opinion, finding Judge Graves worked two jobs for which he was separately compensated allows the county to circumvent the Chief Justice's order prohibiting the city to compensate the magistrate.[4]

---

[4]In finding Judge Graves held two distinct jobs, for which he was separately compensated, the county council found "[t]he payment agreements for the last three fiscal years show the amount [Judge Graves] was being compensated by the County *and by the City of Mullins*." (emphasis added). The county council further noted that when the city terminated its contract

This Court has previously refused to permit a county to avoid paying appropriate compensation to a magistrate through hyper-technical division of a magistrate's duties. In Ramsey v. County of McCormick, 306 S.C. 393, 412 S.E.2d 408 (1991), the county paid Judge Ramsey $5,200 as a part-time magistrate, the $1,500 statutory supplement for her duties as chief magistrate, and $8,500 for her full-time secretarial duties. We held Judge Ramsey was entitled to a full-time chief magistrate's $17,000 salary and $3,000 supplement. We reasoned that because a magistrate's judicial function, by statutory definition,[5] includes time spent performing ministerial duties, Judge Ramsey was "in substance, performing the duties of full-time Chief Magistrate." Id. at 398, 412 S.E.2d at 411. Therefore, the county could not avoid paying her a full-time chief magistrate's salary by classifying her as a part-time magistrate and full-time secretary.

The situation here is analogous to that in Ramsey. Judge Graves has at all times been employed by the county as a full-time magistrate. In my opinion, the county violated § 22-8-40(I) when it reduced Judge Graves's salary during his tenure in office. I would reverse.

---

with the county, "the stipend which [Judge Graves] was receiving *from the City of Mullins* was done away with." (emphasis added).

[5]S.C. Code Ann. § 22-8-20 (1976).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Rick's Amusement, Inc.,
B&B Amusement,
Tripp's Amusement
Company, Fascination of
S.C., Britt's Inc. d/b/a
Tripp's Convenience,
Crenshaw Technology,
Inc., Southern
Amusements, Ballard
Amusements, Inc.,
Wilkinson Fuel Company
d/b/a Nu-Way Marketing,
Greenwood Music Co.,
Inc., McDonalds
Amusements, Inc.,
Cherokee Trail, Sonoco
Amusements, and JSW
Amusement, and all those
similarly situated,

Plaintiffs,

of whom Rick's
Amusements, Inc., B&B
Amusement, Tripp's
Amusement Company,
Fascination of S.C.,
Britt's Inc. d/b/a
Tripp's Convenience,
Crenshaw Technology,

Inc., Southern
Amusements, Ballard
Amusements, Inc.,
Wilkinson Fuel Company
d/b/a Nu-Way Marketing,
Greenwood Music Co.,
Inc., McDonalds
Amusements, Inc.,
Cherokee Trail, Sonoco
Amusements, and JSW
Amusement are Appellants,

v.

State of South Carolina, Respondent.

AND

Leslie Mart, Inc.,
and all those similarly
situated, Plaintiffs,

of whom Leslie Mart,
Inc., is Appellant,

v.

State of South Carolina, Respondent.

____

Appeal From Richland County
Kenneth G. Goode, Circuit Court Judge

____

Opinion No. 25359
Heard June 6, 2001 - Filed September 10, 2001

____

AFFIRMED

____

A. Camden Lewis and Ariail E. King of Lewis Babcock & Hawkins, L.L.P., and Richard A. Harpootlian of Richard A. Harpootlian, P.A., of Columbia, for appellants.

Ronald K. Wray, II, and Denise L. Bessellieu, of Gallivan, White & Boyd, P.A., of Greenville, and Senior Assistant Attorney General Nathan Kaminiski, Jr., and Assistant Attorney General Christie N. Barrett, of Office of Attorney General, of Columbia, for respondent.

____

JUSTICE BURNETT: Appellants, owners of video gaming machines and operators of commercial establishments providing video gaming machines, appeal the circuit court's order granting Respondent State of South Carolina's (the State's) Rule 12(b)(6), SCRCP, motion to dismiss. We affirm.

BACKGROUND

In July 1993, the legislature enacted South Carolina Code Ann. § 12-21-2806 (2000) (local option law) which permitted counties to hold a referendum to determine whether non-machine cash payouts for video gaming should become illegal. As a result of the referendum held in November 1994, twelve counties voted in favor of making payouts illegal. Two years later, the local option law was struck down as unconstitutional special legislation. Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 (1996).

Appellants brought these actions against the State to recover losses allegedly incurred by the local option law and the resulting cash payout ban.[1] Appellants claimed they entered into contracts for the placement of video gaming machines prior to enactment of the local option law and that the law illegally "revoked and/or impounded [their] contracts," constituting a taking without just compensation and an unconstitutional impairment of their contracts.[2]

Relying exclusively on Mibbs, Inc. v. South Carolina Dep't of Revenue, 337 S.C. 601, 524 S.E.2d 626 (1999), the trial judge determined because future regulations were foreseeable in the highly regulated video poker industry, appellants failed to state a takings claim or contract impairment claim. The trial judge granted the State's Rule 12(b)(6), SCRCP, motion to dismiss.

ISSUES

I. Did the trial judge err by granting the State's motion to dismiss appellants' takings claim without conducting the three-prong Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978), test?

II. Did the trial judge err by granting the State's motion to dismiss appellants' impairment of contract claim?

---

[1]Appellants are located in the twelve counties where cash payouts were banned.

[2]Appellant Leslie Mart asserted its contract provided for a term beginning on December 6, 1991, with an automatic renewal of another five year term after the first five years. The other appellants asserted they "entered into valid, enforceable contracts . . . prior to the enactment or notice of the provisions of Section 12-21-2806."

DISCUSSION

I. Takings Claim

Appellants argue the trial judge erred by failing to evaluate their takings claim under the standard three-prong takings analysis rather than simply ruling highly regulated industries are precluded from establishing a takings claim. Appellants rely solely on Maritrans, Inc. v. United States, 40 Fed. Cl. 790 (1998). We disagree.

The Takings Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation." Economic regulation may effect a taking. Eastern Enterprises v. Apfel, 524 U.S. 498 (1998); see Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922) (regulation may result in a taking if it goes "too far."). In determining whether governmental regulation violates the Takings Clause, the Court will consider (1) the economic impact of the regulation, (2) its interference with "distinct" investment-backed expectations, and (3) the character of the governmental action. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). More recent cases describe the second factor as the degree of interference with "reasonable" investment-backed expectations. Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602 (1993); Westside Quik Shop, Inc. v. Stewart, 341 S.C. 297, 534 S.E.2d 270, cert. denied ___ U.S.___, 121 S.Ct. 606, 148 L.Ed.2d 518 (2000).

In Maritrans, Inc. v. United States, supra, the plaintiffs claimed the federal Oil Pollution Act of 1990 "took" their tankers by requiring them to be retrofitted with double hulls to continue operation or to be phased out of service. The government argued the plaintiffs did not have a property interest for purposes of the Fifth Amendment because the shipping industry is heavily regulated and, because plaintiffs could have anticipated the requirement of double hulls, they had no reasonable investment-backed expectations.

The Federal Claims Court explained the Federal Circuit has adopted a two-tier analysis for takings claims. Initially, the Court "must determine whether the proscribed activity is a 'stick' in the plaintiff's bundle of property rights." Id. at 793 citing M&J Coal Co. v. United States, 47 F.3d 1148, 1153-54 (Fed. Cir. 1995). If the Court finds affirmatively, it then considers the three factors set forth in Penn Central.

The Maritrans Court discussed Mitchell Arms, Inc. v. United States, 7 F.3d 212 (Fed. Cir. 1993),[3] which involved the federal government's revocation of import permits for certain assault weapons after the plaintiff had signed contracts with a foreign government to purchase the weapons for resale in this country. The plaintiff claimed its investment-backed reliance on the permits constituted a compensable property interest under the Fifth Amendment. The federal circuit disagreed.

The Maritrans Court noted Mitchell Arms' analysis concerned whether the interest affected was "totally dependent" upon the government's regulatory power or "inherent" in the plaintiff's ownership rights. Mitchell Arms found the "expectation of selling the assault rifles in domestic commerce - - the interest affected in this case - - was not inherent in its ownership of the rifles. Rather, it was totally *dependent* upon the import permits issued by the ATF." Maritrans , supra at 795, citing Mitchell Arms, supra at 217. Accordingly, the Maritrans Court concluded the heavily regulated nature of an industry does not preclude a cognizable Fifth Amendment property interest. It stated:

> We cannot find support for the proposition that the mere presence of regulation precludes analysis of the three familiar *Penn Central* factors at the second tier of analysis mentioned by *M & J Coal*.

---

[3]The Court relied in part on Mitchell Arms in Mibbs, Inc. v. South Carolina Dep't of Revenue, supra.

> Establishing a taking claim in certain spheres of activity may be difficult. But we are not aware of a blanket no-takings rule with respect to regulated industries; or that one may never prevail on a takings claim if participating in a heavily regulated industry. Certainly we cannot accept the Government's argument that because the industry in which Maritrans participates is regulated, we should end the inquiry at the first tier of analysis. The Government's argument in this respect is without merit.

Maritrans, Inc. v. United States, supra, at 797.

Ultimately, the Maritrans Court determined that, although the shipping industry is heavily regulated, the plaintiff's right to ownership of its vessels existed independently of the government's regulatory scheme. Accordingly, Maritrans had a property interest in its tankers which could be compensable under the Fifth Amendment.

We agree with appellants that a plaintiff who operates in an heavily regulated industry is not prohibited from establishing the existence of a property interest protected by the Fifth Amendment. The threshold inquiry is whether the property interest affected is inherent in the plaintiff's ownership rights or completely dependent upon regulatory licensing. Mibbs, Inc. v. South Carolina Dep't of Revenue, supra; see also Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992), citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (the range of interests protected by the Fifth Amendment is defined by "existing rules or understandings that stem from an independent source such as state law."). If the property interest is inherent in the plaintiff's ownership rights, then the Court determines whether a compensatory taking has occurred.

In Mibbs, our Court held the "contractual right to the profits from cash payouts depends totally upon regulatory licensing and is not inherent in [the plaintiff's] right to possess [video gaming] machines." Mibbs, S.C. at 606, S.E.2d at 628.

Here, appellants claim the invalid local option law "revoked and/or impounded [their] contracts" for the placement of video gaming machines, thereby constituting a taking. Initially, we note the local option law did not "take" appellants' contracts. Even after passage of the local option law and approval of the referendum in twelve counties, appellants were free to install video gaming machines and collect the proceeds therefrom.

Moreover, the local option law did not "revoke or impound" appellants' contracts which they entered on the assumption cash payouts would continue to be legal. Appellants' rights to continued cash payouts were completely dependent upon regulatory licensing rather than inherent in appellants' right to own or possess video gaming machines. Id. Appellants' interest in the contracts did not constitute a property interest which could be compensable as a taking. Accordingly, the trial judge did not err by failing to reach the Penn Central factors.

II. Impairment of Contract Claim

Appellants assert the trial judge erred by dismissing their Contract Clause claim. They claim that, in spite of the high degree of regulation of the video poker industry, they could not have foreseen an *illegal* ban on cash payouts. Further, appellants argue that, unlike the video poker operator in Mibbs, supra, they entered into contracts before the enactment or notice provisions of the local option law.

Both the United States and South Carolina Constitutions prohibit the State from passing laws which impair the obligations of contracts. See U.S. Const. art. I, § 10; S.C. Const. art. I, § 4. A three-step analysis is applied to determine whether a law violates the federal and state Contract Clauses. Ken Moorhead Oil Co. v. Federated Mutual Ins. Co., 323 S.C. 532, 476 S.E.2d 481 (1996). Initially, the Court must determine whether the state law has operated as a substantial impairment of a contractual relationship. If the regulation does constitute a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the

regulation. Lastly, once a legitimate public purpose has been identified, the Court determines whether the adjustment of contractual rights is based upon reasonable conditions and is of a character appropriate to the public purpose. Mibbs v. South Carolina Dep't of Revenue, supra.

In Mibbs, the Court addressed this same Contract Clause issue - whether a video poker operator could foresee the passage of the invalid local option law. We held where there is a Contract Clause claim, the threshold inquiry is whether the State law has operated as a substantial impairment of the reasonable expectations of the parties. Id. The validity of the regulation is irrelevant to this initial determination. Id.

Further, the Mibbs Court noted Martin v. Condon, supra, struck down the ban on cash payouts because it did not apply statewide, not because the ban was substantively invalid. Id. Presumably, the legislature could have banned cash payouts for coin-operated video gaming machines if it did so on a statewide basis.[4]

Finally, the fact that appellants entered into contracts for the placement of video gaming machines before the legislature enacted the local option law is an insignificant distinction from Mibbs. In Mibbs, the Court acknowledged there is "no substantial impairment of a contract where the subject of the contract is a highly regulated business whose history makes further regulation foreseeable." Id. S.C. at 608, S.E.2d at 629. It concluded the video poker industry was highly regulated and, therefore, further regulation regarding cash payouts was foreseeable. Although recognizing the operator had entered into contracts after enactment of the local option law, Mibbs was nonetheless decided on the basis of the high degree of regulation in the video gaming industry.

Appellants assert our decision today will affect the reliability of

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[4]At oral argument, appellants conceded the legislature could have banned video gaming altogether.

contracts entered into by participants in other highly regulated fields like banking and insurance. We disagree. Throughout the late 1980s and early 1990s, the same time period during which appellants entered into their contracts, lawmakers repeatedly introduced legislation specifically aimed at eliminating nonmachine cash payouts.[5] In this unique environment, appellants could not have reasonably expected that no regulation would interfere with their anticipated cash payouts. Our ruling does not affect the certainty of contracts in highly regulated fields.

As previously determined in Mibbs, the trial judge properly dismissed the impairment of contract claim because appellants could not have reasonably expected cash payouts for coin-operated video gaming machines to remain legal when they entered into the contracts.

AFFIRMED.

TOAL, C.J., MOORE, J., and Acting Justices C. Victor Pyle, Jr., and Thomas L. Hughston, Jr., concur.

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[5]See, e.g, H.R.3823, 108th Leg., 2d Sess. (1989) (bill to repeal S.C. Code Ann. § 16-19-60; H.R. 2867, 108th Leg., 2d Sess. (1989) (bill to make it unlawful to have or to operate a machine for playing games which utilizes a deck of cards); H.R.3104, 109th Leg. 1st Sess. (1991) (bill to repeal § 16-19-60).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Gerald Cox, Vickie Cox, William Sulzer, Virginia Marie Sulzer, Thomas Mitchum, Sr. and Corine H. Mitchum, on behalf of themselves and all others similarly situated,

Respondents,

v.

Woodmen of the World Insurance Company, Jerry D. Rogers and James K. Dowey,

Appellants.

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

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Opinion No. 3382
Heard December 14, 2000 - Filed September 4, 2001

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AFFIRMED IN PART;
REVERSED AND REMANDED
IN PART

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Evans Taylor Barnette, of McCutchen, Blanton, Rhodes & Johnson, of Columbia; and Charles R. Norris, of Nelson, Mullins, Riley & Scarborough, of Charleston, for appellants.

T.S. Stern, Jr., and Karen W. Creech, both of Covington, Patrick, Hagins, Stern & Lewis, of Greenville; and Paul J. Doolittle, Timothy E. Eble and Michael J. Brickman, all of Ness, Motley, Loadholt, Richardson & Poole, of Charleston, for respondents.

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HUFF, J.: Woodmen of the World Insurance Company, Jerry D. Rogers and James K. Dowey appeal the trial court's denial of their motion to compel arbitration. Woodmen also appeals the trial court's denial of its motion to dismiss pursuant to Rule 12(b)(8), SCRCP. We reverse the denial of the motion to compel arbitration and affirm the denial of the motion to dismiss.

FACTS

Woodmen is a fraternal benefits society organized and existing under the laws of the State of Nebraska with its principal place of business in Omaha, Nebraska. Rogers is the State Manager for Woodmen in South Carolina. Dowey is an Area Manager for Woodmen. Gerald Cox, Vickie Cox, William Sulzer, Virginia Marie Suzler, Thomas O. Mitchum, Corine H. Mitchum (Respondents) are members of Woodmen who purchased Woodmen universal life insurance policies, surrendering life insurance policies with Woodmen.

On July 17, 1997, the Respondents, on behalf of themselves and all others similarly situated, brought this action against Woodmen, Rogers, and Dowey for violation of the Insurance Trade Practices Act, S.C. Code Ann. § 38-57-10, et seq. (1989 and Supp. 2000), fraud, breach of contract accompanied by fraudulent acts, violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 et seq. (1985 and Supp. 2000), constructive fraud, negligent misrepresentation, conversion, and breach of fiduciary duties, and as to Woodmen alone, negligent supervision. They alleged Woodmen, Rogers, and Dowey induced them to replace their life insurance policies with universal life insurance policies.

Woodmen removed the case to the United States District Court for the District of South Carolina. It filed with the federal court a motion to dismiss or in the alternative for a stay of proceedings. In the motion it asserted that an Alabama class action, purported to be a national class action, had been conditionally certified and involved the same or substantially the same issues that are alleged in the South Carolina action. It also filed a motion to stay proceedings pending disposition to alternative dispute resolution and/or a petition to compel alternative dispute resolution. On September 23, 1997, the district court remanded the case to the Court of Common Pleas for Kershaw County without acting on the motions.

Woodmen subsequently filed a motion to dismiss or abate the action on the ground that another action was pending between the same parties for the same claims. The trial court denied the motion on February 6, 1998. It subsequently denied Woodmen's motion for reconsideration.

In an amended order filed April 14, 1999, the trial court denied Woodmen's motion to compel arbitration pursuant to the Federal Arbitration Act, (FAA), 9 U.S.C.A. § 1, et seq. (1999).[1] It found S.C. Code Ann. § 15-48-10(b)(4) (Supp. 2000), which exempts "any insured or beneficiary under any insurance policy or annuity contract" from the South Carolina Arbitration Act, S.C. Code Ann. § 15-48-10 et seq. (Supp 2000) "reverse pre-empts" the FAA through the McCarran-Ferguson Act, 15 U.S.C.A. § 1011 et seq. (1997). In addition, it held section 15-48-10(b)(4) is not within the "general insurance laws of this state," and thus it applies to fraternal benefit associations such as Woodmen. This appeal followed.

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[1] Rogers and Dowey joined the motion.

DISCUSSION

1. McCarran-Ferguson "reverse pre-emption"

Woodmen, Rogers, and Dowey argue the trial court erred in concluding the FAA does not apply to the arbitration provision in the Woodmen constitution by virtue of the McCarran-Ferguson Act. We disagree.

On December 10, 1996, Woodmen adopted an amendment to its constitution to provide for "Problem Resolution Procedures" that include binding arbitration. The amendment is binding on Respondents as if it had been in force at the time of their applications for membership.[2]

In most instances, our state policy, like federal policy favors arbitrating disputes. Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) ("The policy of the United States and this State is to favor arbitration of disputes."). As an exception to this policy, § 15-48-10(b)(4) provides the South Carolina Arbitration Act, which favors arbitration, does not apply to "any insured or beneficiary under any insurance policy or annuity contract."

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[2] S.C. Code Ann. § 38-37-790 (1989) provides in part:

> [A]ny changes, additions, or amendments to the charter or articles of the association or the constitution and bylaws duly made or enacted after the issuance of the benefit certificate bind the member and his beneficiaries and govern and control the contract in all respects the same as though the changes, additions, or amendments had been made prior thereto and were in force at the time of the application for membership.

Generally, if the contract providing for arbitration involves interstate commerce, the FAA displaces the state arbitration statute.[3] Soil Remediation Co. v. Nu-Way Envtl, 323 S.C. 454, 459-60, 476 S.E.2d 149, 152 (1996) ("If the arbitration agreement in the instant controversy is covered by the FAA, then . . . the FAA preempts S.C. Code Ann. § 15-48-10(a). . . . For the Federal Act to apply, the commerce involved in the contract must be interstate or foreign."). The McCarran-Ferguson Act, however, provides an exception to general federal pre-emption. The Act states in part: "No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance . . . ." 15 U.S.C.A. § 1012(b) (1997). It is undisputed the FAA does not specifically relate to insurance. Therefore, we must determine whether section 15-48-10(b)(4) was enacted for the purpose of regulating the business of insurance.

The United States Supreme Court has identified three factors in determining whether a particular practice is part of the business of insurance: "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982). The Court stated none of these factors is necessarily determinative of the issue. Id.

The trial court relied on Mutual Reinsurance Bureau v. Great Plains Mut. Ins. Co. Inc., 969 F.2d 931 (10th Cir. 1992), in which the Tenth Circuit Court of Appeals considered the issue of whether the Kansas arbitration statute was a law enacted for the purpose of regulating the "business of insurance" as the term is used in the McCarran-Ferguson Act. The version of the Kansas

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[3] The contracts at issue in this case, as insurance agreements between a fraternal benefits society incorporated in Nebraska and South Carolina residents, involve interstate transaction in commerce.

arbitration statute, Kan. Stat. Ann. § 5-401,[4] in effect at the pertinent time provided:

> Validity of arbitration agreement. A written agreement to submit any existing controversy to arbitration or a provision in a written contract, other than a contract of insurance . . ., to submit to arbitration any controversy, other than a claim in tort arising between the parties is valid, enforceable and irrevocable.

The Tenth Circuit recognized that statutes aimed at protecting or regulating the relationship between the insurance company and the policyholder "directly or indirectly, are laws regulating the 'business of insurance'" Mutual

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[4] The current version of Kan. Stat. Ann. § 5-401 (Supp. 2000) provides:

> (a) A written agreement to submit any existing controversy to arbitration is valid, enforceable and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract.
> (b) Except as provided in subsection (c), a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract.
> (c) The provisions of subsection (b) shall not apply to:
> (1) Contracts of insurance, except for those contracts between insurance companies, including reinsurance contracts; (2) contracts between an employer and employees, or their respective representatives; or (3) any provision of a contract providing for arbitration of a claim in tort.

Reinsurance Bureau, 969 F.2d at 933 (quoting SEC v. Nat'l Sec., Inc., 393 U.S. 453, 460 (1969)). It held Kan. Stat. Ann. § 5-401 directly regulated the relationship between the insurance company and the policy holder by declaring an agreement to arbitrate unenforceable. Id. It explained, "To expressly invalidate an agreement contained in the insurance contract touches the core of the 'business of insurance . . . .'" Id. at 933. The court noted that a contract of insurance is evidence of an agreement to spread risk and found the Kansas legislature had placed limits on the enforceability of an agreement to spread risk by enacting Kan. Stat. Ann. § 5-401. Id. In addition, the court found that the application of the McCarran-Ferguson Act did not require a state statute that "regulates the business of insurance" be in the form of an insurance code or an act relating only to insurance. Id. It held, "The application of the Kansas statute here concerned to insurance as an exception is clear and direct although included in an act relating basically to arbitration." Mutual Reinsurance Bureau, 969 F.2d at 934. Accordingly, it ruled that the Kansas statute combined with the McCarran-Ferguson Act prevented the application of the FAA. Id. at 935; see Friday v. Trinity Universal, 939 P.2d 869 (Kan. 1997) (while noting Mutual Reinsurance Bureau had been legislatively overruled due to amendment to Kan. Stat. Ann. § 5-401 providing reinsurance contracts are not to be considered contracts of insurance, applying the Tenth Circuit's reasoning to hold the McCarran-Ferguson Act precluded application of the FAA and arbitration clause was unenforceable because of Kan. Stat. Ann. § 5-401).

Woodmen, Rogers and Dowey urge this court to follow the reasoning employed by the Second Circuit Court of Appeals in Hamilton Life Ins. Co. v. Republic Nat'l Life Ins. Co., 408 F.2d 606 (2d Cir. 1969). In Hamilton, the Second Circuit held, "It is quite plain that arbitration statutes, including those of Texas and New York, are not statutes regulating the business of insurance, but statutes regulating the method of handling contract disputes generally." Id. at 611. It concluded that neither the Texas Arbitration Act nor the New York Arbitration Act was a law regulating the business of insurance within the meaning of the McCarran-Ferguson Act. Id. However, as the Tenth Circuit noted, the statutes in Hamilton differed from K.S.A. § 5-401 in a very important aspect in that those statutes governed arbitration in general and did

not mention "contracts of insurance." Mutual Reinsurance Bureau, 969 F.2d at 934.

More recently, the United States District Court for the Middle District of Alabama and the Supreme Court of Alabama have found the Alabama anti-arbitration statute[5] does not reverse pre-empt the FAA by way of the McCarran-Ferguson Act. Woodmen of the World Life Ins. Soc'y. v. White, 35 F.Supp.2d 1349 (M.D. Ala. 1999); Clayton v. Woodmen of the World Life Ins. Soc'y., 981 F.Supp. 1447 (M.D. Ala. 1997); American Bankers Ins. Co. v. Crawford, 757 So.2d 1125 (Ala. 1999). The district court in Clayton noted the anti-arbitration statute is not confined to insurance contracts, but was included with the section of the Alabama code that applies to all contracts. Clayton, 981 F.Supp. at 1450 n.1. In Crawford, the appellant argued the anti-arbitration statute was incorporated into the law of insurance by Ala. Code § 27-14-22 (1986), which provides: "All contracts of insurance, the application for which is taken within this state, shall be deemed to have been made within this state and subject to the laws thereof." 757 So.2d at 1135. The Alabama Supreme Court explained Ala. Code § 27-14-22 was simply a mandatory choice-of-law provision and found the appellant's incorporation argument too attenuated to require the conclusion that the policy of the McCarran-Ferguson Act should take precedence over the federal policy in favor of arbitration. Id. at 1136.

Considering the similarity between the Kansas arbitration statute, Kan. Stat. Ann. § 5-401 and S.C. Code Ann. § 15-48-10(b)(4), we find the reasoning of the Tenth Circuit in Mutual Reinsurance Bureau to be persuasive. Section 15-48-10(b)(4) is not a statute of general applicability like the Texas, New York, and Alabama statutes. Like the Kansas statute, § 15-48-10(b)(4)

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[5] Ala. Code § 8-1-41 (1993)provides in part: "The following obligations cannot be specifically enforced: . . . (3) An agreement to submit a controversy to arbitration . . . ."

specifically exempts "any insured or beneficiary under any insurance policy or annuity contract" from the South Carolina Arbitration Act. We find § 15-48-10(b)(4) was enacted for the purpose of regulating the business of insurance. The arbitration exception is an integral part of the policy relationship between the insurer and the insured because it expressly invalidates a provision contained in an insurance policy and sets forth the method for resolving disputes between the insured and the insurer. Through the exception, the legislature placed limits on the enforceability of an agreement to spread risk. Furthermore, § 15-48-10(b)(4) is a specific exemption limited to entities within the insurance industry. Accordingly, we conclude § 15-48-10(b)(4) "reverse pre-empts" the FAA through application of the McCarran-Ferguson Act.

2. Application of §38-37-70

Woodmen, Rogers, and Dowey argue the trial court erred in holding S.C. Code Ann. § 38-37-70 (1989) does not exempt Woodmen from § 15-48-10(b)(4). We agree.

Section 38-37-70 provides: "Fraternal benefits associations are governed by this chapter. The general insurance laws of this State do not apply to fraternal benefits associations unless provision is made in the law for them." Therefore, we must determine whether § 15-48-10(b)(4) is within the legislature's definition of "general insurance laws of this State."

The primary concern in interpreting a statute is to determine the intent of the legislature if it reasonably can be discovered in the language when construed in the light of its intended purpose. Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997). In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. First Baptist Church of Mauldin v. City of Mauldin, 308 S.C. 226, 417 S.E.2d 592 (1992).

The trial court relied on the Supreme Court's decision in Raggio v. Woodmen of the World Life Ins. Soc'y., 228 S.C. 340, 90 S.E.2d 212 (1955). However, Raggio does not stand for the proposition that the term "the general

insurance laws" refers only to the codification of laws contained in the predecessor to Title 38. In Raggio, the supreme court considered whether a statute that contained a limitation of two years for insurers to contest the truth of applications for insurance applied to fraternal benefits associations. The court discussed the history of the statute. It noted the legislature expressly made the statute applicable to fraternal benefits associations and found no change of the legislative intent. The court thus concluded fraternal benefits associations were bound by the statute. Raggio, 228 S.C. at 353-55, 90 S.E.2d at 219.

Although not found in Title 38, § 15-48-10(b)(4) is a law enacted for the purpose of regulating the business of insurance, and is accordingly, an insurance law. The legislature did not expressly provide the statute applies to fraternal benefits associations. Thus, rather than being an insurance law that expressly applies to fraternal benefits associations, it is a "general insurance law of this state" within the legislature's meaning of § 38-37-70. Accordingly, the arbitration exception is not applicable to fraternal benefits associations such as Woodmen. Thus, as the Woodmen contracts provide for arbitration, the current dispute is subject to arbitration pursuant to the FAA.

3. Motion to dismiss pursuant to Rule 12(b)(8), SCRCP

Woodmen argues the trial court erred in denying its motion to dismiss pursuant to Rule 12(b)(8), SCRCP, asserting there is a pending action in Alabama involving the same parties and the same or substantially the same issues. The Respondents assert the order denying the motion to dismiss is not appealable. However, an order that is not directly appealable will be considered if there is an appealable issue before the court. Pruitt v. Bowers, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998); see Briggs v. Richardson, 273 S.C. 376, 256 S.E.2d 544 (1979). Accordingly, we may consider the issue.

On January 14, 1998, counsel for the Respondents informed the court that the judge had decertified the Alabama action and no South Carolina class members were included within the previously conditionally certified class action. Accordingly, we find that under the facts presented to the trial court at

the time of its decision, it did not err in denying Woodmen's motion to dismiss pursuant to Rule 12(b)(8), SCRCP.

For the forgoing reasons, the trial court's denial of the motion to compel arbitration is **REVERSED** and the matter **REMANDED** for an order consistent with this opinion.[6] The trial court's denial of the motion to dismiss is **AFFIRMED.**

GOOLSBY and SHULER, JJ., concur.

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[6] The Respondents raise numerous issues not addressed by the trial court as alternate grounds for affirmance. We decline to address these issues. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (stating the appellate court may not wish to discuss additional sustaining grounds when it reverses the lower court's decision).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Jon Pierre LaCoste,

Appellant.

Appeal From York County
Wyatt T. Saunders, Jr., Circuit Court Judge

Opinion No. 3383
Heard June 6, 2001 - Filed September 4, 2001

REVERSED AND REMANDED

Assistant Appellate Defender Robert M. Pachak, 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, Senior Assistant

Attorney General Charles H. Richardson; and Solicitor Thomas E. Pope, of York, for respondent.

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HUFF, J.: Jon Pierre LaCoste was convicted of resisting arrest, disorderly conduct, and assault. He appeals, arguing the trial court erred in (1) refusing to grant a directed verdict on each of his indicted charges, (2) excluding certain hearsay statements, (3) refusing to give a full and complete charge on the right to resist an illegal arrest, and (4) charging simple assault as a lesser included offense of criminal domestic violence. We reverse and remand.

FACTUAL/PROCEDURAL BACKGROUND

LaCoste was indicted on charges of criminal domestic violence (CDV), resisting arrest, and disorderly conduct following an incident at The Galleria Mall in York County. At trial, Joyce Giles testified she visited the mall on the afternoon of July 14, 1998. As she was leaving in her car, she noticed a man and a woman "hitting at each other." The man, whom she identified as LaCoste, "grabbed at [the woman]," who "jerked away," and began striking him with her purse. She believed LaCoste was trying to rob the woman and that the woman was attempting to get away from him. She was also concerned because LaCoste was considerably larger than the woman. LaCoste slapped at the woman, making contact seven or eight times. As the pair moved about the parking lot exchanging blows, Giles called 9-1-1. During the four to five minutes before the police arrived, the two continued "pushing and shoving each other."

Officer Jeremy McCloud of the Rock Hill Police Department testified he arrived at the mall in response to a possible domestic disturbance dispatch. As he approached, he noticed the man and woman in a verbal altercation which he immediately recognized as a possible domestic situation. LaCoste was flailing his arms about in an angry, almost hostile manner, while the woman stood in a "normal, . . . defensive-type posture." When McCloud exited his patrol car, the woman retreated to an area behind him while the man

continued to advance. McCloud told LaCoste to stop, to which the man threw his arms up in a hostile manner and replied, "for what." McCloud told him to "stop right there" and the man again replied, "for what." The officer then told LaCoste to stop because he was under arrest for criminal domestic violence. According to McCloud, LaCoste began cursing at him and stated he would not follow the officer's commands. After a continued verbal exchange where McCloud ordered him to stop and the man continued to refuse, McCloud prepared to pepper spray LaCoste and threatened to do so if he did not comply. LaCoste cursed the officer and told him to put the spray away. When sprayed, he pushed the officer away. The officer sprayed him again, but it appeared to have little effect on him.

By this time, Officer Jeffrey Cornwell of the York County Sheriff's Department arrived to assist McCloud. LaCoste continued to resist and was sprayed by Officer Cornwell, again to no avail. He held his arms straight to avoid being handcuffed. The two officers held LaCoste on the hood of the car until additional units arrived and only then were they able to physically overpower him and handcuff him. Because he had been in an altercation with LaCoste, Officer McCloud did not personally conduct any interviews.

Giles testified she approached the woman after officers placed LaCoste in a police car. The woman said LaCoste was her husband, he was a karate expert, and she was afraid of him.

LaCoste and his wife testified in his defense. The couple had separated approximately two or three weeks prior to the incident and remained separated at the time of trial. They both testified Mrs. LaCoste came to the mall looking for her husband to discuss finances. LaCoste was at the mall buying shoes. Mrs. LaCoste, who was already upset, became angry when she saw LaCoste's girlfriend, Angela Ervin, who was working at the mall. Ervin saw Mrs. LaCoste and smirked at her. When LaCoste tried to prevent his wife from following Ervin out of the mall, she punched him in the face and slapped him several times, before following Ervin.

Once outside the mall, Mrs. LaCoste checked to see if Ervin was inside LaCoste's car. Ervin was not inside, but Mrs. LaCoste grabbed a shopping cart and banged it into the car's headlights. She then began scratching the car with her keys. LaCoste pleaded with her to stop, telling her someone was going to see her and she might get arrested. She then turned the keys on LaCoste, lunging at him with the keys in one hand while swinging her purse at him with her other hand. After a while, he grabbed the keys from her and threw them to the ground. Mrs. LaCoste testified her husband never hit her.

About this time, Officer McCloud arrived. LaCoste testified he tried to explain the situation to the officer, but the officer would not listen. He testified that during the altercation with his wife, he asked a woman who was with a man in a military uniform to call the police and the woman then walked over to a telephone. He thus thought McCloud was there upon his request. LaCoste stated he did not comply with McCloud's requests that he put his arms behind his back to be handcuffed because he knew he had not done anything wrong.

The jury found LaCoste guilty on the indictments for resisting arrest and disorderly conduct. On the charge of criminal domestic violence, the jury found him guilty of simple assault, which the trial court submitted as a lesser included offense. The trial court sentenced him to one year imprisonment, suspended upon service of ninety days with one year of probation for resisting arrest, and thirty days imprisonment, suspended, with one year probation for the disorderly conduct and simple assault convictions. This appeal follows.

LAW/ANALYSIS

I. Statements of Unknown Declarants

LaCoste argues the trial court erred in refusing to admit certain hearsay statements made by two unknown bystanders, one male and one female, which corroborated his testimony. He contends the statements were admissible under the excited utterance exception. As to the male bystander, we agree.

During cross-examination of Officer Cornwell, LaCoste asked about one male and one female bystander who were present during the arrest. Cornwell described the man as a white male wearing a Vietnam or V.F.W. hat. The man was "a little bit agitated," approached Cornwell, and tried to speak with him. When counsel asked Cornwell whether the man was trying to tell Cornwell what he had seen, the trial court sustained the State's hearsay objection. Cornwell did not take a statement from the man, but directed him to speak with the Rock Hill police officers. Cornwell then saw the man and woman walk over to a Rock Hill officer and speak with him.

The court held an in camera hearing upon LaCoste's request to determine the admissibility of any statements made by the unknown man and woman. During the hearing, Cornwell testified the man who approached him said LaCoste did not assault the lady (Mrs. LaCoste), he had done nothing wrong, and police should not be trying to handcuff him. He indicated LaCoste was in fact the victim of the woman's attack. Cornwell remembers the man was speaking and that he claimed to be a witness to the incident. However, Cornwell testified he did not know whether the man was in fact an eyewitness. About the woman, Cornwell testified he didn't recall her having much to say and stated, "I think she was there for the same purpose, but I didn't really get in a conversation with her." The trial court refused to admit the unknown man's statement because Cornwell was not able to verify the man was an eyewitness and, as such, the probative value of the statements was outweighed by the prejudice because the statements were unreliable. LaCoste was permitted, however, to elicit some testimony about the man and woman in the jury's presence. Cornwell testified he thought the man and woman were together, but he was not certain. Both were agitated and claimed to be witnesses, but the woman appeared less agitated than the man.

LaCoste also proffered the testimony of James Whiting, a mall security officer, concerning the two bystanders. Whiting testified he received a call that an officer needed help in the parking lot. When he reached the parking lot, he saw LaCoste in handcuffs and a number of police cars. He also saw an elderly man and lady who were "hollering," "He didn't do it. He didn't do it." The pair were upset, and said the woman (Mrs. LaCoste) was

beating on the man (LaCoste). The court found the statements did fit within the excited utterance hearsay exception, but that they were unreliable in that Whiting could not testify that either or both of the declarants actually observed the events in question. Because the bystanders' identities and what they observed were unknown, the court held the probative value of the statements was outweighed by their prejudicial effect.

Rulings on the admissibility of evidence are within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion resulting in prejudice to the complaining party. State v. Hughey, 339 S.C. 439, 453, 529 S.E.2d 721, 728-29 (2000); State v. Varvil, 338 S.C. 335, 340, 526 S.E.2d 248, 251 (Ct. App. 2000).

Hearsay is inadmissible except as provided by statute, the South Carolina Rules of Evidence, or other court rules. Rule 802, SCRE. The excited utterance exception permits introduction of a hearsay statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE. "The rationale behind the excited utterance exception is that the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication. In determining whether a statement falls within the excited utterance exception, a court must consider the totality of the circumstances." State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999).

Our supreme court addressed the admissibility of hearsay statements made by unknown declarants in State v. Hill, 331 S.C. 94, 501 S.E.2d 122 (1998). Hill was convicted of murdering a police officer in the parking lot of a car wash after the officer pulled him over. Id. at 98, 501 S.E.2d at 124. His defense at trial was that a person who had been hiding in his backseat shot the officer. Id. at 99, 501 S.E.2d at 124. The defense offered testimony of Kenneth Grant, a man who went to the car wash approximately fifteen minutes after the shooting. Grant testified in camera that after being at the car wash for fifteen or twenty minutes, he heard an unknown person in the crowd say there were two suspects. Id. at 99, 501 S.E.2d at 125. Hill attempted to introduce the statement

under the excited utterance or res gestae exception to hearsay, but the trial court held the testimony was inadmissible hearsay. Id.

The supreme court agreed, and held the excited utterance exception is limited to firsthand information, such as the statements of an actual witness to an event. Id. The court further held, "[t]he hearsay statement of an unknown bystander is admissible under the excited utterance exception only when the circumstances which surround it would affect the declarant in a way that assures its spontaneity and, therefore, its reliability for trustworthiness." Id. at 99-100, 501 S.E.2d at 125. The unknown declarant must have had an opportunity to personally observe the matter and must have perceived the event, and if the circumstances indicate the bystander did not observe the act, the declaration should be excluded. Id. at 100, 501 S.E.2d at 125. In Hill, the statement made by the unknown declarant occurred some thirty to thirty-five minutes after the event, and there was no indication that the knowledge of the declarant was firsthand. Because there was no evidence the unknown declarant witnessed the shooting and it was unknown whether the declaration was made "under the stress of excitement cause by the event," the supreme court found no error in the trial court's exclusion of Grant's testimony. Id.

Under the totality of the circumstances, we find the statements of the unknown male bystander should have been admitted. First, the defense was prepared to offer evidence the man was an actual eyewitness to the incident between LaCoste and his wife. Cornwell testified the man talked with him and identified himself as a witness to the events. Hill indicates statements are limited to firsthand knowledge, but does not require the firsthand knowledge of unknown declarants be established by evidence outside the statements themselves. Therefore, the man's claim to Cornwell that he witnessed the event was sufficient.

Second, the evidence demonstrates the man was under the stress of a startling event to the extent that his ability for reflective thought was suspended, and thus his statements fit within the excited utterance exception as the court found. According to Cornwell, the man was agitated and claimed to be a witness to the altercation in question. The fact that he actually approached

the officer and offered information while visibly upset supports a finding of his excited state. Moreover, Whiting testified the man was upset and "hollering." Because the evidence shows the unknown man was an actual eyewitness and the statements he made were excited utterances, the trial court erred in excluding Cornwell and Whiting's testimonies regarding these statements.[1]

II. Directed Verdict Motions

LaCoste also contends the trial court should have directed a verdict in his favor on each of the indicted offenses because Officer McCloud did not have probable cause to arrest him when he placed him under arrest, and thus his resistance of the arrest was lawful. We disagree.

First, we note appellant did not specifically raise any lack of probable cause to arrest as a ground in his motion for directed verdict. Further, in ruling on a motion for a directed verdict, the trial court considers the existence of evidence rather than its weight, and if there is any direct or substantial circumstantial evidence tending to prove the defendant's guilt or from which his guilt may be logically deduced, the case should be submitted to the jury. State v. Fennell, 340 S.C. 266, 270, 531 S.E.2d 512, 514 (2000). In reviewing the denial of a motion for directed verdict, this court must view the

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[1] The trial court, however, did not err in excluding any alleged statements made by the woman. The record is unclear as to whether she was an eyewitness to the event. During his in camera testimony, Cornwell answered affirmatively to a question of whether the man and woman claimed to be witnesses. During another portion of his testimony, however, Cornwell remembered the woman's presence and believed she was there for the same reason as the unknown man, but he did not speak with her and she did not say much. Unlike the unknown man, he attributed no particular statement to the unknown woman. Whiting's testimony also fails to identify the woman as an eyewitness. Because it is unclear on the record before us whether the woman saw the incident in question, we find any statements attributed to her were properly excluded.

evidence by the same standard in the light most favorable to the State. State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998).

Viewing the evidence in the light most favorable to the State, we find sufficient evidence to support the submission of each of the indicted charges to the jury.

LaCoste was charged with criminal domestic violence (CDV) in violation of S.C. Code Ann. § 16-25-20 (Supp. 2000), which provides:

> It is unlawful to: (1) cause physical harm or injury to a person's own household member, (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

A spouse fits within the definition of a household member regardless of whether the parties are currently cohabitating. S.C. Code Ann. § 16-25-10 (Supp. 2000).

Through the testimony of Giles, the State introduced evidence that LaCoste repeatedly struck a woman who identified herself as his wife and who, immediately after the incident, reported being afraid of him. Despite the lack of testimony regarding injuries to Mrs. LaCoste, this evidence is sufficient to support submission of the case to the jury on the theory that LaCoste caused physical harm to a household member or attempted to cause the same with the "apparent present ability under circumstances reasonably creating fear of imminent peril."

LaCoste was also charged with violating S.C. Code Ann. § 16-9-320(A) (Supp. 2000), which prohibits, inter alia, the knowing and willful resist of an arrest being made by one the person knows or reasonably should know is a law enforcement officer.

Officer McCloud arrived on the scene wearing his uniform and driving his marked Rock Hill Police Department patrol car. When he tried to place LaCoste under arrest, LaCoste resisted verbally and physically. He continued to resist after Officer Cornwell arrived despite the officers' use of pepper spray, holding his arms stiff to prevent the officers from handcuffing him. He was not handcuffed until additional officers arrived to assist in holding his hands behind his back. The trial court properly denied LaCoste's directed verdict motion on this charge.

Finally, LaCoste faced a charge of disorderly conduct in violation of S.C. Code Ann. § 16-17-530 (1985), which prohibits, inter alia, disorderly or boisterous conduct or the use of obscene or profane language at any public place or gathering.

Officer McCloud testified that, as he approached LaCoste and instructed him to stop, LaCoste threw up his arms in a hostile manner and began yelling obscenities at the officer, insisting he would not comply with the officers demands. After the officer informed LaCoste he was under arrest for disorderly conduct, LaCoste continued to repeatedly shout obscenities and challenge the officer. Additionally, he taunted officers McCloud and Cornwell regarding their lack of success in bringing him under control. This testimony constituted ample evidence of disorderly conduct to enable the trial court to deny LaCoste's motion for directed verdict.

III. Jury Charge on Right to Resist Unlawful Arrest

Next, LaCoste maintains the trial court should have issued the entire charge he requested on the right to resist an unlawful arrest. We find no error.

The law to be charged to the jury is determined by the evidence presented at trial. State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). "The substance of the law must be charged to the jury, not particular verbiage." State v. Hughey, 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000). As long as the charge is substantially correct and covers the law, reversal is not required. State v. Hoffman, 312 S.C. 386, 395, 440 S.E.2d 869, 874 (1994).

LaCoste submitted the following proposed charge on the right to resist an illegal arrest:

> Separate and distinct from the law of self-defense is the right of any citizen to resist an unlawful arrest. Under the law of the state a person has the right to resist an unlawful arrest by force, if such be necessary. In so doing, he may use such force as is apparently necessary to regain his liberty if such be necessary.
>
> In order to justify the use of force in resisting an unlawful arrest, it is not necessary for the defendant to show that he had no opportunity to retreat or escape. He may stand his ground and use such force as may be apparently necessary to repel an unlawful arrest or detention or interference with his person, provided such force is reasonable in degree and kind.

The trial court instructed the jury that the State had the burden to prove beyond a reasonable doubt that the arrest was lawful. He charged them that "[n]o citizen is required to submit to an illegal arrest and may use reasonable force in resisting an illegal arrest." LaCoste objected, but the court ruled the instruction given was legally sufficient. The charge issued by the trial court essentially restated the instruction LaCoste requested, albeit more succinctly. The single concept requested by LaCoste which the court's charge did not cover was that a person resisting an illegal arrest need not show lack of opportunity for retreat or escape, but is entitled to stand his ground. However, we are of the opinion that the court did not err in failing to include this in the charge, as it was not required by the evidence presented at trial.

IV. Simple Assault as Lesser Included Offense

Finally, LaCoste argues simple assault is not a lesser included offense of criminal domestic violence and the trial court erred in submitting it as such to the jury. We disagree.

"The test for determining if a crime is a lesser included offense is whether the greater of the two offenses includes all the elements of the lesser offense." State v. McFadden, 342 S.C. 629, 632, 539 S.E.2d 387, 389 (2000). If the lesser offense includes an element which is not included in the greater offense, then the lesser offense is not included in the greater offense. Hope v. State, 328 S.C. 78, 81, 492 S.E.2d 76, 78 (1997).

Criminal domestic violence is defined by S.C. Code Ann. § 16-25-20 (Supp. 2000), which provides:

> It is unlawful to: (1) cause physical harm or injury to a person's own household member, (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

Assault is an attempted battery or "an unlawful attempt or offer to commit a violent injury upon another person, coupled with the present ability to complete the attempt or offer by a battery." State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000).

Assault and subsection (2) of the CDV statute appear very similar. LaCoste contends, however, that simple assault is not a lesser included offense of CDV because assault includes the elements of violent injury and person of another. These differences are in fact more semantical than they are practical.

First, in regard to violent injury, "[t]he adjective 'violent' may be somewhat misleading." William Shepard McAninch & W. Gaston Fairey, The Criminal Law of South Carolina 188 (3d ed. 1996). For example, assault and battery has also been defined as "any touching of the person of an individual in a rude or angry manner, without justification." State v. Mims,286 S.C. 553, 554, 335 S.E.2d 237, 237 (1985); see also State v. Germany, 211 S.C. 297, 300, 44 S.E.2d 840, 841 (1947) ("Violence [as included in the definition of assault and battery] does not necessarily import serious injury."); cf. State v. DeBerry,

250 S.C. 314, 319, 157 S.E.2d 637, 640 (1967) (serious bodily injury is not necessary to establish assault and battery of a high and aggravated nature). Further, the essential purpose of § 16-25-20 of the Criminal Domestic Violence Act is "to protect against harm and **violence** from members of an individual's household." Arthurs v. Aiken County, 338 S.C. 253, 266, 525 S.E.2d 542, 549 (Ct. App. 1999) (emphasis added). Finally, assault and battery of a high and aggravated nature (ABHAN) and assault of a high and aggravated nature (AHAN) have been determined to be lesser included offenses of criminal sexual conduct (CSC) in the first degree, in spite of the fact that ABHAN and AHAN specifically include the term "violent" within their definitions, while first degree CSC does not. See State v. Frazier, 302 S.C. 500, 502, 397 S.E.2d 93, 94 (1990) (ABHAN is an unlawful act of violent injury to the person of another, accompanied by circumstances of aggravation; ABHAN is a lesser included offense of CSC in the first degree); State v. Murphy, 322 S.C. 321, 325, 471 S.E.2d 739, 741 (Ct. App. 1996) (because AHAN contains the same elements of ABHAN with the exception of the element of touching the victim, and ABHAN is a lesser included offense of first degree CSC, AHAN is also a lesser included offense of CSC in the first degree); S.C. Code Ann. § 16-3-652(1) (Supp. 2000) (first degree CSC requires a sexual battery and (1) aggravated force or (2) forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar offense or act or (3) the victim, without consent, be mentally incapacitated or physically helpless by virtue of the actor's administration of any intoxicating substance); S.C. Code Ann. § 16-3-655(1) (Supp. 2000) (a person is guilty of CSC in the first degree if the actor engages in sexual battery with a victim of less than eleven years of age).

As for the element of the person of another, to attempt to cause harm to a household member is in fact an attempt to cause harm to the person of another. The term "household member" is simply another requirement under § 16-25-20. The statute merely includes the additional element that the person of another be a household member. Therefore, the person of another is in fact an element of criminal domestic violence. In that simple assault contains no element which is not included within the offense of CDV, the former is a lesser included offense of the latter.

CONCLUSION

Because the trial court erred in refusing to admit the excited utterances of the unknown male bystander, we reverse on this issue. Accordingly, LaCoste's convictions are reversed and remanded for a new trial consistent with this opinion. See State v. Bryant, 316 S.C. 216, 447 S.E.2d 852 (1994) (wherein supreme court reversed all of the appellant's remaining convictions, including resisting arrest, where the trial court improperly admitted evidence pitting witnesses).

REVERSED AND REMANDED.

SHULER, J., concurs.

ANDERSON, J., dissents in a separate opinion.

ANDERSON, J. (dissenting): I respectfully dissent. The majority concludes the trial court erred in refusing to admit certain hearsay statements made by an unknown male bystander. In addition, the majority holds simple assault is a lesser included offense of criminal domestic violence. I disagree as to both issues.

I. STATEMENTS MADE BY UNKNOWN MALE BYSTANDER

LaCoste complains the trial court erred in refusing to admit, under the exception for either excited utterance or present sense impression, certain hearsay statements made by an unknown male bystander which corroborated LaCoste's testimony. I disagree.

The admission of evidence is within the sound discretion of the trial court. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000); State v. James, Op. No. 3361 (S.C. Ct. App. filed June 25, 2001)(Shearouse Adv. Sh. No. 23 at 86). A court's ruling on the admissibility of evidence will not be reversed by this Court absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001); State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000).

South Carolina's hearsay exceptions for excited utterances and present sense impressions are identical to those contained in the federal rules of evidence. State v. Burroughs, 328 S.C. 489, 492 S.E.2d 408 (Ct. App. 1997). The Advisory Committee's Notes to Federal rule 803, subsections (1) and (2) state that when the declarant is an unidentified bystander, the cases indicate hesitancy in upholding the statement alone as sufficient. Fed. R. Evid. 803(1), (2) advisory committee's note.

A. Excited Utterance Exception

The issue regarding the admissibility under Rule 803(2), SCRE, of hearsay statements made by unknown declarants was examined by our Supreme Court in State v. Hill, 331 S.C. 94, 501 S.E.2d 122 (1998). Hill was found

guilty of murdering a police officer in a car wash parking lot after the officer stopped him. Hill's defense at trial was that someone who had been hiding in the backseat of his car shot the officer. In support of this claim, Hill offered the testimony of Kenneth Grant, who was a block away from the car wash when the shooting occurred. Grant arrived at the car wash fifteen minutes after the shooting. Grant testified in camera that after being at the car wash for approximately fifteen or twenty minutes, he heard an unidentifiable person in the crowd state that there were two suspects. The trial judge ruled this hearsay testimony was inadmissible.

On appeal, Hill contended the trial judge erred in refusing to allow Grant to testify as to the hearsay evidence under the excited utterance or res gestae exception. The Supreme Court disagreed with Hill and explained:

> Rule 803(2), SCRE, states: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."
>
> The rationale behind the excited utterance exception is that the startling event suspends the declarant's process of reflective thought, thus reducing the likelihood of fabrication. See State v. Harrison, 298 S.C. 333, 380 S.E.2d 818 (1989)(decided prior to the adoption of the Rules of Evidence but discussed the "excited utterance" exception in relation to res gestae). In determining whether a statement falls within the excited utterance exception, the totality of the circumstances is viewed. Id.
>
> "Statements which are not based on firsthand information, as where the declarant was not an actual witness to the event, are not admissible under the excited utterance or spontaneous declaration exception to the hearsay rule." 23 C.J.S. Crim. Law § 876 (1989). The hearsay statement of an unknown bystander is admissible under the excited utterance exception only when the circumstances which

> surround it would affect the declarant in a way that assures its spontaneity and, therefore, its reliability for trustworthiness. People v. Mares, 705 P.2d 1013, 1016 (Colo. App. 1985). See also People v. Fields, 71 Ill.App.3d 888, 28 Ill.Dec. 202, 390 N.E.2d 369 (1979) (if nature of event or circumstances indicate bystander did not observe the act, declaration should be excluded); State v. Kent, 157 Mich.App. 780, 404 N.W.2d 668 (1987)(declarant must have had opportunity to personally observe the matter of which he speaks); Commonwealth v. Stetler, 494 Pa. 551, 431 A.2d 992 (1981) (declarant must have perceived the happening); Underwood v. State, 604 S.W.2d 875 (Tenn. Crim. App. 1979)(excited utterance of bystanders admissible when declarant observed the act and the declaration arose from personal observation). Cf. Crawford v. Charleston-Isle of Palms Traction Co., 126 S.C. 447, 120 S.E. 381 (1923)(under res gestae exception, declarant must have had opportunity to personally observe the matter of which he speaks).
>
> There is no evidence the unidentified declarant witnessed the shooting. Further, it is unknown whether the declarant was under the stress of excitement caused by the event. Therefore, the trial judge did not err in ruling this statement inadmissible.

Hill, 331 S.C. at 99-100, 501 S.E.2d at 125.

Statements made by unidentified declarants are admissible under the excited utterance exception of Rule 803(2) if they otherwise meet the criteria of the rule. Miller v. Keating, 754 F.2d 507 (3rd Cir. 1985). Unlike unavailability, which is immaterial to admission under Rule 803, the unidentifiability of the declarant is germane to the admissibility determination. Id. A party seeking to introduce such a statement carries a burden heavier than where the declarant is identified to demonstrate the statement's circumstantial trustworthiness. Id. At a minimum, when the declarant of an excited utterance is unidentified, it becomes more difficult to satisfy the established case law requirements for admission of a statement under Rule 803(2). Id. "Wigmore defines these requirements as: (1) a startling occasion, (2) a statement relating to the

circumstances of the startling occasion, (3) a declarant who appears to have had opportunity to observe personally the events, and (4) a statement made before there has been time to reflect and fabricate." Id. at 510 (citing 6 J. Wigmore, Evidence §§ 1750-51 (J. Chadbourn rev. 1976)).

The situation of an unavailable, anonymous, unknown declarant who makes a hearsay statement presents serious concerns for a court considering whether to admit the statement into evidence. The fact that the statements at issue here were made by an unidentified bystander raises the question of reliability.

In the present case, there is no evidence the circumstances which surround the hearsay statements affected the unknown declarant in a way that assures the spontaneity of the statement and, therefore, its reliability for trustworthiness. See Hill, 331 S.C. at 99-100, 501 S.E.2d at 125. Further, it was never ascertained whether the utterance was made while the unknown declarant was under the stress of excitement caused by the incident, as is required by Rule 803(2), SCRE. Although Officer Jeffrey Cornwell testified the declarant was "agitated," this state of agitation could have been caused by some event other than the altercation.

Additionally, there was no evidence, other than the declarant's statement, to establish the unknown declarant was an actual witness to the event and was giving firsthand information. When there is no evidence of personal observation of the startling event, apart from the declaration itself, courts have hesitated to allow the excited utterance to stand alone as evidence of the declarant's opportunity to observe. See Miller, 754 F.2d at 511. See also State v. Bass, 12 P.3d 796 (Ariz. 2000)(where sole evidence of declarant's personal perception is declaration itself, courts are reluctant to allow excited utterance to stand alone as evidence of declarant's opportunity to observe); Cluster v. Cole, 319 A.2d 320 (Md. Ct. Spec. App. 1974)(hearsay declaration by unidentified witness to accident ruled inadmissible where nothing in statement or circumstances under which it was given would make it so inherently trustworthy as to dispense with oath and right to cross-examination). The declarant of an excited utterance must

personally observe the startling event before the statement will be admitted. Miller, 754 F.2d at 511.

Officer Cornwell and James Whiting, the mall security officer, testified they did not know whether the man was in fact an eyewitness. All the two men could say with certainty was that the unknown declarant was in the parking lot at the time of LaCoste's arrest. Officer Cornwell declared he did not "notice" the unknown declarant when he arrived at the scene. The mere fact that the unknown declarant stated he witnessed the altercation does not lend any more credence or trustworthiness to the out-of-court statements. See Carney v. Pennsylvania R.R. Co., 240 A.2d 71 (Pa. 1968).

There was no proof the unknown declarant had an adequate opportunity to observe the events he described. The man spoke with Officer Cornwell and Officer Whiting after LaCoste was arrested. We have no way of knowing where this unidentified person was at the time the altercation began, what ability this person might have had to hear or see what transpired, and whether the person had a relationship with the defendant so as to be biased or prejudiced in LaCoste's favor. The allowance of this type of nebulous evidence, which cannot be effectively challenged, is an open invitation to fabrication.

Whether a statement is admissible under the excited utterance exception to the hearsay rule depends on the circumstances of each case and the determination is generally left to the sound discretion of the trial court. State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999). The trial court did not abuse its discretion in concluding the statements were not admissible under the excited utterance exception because there was no sufficient showing of reliability.

B. Present Sense Impression Exception

LaCoste's assertion that the statements should alternatively be admitted under the present sense impression exception is meritless. Rule 803(1), SCRE provides an exception to the hearsay rule for a present sense impression, which is defined as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately

thereafter." Trustworthiness is the cornerstone of Rule 803 exceptions to the hearsay rule. State v. Bass, 12 P.3d 796 (Ariz. 2000). In the case at bar, there is no proof, other than the declarant's statement, that the unknown declarant "perceived" the altercation.

Viewing the totality of the circumstances, I find the statements of the unknown male bystander should not have been admitted. Thus, the trial court did not err in excluding the testimony of Officer Cornwell and Security Officer Whiting as to the hearsay statements made by the unknown male bystander.

II. SIMPLE ASSAULT IS NOT LESSER INCLUDED OFFENSE OF CRIMINAL DOMESTIC VIOLENCE

LaCoste contends the trial court erred in charging the law of simple assault because it is not a lesser included offense of criminal domestic violence. I agree.

A Circuit Court has subject matter jurisdiction only if: (1) there has been an indictment which sufficiently states the offense; (2) there has been a waiver of indictment; or (3) the offense is a lesser included offense of the crime charged in the indictment. State v. Lynch, 344 S.C. 635, 545 S.E.2d 511 (2001); Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998). Upon indictment for a greater offense, a trial court has subject matter jurisdiction to convict a defendant for any lesser included offense. Browning v. State, 320 S.C. 366, 465 S.E.2d 358 (1995); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999).

The scope of the jurisdiction conferred by an indictment is limited to the charged offense and any lesser-included offenses. State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993); State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999). The trial court lacks subject matter jurisdiction to convict the defendant of a crime that is not a lesser included of the offense charged in the indictment. State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000). See also State v. Roof, 298 S.C. 351, 380 S.E.2d 828 (1989)(defendant cannot be convicted of crime for which he is not indicted if it is not lesser included offense to that

charged in indictment). The general rule is that an indictment will sustain a conviction for a lesser offense included within a greater offense charged. State v. Fennell, 263 S.C. 216, 209 S.E.2d 433 (1974).

The test for determining whether a crime is a lesser included offense of that charged in the indictment is whether the greater of the two offenses includes all the elements of the lesser offense. McFadden, 342 S.C. at 632, 539 S.E.2d at 389; Carter, 329 S.C. at 363, 495 S.E.2d at 777; State v. Sprouse, 325 S.C. 275, 478 S.E.2d 871 (Ct. App. 1996). Thus, if the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater. Hope v. State, 328 S.C. 78, 492 S.E.2d 76 (1997); State v. Bland, 318 S.C. 315, 457 S.E.2d 611 (1995). See also State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997)(lesser offense is included in greater only if each of its elements is always a necessary element of greater offense); 42 C.J.S. Indictments and Informations § 218 (1991)(an offense can be considered as lesser included if, and only if, all essential elements of lesser offense are included among essential elements of greater offense). If, under any circumstances, a person can commit the greater offense without being guilty of the purported lesser offense, then the latter is not a lesser-included offense. Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000).

Generally, a lesser included offense is one composed of some, but not all, of the elements of the greater offense, and which does not have any element not included in the greater offense, so that it is impossible to commit the greater offense without also committing the lesser offense. 42 C.J.S. Indictments and Informations § 218 (1991). An offense is a lesser included one of another only if, in order to commit the greater offense, it is necessary to commit the lesser. 21 Am. Jur. 2d Criminal Law § 353 (1998). Where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense. 41 Am. Jur. 2d Indictments and Informations § 299 (1995). The lesser offense is a lesser-included offense if proof of every fact necessary to show the lesser offense must be proven to show the greater, notwithstanding the greater offense may require proof of several additional elements. 21 Am. Jur. 2d Criminal Law § 353.

An offense is lesser included if the manner and means used to commit the essential elements of the charged crime include all the elements of the lesser crime. 42 C.J.S. Indictments and Informations § 218. An offense, in order to be a lesser included offense, must be a less serious crime in terms of its classification and degree, and no offense is deemed to be a lesser offense if it carries the same penalty as the crime under consideration. Id. Furthermore, a lesser included offense cannot have a mental state greater than or different from that which is required for the charged offense, nor can it have the same or more serious injury or risk of injury as compared to the charged offense. Id. A lesser included offense is one that requires no proof beyond that which is required for conviction of the greater offense. State v. Cribb, 310 S.C. 518, 426 S.E.2d 306 (1992). The greater offense must include all the elements of the lesser. Id.

In the instant case, LaCoste was charged with criminal domestic violence (CDV). He was convicted of simple assault. For the trial court to have jurisdiction to convict LaCoste for simple assault when he was indicted for CDV, simple assault must be a lesser included offense of CDV. Simple assault can be a lesser included offense of CDV only if CDV contains all the elements of simple assault.

South Carolina Code Ann. § 16-25-20 (Supp. 2000) sets out the definition of criminal domestic violence:

> It is unlawful to: (1) cause physical harm or injury to a person's own household member, (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

In contrast, the crime of assault involves an "attempted battery" or an unlawful attempt or offer to commit a violent injury upon the person of another, coupled with the present ability to complete the attempt or offer by a battery. State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000); State v. Mims, 286 S.C. 553, 335 S.E.2d 237 (1985); State v. Murphy, 322 S.C. 321, 471 S.E.2d 739 (Ct. App. 1996). In addition, the Court has defined an assault as placing another in

apprehension of harm. Sutton, 340 S.C. at 397, 532 S.E.2d at 285. In In re McGee, 278 S.C. 506, 508, 299 S.E.2d 334, 334 (1983), the Supreme Court held that "[w]hile words alone do not constitute an assault, if by words and conduct a person intentionally creates a reasonable apprehension of bodily harm, it is an assault." (Citation omitted).

Facially, the offense of assault contains two elements not found in the greater offense of CDV. The difference in elements between these two offenses is that (1) an assault requires a "violent" injury, as opposed to the "physical harm or injury" element of CDV and (2) the assault must be to the "person of another," whereas the CDV is limited to a person's "own household member." Each offense requires proof of an element not required by the other. These differences are dispositive. Because CDV does not necessarily include all elements of assault, the latter cannot be a lesser included offense.

Further, the legislative intent is compelling. First, the legislature could have used the phrase, "violent injury," in § 16-25-20 in place of the phrase, "physical harm or injury," if it meant for the two phrases to be synonymous. Second, the fundamental purpose of § 16-25-20 of the CDV Act is to protect against harm and violence from **members of an individual's household**. Arthurs v. Aiken County, 338 S.C. 253, 525 S.E.2d 542 (Ct. App. 1999). Household members are the class of persons intended to be protected by the CDV statute. Id. The common law definition of assault refers to a broader protected class, "the person of another."

The offenses of assault and criminal domestic violence were not contemplated by the legislature to be considered together. The two offenses protect different societal interests. Assault is a broad encompassing common law offense. Criminal domestic violence is a targeted offense to protect "household members." The legislative purpose of the CDV Act is crystal clear. The intent of the General Assembly is demonstrated with clarity from the language and framework of the legislative enactment.

Assault is not a lesser included offense of criminal domestic violence. The trial court erred in charging the jury as to simple assault. Consequently, the court lacked subject matter jurisdiction to convict LaCoste of assault.

III. CONCLUSION

The trial court did not err in refusing to admit the hearsay statements of the unknown male bystander. However, because simple assault is not a lesser included offense of criminal domestic violence, the trial court committed reversible error in charging the jury as to simple assault. Accordingly, I would reverse LaCoste's convictions and remand for a new trial.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Margaret T. Carrigg and Marilyn T. Schmitt, as Personal Representatives of the Estate of Katherine T. Reese,

Respondents,

v.

Al Cannon in his Official Capacity as Sheriff of Charleston County, South Carolina,

Appellant.

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Appeal From Charleston County
Gerald C. Smoak, Sr., Circuit Court Judge

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Opinion No. 3384
Heard December 14, 2000 - Filed September 10, 2001

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REVERSED AND REMANDED

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Stephen Bucher, of The Bucher Firm, of Charleston, for appellant.

Gedney M. Howe, III, of Charleston; and H. Stanley Feldman, of N. Charleston, for respondents.

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PER CURIAM: This wrongful death action arises from the death of Katherine T. Reese after her vehicle was struck by a patrol car driven by a Charleston County sheriff's deputy. Margaret T. Carrigg and Marilyn T. Schmitt (Respondents), as personal representatives of Reese's estate, brought this action against Sheriff Al Cannon pursuant to the South Carolina Tort Claims Act, South Carolina Code Annotated §§ 15-78-10 to -200 (Supp. 2000) (SCTCA). The circuit court granted Respondents' motion for partial summary judgment, holding Cannon was collaterally and judicially estopped from disputing liability based on the deputy's guilty plea to reckless driving and his statements about the accident. We reverse and remand.

BACKGROUND

On February 10, 1998, Reese was pulling onto Highway 171 from Southgate Drive when her vehicle was struck by a patrol car traveling north on Highway 171 and driven by Deputy Kenneth Heider. The intersection was controlled by a stop sign on Southgate Drive. Heider, who was on his way to a hearing, admitted he was speeding at the time of the accident and did not have his blue light activated. Reese died at the scene.

Heider was indicted for reckless homicide and pled guilty in August 1998 to the reduced charge of reckless driving. Shortly thereafter, Respondents commenced this wrongful death action against Cannon in his official capacity as Sheriff of Charleston County.

Respondents moved for partial summary judgment, arguing Cannon was collaterally and judicially estopped from disputing liability based on Heider's guilty plea to reckless driving and his statement during the plea proceeding that he accepted "full responsibility" for the accident. Cannon countered by arguing collateral and judicial estoppel were inapplicable in this case and there remained unresolved issues of fact to be determined. Cannon argued Reese's own negligence contributed to the accident because her impaired eyesight from macular degeneration prevented her from seeing Heider's vehicle and resulted in her failing to yield the right of way.

The circuit court granted partial summary judgment in favor of Respondents as to liability. The court found Cannon was in privity with Heider, who was acting in the course and scope of his employment at the time of the accident. Therefore, the court reasoned, collateral and judicial estoppel prevented Cannon from disputing Heider's "reckless conduct was the proximate cause of [Reese's] injury and death[.]" The court concluded Cannon was liable to Respondents "for damages in such amount as the Court or Jury may hereafter determine." Cannon appeals.

STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; see also Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) (noting summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party opposing summary judgment. Summer v. Carpenter, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997).

DISCUSSION

Cannon contends the circuit court erred in finding the doctrines of collateral and judicial estoppel barred him from disputing liability based on the court's erroneous assumption that Cannon was in privity with Heider. We agree.

I. Collateral Estoppel

"Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the

parties and their privies in any subsequent action based upon a different claim." Richburg v. Baughman, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986); see also Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 251, 481 S.E.2d 706, 707 (1997) (noting collateral estoppel or issue preclusion prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action). The party asserting collateral estoppel "must show that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment." Beall v. Doe, 281 S.C. 363, 371, 315 S.E.2d 186, 191 (Ct. App. 1984) (citing in part Restatement (Second) of Judgments § 27 (1982)). See, e.g., Shelton, 325 S.C. at 254, 481 S.E.2d at 709 (holding Employment Security Commission's findings of fact that an employee was discharged without cause would not be given preclusive effect on the basis of collateral estoppel in employee's subsequent civil action against employer for wrongful termination).

Only a party to a prior action or one in privity with a party to a prior action can be precluded from relitigating an issue on the basis of offensive collateral estoppel.[1] Ex parte Allstate Ins. Co., 339 S.C. 202, 206, 528 S.E.2d 679, 681 (Ct. App. 2000); Wade v. Berkeley County, 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct. App. 1998) ("A party may assert nonmutual collateral estoppel to prevent relitigation of a previously litigated issue unless the party sought to be precluded did not have a fair and full opportunity to litigate the issue in the first proceeding, or unless other circumstances justify providing the party an opportunity to relitigate the issue.").

"'[T]he term "privity," when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right.'" Allstate, 339 S.C. at 207, 528 S.E.2d at 681 (quoting Roberts v. Recovery

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[1] We are mindful of our supreme court's recent decision in Doe v. Doe, Op. No. 25341 (S.C. Sup. Ct. filed August 13, 2001) (Shearouse Adv. Sh. No. 29 at 23). However, the lack of mutuality discussed therein is not the same as the privity at issue here.

Bureau, Inc., 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994)). As the Wade court explained:

> Privity deals with a person's relationship to the subject matter of the previous litigation, not to the relationships between entities. To be in privity, a party's legal interests must have been litigated in the prior proceeding. Having an interest in the same question or in proving or disproving the same set of facts does not establish privity. Nor is privity found when the litigated question might affect a person's liability as a judicial precedent in a subsequent action.

330 S.C. at 317, 498 S.E.2d at 687 (citations omitted). Due process concerns prohibit estopping litigants who never had a chance to present their evidence and arguments on a claim, despite one or more existing adjudications of the identical issue which stand squarely against their position. Richburg, 290 S.C. at 434-35, 351 S.E.2d at 166.

Even where all the elements for collateral estoppel are met, it will not be rigidly or mechanically applied, and the application of the doctrine may be precluded where unfairness or injustice results, or public policy requires it. State v. Bacote, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998) (holding that in a subsequent criminal action for driving under the influence, collateral estoppel did not apply to issues decided at a prior administrative hearing held pursuant to implied consent statute).

The circuit court found Cannon and Heider, as sheriff and deputy, were in privity because Heider was acting within the course and scope of his employment at the time of the accident. The circuit court also noted "Heider, in privity with [Cannon], had a full opportunity in the criminal proceeding to have pled not guilty and have a jury determine whether his driving, which undisputedly resulted in the death of [Reese], was reckless." Respondents argue that since the underlying action is premised on the SCTCA, Cannon, as the agency or political subdivision for which Heider was acting at the time of the

accident, is liable for the tortious conduct of his deputy, "making privity between the employee and the agency/political subdivision inescapable."

The circuit court and Respondents both incorrectly analyze the question of privity by focusing on Cannon and Heider's relationship. For purposes of collateral estoppel, privity turns on Cannon's relationship to the subject matter litigated in the prior proceeding, not Cannon and Heider's relationship to each other. Although Respondents assert privity is established since they would have to bring a claim against Cannon in his official capacity under the SCTCA instead of directly suing Heider, this statutory requirement sheds no light on the issue of privity. To be in privity, Cannon's legal interests must have been represented or litigated during Heider's criminal proceeding and, clearly, this was not the case. Cannon's legal interest in the civil action stands in sharp contrast to Heider's legal interest in the criminal case. Moreover, as a representative of law enforcement, Cannon's interest during the guilty plea proceeding would be more aligned with the prosecution than with Heider, as an indicted defendant, thereby creating a potential conflict of interest for Cannon that would foreclose a finding of privity in a subsequent lawsuit. See 50 C.J.S. Judgment § 830 (1997) ("Actual or potential conflicts of interest in the previous litigation will negate the necessary element of adequate representation to establish privity." (footnote omitted)).

While the circuit court correctly notes Heider had an opportunity to fully litigate his criminal responsibility, once again, this analysis is misplaced. For the sake of privity, the question is whether Cannon, not Heider, had a full and fair opportunity to litigate the issue of Heider's civil liability, especially in light of Reese's possible comparative negligence. During Heider's guilty plea proceeding, Cannon was unable to present evidence or arguments, had no control over Heider's decision to plead guilty or proceed to trial, and could not have intervened as a party in a criminal proceeding. As such, due process and fairness concerns weigh against finding privity between Cannon and Heider. Therefore, the circuit court erred in ruling Cannon was collaterally estopped from disputing Heider's conduct was the proximate cause of Reese's death.

II. Judicial Estoppel

"Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). In Hayne, the supreme court adopted the doctrine of judicial estoppel as to inconsistent statements of fact but not for conclusions of law or assertions of alternative legal theories. Id.; Quinn v. Sharon Corp., 343 S.C. 411, 414, 540 S.E.2d 474, 475 (Ct. App. 2000). The Hayne court stated "[t]he purpose or function of the doctrine is to protect the integrity of the judicial process or the integrity of courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries." 327 S.C. at 251, 489 S.E.2d at 477 (relying on 31 C.J.S. Estoppel & Waiver § 139 (1996)). See also Hawkins v. Bruno Yacht Sales, Inc., 342 S.C. 352, 368, 536 S.E.2d 698, 706 (Ct. App. 2000) ("[J]udicial estoppel focuses on the relationship between the litigants and the judicial system."). Since judicial estoppel precludes parties from misrepresenting the facts in order to gain an unfair advantage, once "a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him." Hayne, 327 S.C. at 252, 489 S.E.2d at 477.

Although our supreme court has not explicitly stated the requirements for judicial estoppel to apply, five circumstances are generally necessary: (1) two inconsistent positions must be taken by the same party or parties in privity with each other; (2) the positions must be taken in the same or related proceedings involving the same parties or parties in privity with each other; (3) the party taking the position must have been successful in maintaining the first position and must have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. 28 Am. Jur. 2d Estoppel & Waiver § 74 (2000); see also Lowery v. Stovall, 92 F.3d 219, 223-24 (4th Cir. 1996) (noting certain common elements of judicial estoppel are: (1) the party sought to be estopped must be asserting a position of fact that is inconsistent with a stance taken during prior litigation; (2) the prior inconsistent position must have been accepted by the court; and (3) the party sought to be estopped must have intentionally misled the court to gain an unfair advantage).

However, "[b]ecause judicial estoppel is an equitable concept, depending upon the facts and circumstances of each individual case, application of the doctrine is discretionary." Hawkins, 342 S.C. at 368, 536 S.E.2d at 706. See also Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 (4th Cir. 1982) (observing judicial estoppel should be applied with caution); 28 Am. Jur. 2d Estoppel & Waiver § 75 (2000) (noting judicial estoppel is an equitable concept that must be applied with caution and in the narrowest of circumstances at the discretion of the trial court).

Since Cannon was not a party to the guilty plea proceeding, either personally or in his official capacity, the question arises whether judicial estoppel may be invoked against him if he is indeed in privity with Heider. South Carolina law does not specifically address this question, although some authority exists for extending the concept of judicial estoppel to parties in privity. See, e.g., 28 Am. Jur. 2d Estoppel & Waiver § 74.

However, we find it unnecessary to reach this issue because, under the facts and circumstances of this case, we find Cannon and Heider are not in privity for the purpose of applying judicial estoppel. For essentially the same reasons outlined in the discussion on privity in connection with the collateral estoppel issue, the trial court erred in finding Cannon and Heider were in privity and determining judicial estoppel applied. Heider's guilty plea was entered on an individual basis, totally apart from his official duties as a deputy sheriff. Cannon had no control over what Heider said or did during the guilty plea proceeding. In short, Heider was representing his own personal interests and not acting as an official representative of the sheriff's department while entering his guilty plea. The discretionary nature of judicial estoppel is such that it should not be applied if doing so would work "an injustice against the party being estopped while simultaneously subverting the judicial process." Hawkins, 342 S.C. at 368, 536 S.E.2d at 706. Therefore, even if judicial estoppel may be invoked against those in privity in South Carolina, under the facts and circumstances of this case, Cannon and Heider are not in privity and judicial estoppel does not apply.

CONCLUSION

For the foregoing reasons,[2] the circuit court's grant of partial summary judgment to Respondents on the issue of liability is

REVERSED AND REMANDED.

GOOLSBY, HUFF, and STILWELL, JJ., concur.

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[2] Although Cannon raises several grounds on appeal, since we are reversing the trial court's decision on the basis of the privity issue, we find it unnecessary to reach Cannon's remaining arguments.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Ferrell Cothran, Personal Representative of the Estate of Douglas H. McFaddin,

Respondent,

v.

Alvin Brown,

Appellant.

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

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Opinion No. 3385
Heard December 14, 2000 - Filed September 10, 2001

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REVERSED AND REMANDED

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William B. Woods, Donna Seegars Givens and Darra James Vallini, all of Woods & Givens, of Lexington; and Samuel R. Clawson and Timothy A. Domin, both of Clawson & Staubes, of Charleston, for appellant.

Gedney W. Howe, III, of Charleston; John C. Land, of Land, Parker & Reeves, of Manning; and Daniel H. Shine, of Dillon, for respondent.

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PER CURIAM: Ferrell Cothran, as personal representative of the estate of Douglas H. McFaddin, brought this action asserting wrongful death and survival claims against Alvin Brown after McFaddin was struck and killed by a vehicle driven by Brown. The circuit court granted Cothran partial summary judgment on liability based on the doctrine of judicial estoppel after Brown pled guilty to reckless homicide. We reverse and remand.

BACKGROUND

At approximately 8:45 p.m. on December 2, 1995, McFaddin parked his truck near a curve on the eastbound shoulder of Rainbow Lake Road facing westbound with the headlights on. Apparently, McFaddin, who was hunting in the area, had pulled over and exited his truck to call for his dogs.

At about the same time, Brown was traveling east on Rainbow Lake Road. According to Brown, as he approached the curve he noticed what appeared to be headlights in his lane of travel, so he veered off the road to the right to avoid a head-on collision. Brown's car struck both the truck and McFaddin, resulting in McFaddin's death. Brown failed several field sobriety tests and registered a .17 on a breathalyzer.

Brown was indicted for felony driving under the influence (DUI) and pled guilty to reckless homicide.[1] Although Brown faced the possibility of a ten-year sentence, the circuit court sentenced him to six years imprisonment. S.C. Code Ann. § 56-5-2910 (Supp. 2000).

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[1] At the time this action arose, reckless homicide was considered a lesser included offense of felony DUI in cases where death occurred. State v. King, 289 S.C. 371, 373, 346 S.E.2d 323, 323 (1986). The supreme court overruled King in State v. Cribb, 310 S.C. 518, 523-24, 426 S.E.2d 306, 310 (1992), and held that reckless homicide was not a lesser included offense of felony DUI.

Six months later, McFaddin's wife brought a civil action asserting wrongful death and survival claims against Brown. The complaint was amended after Cothran was substituted as personal representative of McFaddin's estate. Brown answered and admitted his vehicle ran off the paved portion of the highway and struck McFaddin, causing his death. However, Brown asserted comparative negligence as a defense, arguing McFaddin, who had parked his truck on the wrong side of the roadway, facing traffic, at night, and with its headlights on, had created a hazard for approaching motorists such as Brown.

Cothran moved for summary judgment as to liability, arguing there was no genuine issue of material fact as to whether Brown's negligence alone proximately caused McFaddin's death.

The circuit court granted partial summary judgment to Cothran on liability, leaving damages to be determined by a jury. The circuit court found the doctrine of judicial estoppel precluded Brown from disputing that his recklessness was the proximate cause of McFaddin's death. The court found Brown's current position that McFaddin contributed to the accident was inconsistent with his position during the guilty plea proceeding. Specifically, the circuit court noted that during the guilty plea hearing, Brown admitted to drinking alcohol the night the accident occurred, to hitting McFaddin with his vehicle, and to being guilty of reckless driving. The court observed, "Defendant's lawyer at the taking of the plea indicated to the Court on behalf of the Defendant that [McFaddin] was not to blame whatsoever for this accident and that the bottom line cause of the accident was Brown's consumption of alcohol that evening. His plea reflects that he told the sentencing Court he accepted sole responsibility for the accident and was willing to take the consequences." The circuit court found the plea judge had accepted Brown's prior position because the court gave him a reduced sentence. Brown's efforts to assert his present position, the circuit court added, was an intentional attempt to mislead the court in order to gain an unfair advantage in the civil suit.

STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; see also Etheredge v. Richland School Dist. One, 341 S.C. 307, 311, 534 S.E.2d 275, 277 (2000) ("Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed."). In ruling on a motion for summary judgment, the evidence and inferences which can be drawn therefrom must be viewed in the light most favorable to the party opposing summary judgment. Garvin v. Bi-Lo, Inc., 343 S.C. 625, 628, 541 S.E.2d 831, 833 (2001).

DISCUSSION

While Brown raises several issues on appeal, his arguments essentially boil down to one dispositive issue: whether he is judicially estopped from litigating the issue of comparative negligence in the subsequent civil suit because of his guilty plea to the criminal charge arising from the same incident. Based on the facts and circumstances of this case, we agree the circuit court erred in holding judicial estoppel applied in a preclusive fashion.[2]

The supreme court adopted the doctrine of judicial estoppel in Hayne Federal Credit Union v. Bailey, stating, "Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). The Hayne court

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[2] As a threshold issue, State Auto, as the uninsured motorist carrier for McFaddin, argues that although it has undertaken the defense of Brown pursuant to South Carolina Code Annotated § 38-77-150 (Supp. 2000), it maintains rights separate and distinct from Brown and should not be precluded on the basis of judicial estoppel. However, because we are reversing on other grounds, we find it unnecessary to address this argument.

limited the application of judicial estoppel to inconsistent statements of fact, not for conclusions of law or assertions of alternative legal theories. Id.; Quinn v. Sharon Corp., 343 S.C. 411, 414, 540 S.E.2d 474, 475 (Ct. App. 2000). The Hayne court further explained "[t]he purpose or function of the doctrine is to protect the integrity of the judicial process or the integrity of courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries." 327 S.C. at 251, 489 S.E.2d at 477 (relying on 31 C.J.S. Estoppel & Waiver § 139, at 593 (1996)). See also Hawkins v. Bruno Yacht Sales, Inc., 342 S.C. 352, 368, 536 S.E.2d 698, 706 (Ct. App. 2000) ("[J]udicial estoppel focuses on the relationship between the litigants and the judicial system."); 28 Am. Jur. 2d Estoppel & Waiver § 74 (2000) (noting the ultimate goal of judicial estoppel is to protect the courts, not the opposing party, from being manipulated by "chameleonic litigants who seek to prevail, twice, on opposite theories"). Under the doctrine of judicial estoppel, a party is precluded from misrepresenting the facts in order to gain an unfair advantage. Hayne, 327 S.C. at 252, 489 S.E.2d at 477. Once "a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him." Id.

Although the Hayne court did not explicitly state the requirements for the application of judicial estoppel, five circumstances are generally necessary: (1) two inconsistent positions must be taken by the same party or parties in privity with each other; (2) the positions must be taken in the same or related proceedings involving the same parties or parties in privity with each other; (3) the party taking the position must have been successful in maintaining the first position and must have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. 28 Am. Jur. 2d Estoppel & Waiver § 74. Likewise, the Fourth Circuit noted some common elements of judicial estoppel as: (1) the party sought to be estopped must be asserting a position of fact that is inconsistent with a stance taken during prior litigation; (2) the prior inconsistent position must have been accepted by the court; and (3) the party sought to be estopped must have intentionally misled the court to gain an unfair advantage. Lowery v. Stovall, 92 F.3d 219, 223-24 (4th Cir. 1996).

Still, "[b]ecause judicial estoppel is an equitable concept, depending upon the facts and circumstances of each individual case, application of the doctrine is discretionary." Hawkins, 342 S.C. at 368, 536 S.E.2d at 706. See also Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 (4th Cir. 1982) (observing judicial estoppel should be applied with caution); 28 Am. Jur. 2d Estoppel & Waiver § 75 (2000) (noting judicial estoppel is an equitable concept that must be applied with caution and in the narrowest of circumstances at the discretion of the trial court). An appellate court will overturn an application of judicial estoppel that works "an injustice against the party being estopped while simultaneously subverting the judicial process." Hawkins, 342 S.C. at 368, 536 S.E.2d at 706.

The trial court relied in part on Lowery, 92 F.3d 219. Lowery brought a § 1983 action against police officers, alleging that they had violated his constitutional rights by using excessive force and failing to protect him from such force. Id. at 221. While the civil action was pending, Lowery pled guilty to malicious bodily injury to the officers and signed a detailed statement, which was reviewed in court by the plea judge. Id. at 221-22. In the statement, Lowery admitted all the factual allegations supporting the plea, including the fact that he had cut one of the officers on the face and intended to maim and disable him. Id. The Fourth Circuit upheld the district court's dismissal of Lowery's § 1983 action, finding that Lowery's position in the civil suit, that he did not attack the police who shot him without provocation, presented a factual position inconsistent with the factual allegations accepted by the plea court and was calculated to intentionally mislead the district court in the civil case. Id. at 224-25.

Brown's case, however, is factually distinguishable from Lowery. First, Lowery is a case in which the criminal defendant was the plaintiff, not the defendant. Lowery also executed a written statement, reviewed on the record in open court, in which he conceded that he had discussed his case with defense counsel, including the implications of his plea on his civil case. Id. at 222.

Brown, on the other hand, signed no such statement.[3] Of greater importance, however, is the fact that Lowery's tort action did not involve comparative negligence. Therefore, Lowery's factual admissions during the plea were determinative on the issues raised in his subsequent civil suit.

In contrast, the facts that supported Brown's plea, such as his admission that he had been drinking, that he failed several field sobriety tests, that he registered .17 on a breathalyzer, that he hit McFaddin with his car, and that McFaddin later died from his injuries, are facts which are not completely determinative on the issue of comparative negligence in Cothran's subsequent civil suit. McFaddin's negligence, if any, was not an issue that had to be considered by the court in connection with Brown's plea to reckless homicide. See S.C. Code Ann. § 56-5-2910 (defining reckless homicide as "[w]hen the death of a person ensues within one year as a proximate result of injury received by the driving of a vehicle in reckless disregard of the safety of others"). Brown's recklessness did not have to be the sole proximate cause for him to be found guilty of reckless homicide so long as it is a proximate cause. The same concept is true in connection with the wrongful death suit, as the negligence of both Brown and McFaddin can combine to be the proximate cause of McFaddin's death. The difference is that in the civil context any negligence on the part of McFaddin would be used to reduce the amount of Cothran's recovery in direct proportion to the percentage of McFaddin's negligence under the concept of comparative negligence.

Cothran relies in part on Cooper v. County of Florence, 306 S.C. 408, 412 S.E.2d 417 (1991), for the proposition that simple negligence would not bar

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[3] In ruling that Brown was judicially estopped, the trial court apparently considered an affidavit dated March 3, 1997, in which Brown stated the accident "was all [his] fault and was caused by the fact that [he] had had too much to drink." However, the record does not show that this affidavit was submitted to or considered by the court during Brown's guilty plea proceeding. It should not, therefore, be considered for the purpose of determining whether judicial estoppel is applicable in the civil case.

recovery when the defendant is admittedly guilty of reckless behavior. However, this reliance is misplaced because contributory negligence was the applicable theory in Cooper. In Nelson v. Concrete Supply Co., 303 S.C. 243, 399 S.E.2d 783 (1991), the concept of contributory negligence was discarded in favor of the doctrine of comparative negligence, and even simple negligence, in the face of reckless behavior, could potentially reduce a claimant's recovery.

Guilty plea proceedings and civil tort actions based on negligence have substantially different consequences for defendants. The confessed guilt of a defendant in some circumstances may not be conclusive for judicial estoppel purposes on the issue of his civil liability for a wrong. In a recent collateral estoppel decision, our supreme court adopted "the rule that once a person has been criminally convicted he is bound by that adjudication in a subsequent civil proceeding based on the same facts underlying the criminal conviction." Doe v. Doe, Op. No. 25341 (S.C. Sup. Ct. filed August 13, 2001) (Shearouse Adv. Sh. No. 29 at 23, 26) (emphasis added). Although the rule implicates collateral rather than judicial estoppel, we note the court went on to hold that "it must be shown the identical issue must have necessarily been decided in the prior criminal action and be decisive in the present civil action. It must also be shown the party precluded from relitigating the issue, appellant here, must have had a full and fair opportunity to contest the prior determination." Id. at 27 (emphasis added) (citations omitted). While Brown is bound by his factual admissions from his guilty plea, the relative degree of culpability was not at issue nor was it decided in the prior proceeding. Because plaintiff's relative fault, if any, was not an issue in his guilty plea, Brown has not yet had a full and fair opportunity to contest it. We therefore hold the grant of summary judgment in Cothran's favor on the basis of judicial estoppel was inappropriate.

CONCLUSION

For the foregoing reasons, the circuit court's grant of partial summary judgment to Cothran on the issue of liability is

REVERSED AND REMANDED.

GOOLSBY, HUFF, and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Marilyn Bray and Allan Bray,

Appellants,

v.

Marathon Corporation, and Alabama Corporation; American Refuse Systems, Inc., a North Carolina Corporation; John Doe and Richard Doe,

Defendants,

of whom Marathon Corporation, and Alabama Corporation; and American Refuse Systems, Inc., a North Carolina Corporation; are,

Respondents.

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

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Opinion No. 3386
Heard April 4, 2001 - Filed September 10, 2001

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AFFIRMED IN PART; REVERSED IN PART; AND REMANDED

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Ray P. McClain, of Charleston; and Ronald J. Jebaily, of Jebaily & Glass, of Florence, for appellants.

Gary T. Culbreath and Ellen M. Adams, both of Collins & Lacy, of Columbia; and Saunders M. Bridges, of Bridges, Orr & Ervin, of Florence, for respondents.

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HOWARD, J.: Marilyn Bray brought this products liability action against Marathon Corporation ("Marathon"), the manufacturer of a trash compactor, and American Refuse Systems, Inc. ("ARS"), the lessor of the compactor, alleging claims of negligence, breach of warranty, and strict liability.[1] Bray seeks recovery as the user of the compactor for emotionally induced injuries she sustained as a result of witnessing the compactor crush her co-worker to death. Applying the negligence "bystander" requirements adopted by our supreme court in Kinard v. Augusta Sash and Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985), to all causes of action, the trial court granted summary judgment to Marathon and ARS because Bray did not have a close relationship with her co-worker. We conclude the Kinard bystander analysis is inapplicable to Bray's strict liability cause of action. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

FACTS

The facts, viewed in a light most favorable to Bray, are as follows. Baron Blackmon was a maintenance mechanic at General Electric's manufacturing plant located in Florence, South Carolina. Bray and Blackmon had been co-workers for approximately fifteen years. On March 5, 1994, Blackmon was

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[1] Allan Bray joined a claim for loss of consortium. His claim is dependant upon the viability of his wife's claim. For clarity, we refer throughout this opinion only to Marilyn Bray or "Bray," although the rulings also apply to the consortium claim of Allan Bray.

inside the "charge box" of a Ram-Jet Trash Compactor manufactured by Marathon and leased to General Electric by ARS. When Bray approached it to discard a bag of trash, Blackmon asked Bray to start the trash compactor. Bray declined, until Blackmon assured her it was safe to do so. Bray pressed the "start" button, causing the ram to move toward Blackmon instead of away from him. Blackmon called to Bray to reverse the compactor. Bray turned the manual override switch to "reverse," but the ram continued moving toward Blackmon. Bray attempted to stop the compactor, but the ram would remain stopped only as long as she maintained continuous pressure on the "stop" button. Blackmon was pinned inside the compactor, so Bray released the button and ran for help. Upon her return, she found Blackmon blue and unconscious. The ram had crushed him to death.

Bray filed this action against Marathon and ARS for breach of implied and express warranty, strict liability, and negligence, alleging she suffered serious and permanent physical injuries caused by the emotional trauma of witnessing Blackmon's death.[2]

Marathon and ARS moved for summary judgment, arguing Bray failed to state a cause of action because her claim did not meet the bystander requirements adopted by our supreme court in Kinard. The court granted summary judgment to Marathon and ARS, concluding Bray was a "bystander" to Blackmon's death and could not recover for her injuries because she was not closely related to him. See Kinard, 286 S.C. at 582-83, 336 S.E.2d at 467.

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[2] Although the trial court granted summary judgment to Marathon and ARS on all causes of action, Bray makes no argument as to the propriety of the ruling on the warranty claims. We, therefore, deem those issues abandoned. See Solomon v. City Realty Co., 262 S.C. 198, 201, 203 S.E.2d 435, 436 (1974); Muir v. C.R. Bard, Inc., 336 S.C. 266, 298, 519 S.E.2d 583, 600 (Ct. App. 1999).

Bray moved for reconsideration pursuant to Rule 59, SCRCP, arguing her claim was not a "bystander" cause of action. The court denied the motion, and Bray appeals.

STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from it in the light most favorable to the nonmoving party. Worsley Cos. v. Town of Mt. Pleasant, 339 S.C. 51, 55, 528 S.E.2d 657, 659 (2000). If triable issues exist, they must be submitted to the jury. Id. at 55, 528 S.E.2d at 660.

"The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999). "In such a situation, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991).

On appeal, this Court reviews the grant of summary judgment using the same standard applied by the trial court. Id. at 114, 410 S.E.2d at 545.

DISCUSSION

I. Negligence

Bray asserts two theories of recovery based upon negligence. She asserts a claim for negligence under a line of cases allowing recovery for injury as a result of mental and emotional trauma in the absence of physical impact and an action for negligent infliction of emotional distress under Kinard.

A. Cause of Action under Padgett

First, Bray argues her claims are supported by Padgett v. Colonial Wholesale Distributing Co., 232 S.C. 593, 103 S.E.2d 265 (1958), and other South Carolina cases allowing recovery for injury as a result of mental and emotional damages in the absence of physical impact. See Spaugh v. Atl. Coast Line R.R. Co., 158 S.C. 25, 155 S.E. 145 (1930); Mack v. S. Bound R.R. Co., 52 S.C. 323, 29 S.E. 905 (1898). We find Padgett inapplicable to support a cause of action in the current circumstances.

Padgett was not a products liability case. The plaintiff in Padgett was inside his house when he heard a "terrible noise and there was a jarring of the residence." 232 S.C. at 597, 103 S.E.2d at 266. The plaintiff opened his door and discovered a wholesale liquor truck had collided with his house. He remained outside after the accident for about two hours talking to officers at the scene and picking up debris. The next morning he was ill and later suffered from skin problems and nervousness. Relying upon previous cases, our supreme court ruled that the trial judge was correct in submitting to the jury the question of whether or not the plaintiff had sustained physical or bodily injury as a consequence of the shock, fright, and emotional upset he had experienced. Id. at 607-608, 103 S.E.2d at 272.

Bray asserts that Padgett is applicable in this instance. However, we note that unlike Bray, Padgett was a direct victim. He was in his house when it was jarred by the truck and he suffered physical damage to his property. His shock and distress did not result from witnessing an injury to another person but, presumably, from fear of harm to himself. Under Bray's version of the facts, she was never in harm's way. The negligence of Marathon and/or ARS, if any, did not operate directly against Bray, as it did against the plaintiff in Padgett. We do agree with Bray in her assertion that damages may be recovered in South

Carolina for bodily injuries suffered as a result of emotional and mental distress caused by a defendant's negligence in the absence of any physical impact. Kinard allows such an action in the absence of physical impact and without the requirement that the plaintiff be in the zone of danger. 286 S.C. at 582, 33 S.E.2d at 467.

Although we find that the Padgett line of cases is not applicable as a cause of action, the cases are helpful in understanding whether Bray's injuries are compensable as "physical harm" under a strict liability analysis as discussed later in this opinion.

B. Bystander Cause of Action under Kinard

Upon establishing that plaintiffs could recover for physical injury resulting from emotional trauma in the absence of physical impact, a problem arose concerning who could recover for these injuries. Physical harm directly resulting from physical impact is limited to the person or persons sustaining the physical impact. However, physical harm resulting from emotional trauma at witnessing some event could be experienced by all those who have perceived the traumatic event through their senses. These people have generally been described as bystanders.

Our supreme court recognized a cause of action for negligent infliction of emotional distress in a bystander setting in Kinard. 286 S.C. at 579, 336 S.E.2d at 465. In Kinard, a child was severely injured while riding in a car with her mother. The mother sought damages "for severe shock and emotional trauma" caused by witnessing her daughter's injury. Id. at 580-81, 336 S.E.2d at 466. To resolve the problem of disproportionate liability[3] which could arise from the recognition of bystander liability, the court approved the analysis of Dillon v. Legg, 441 P.2d 912 (Cal. 1968), in which the California Supreme Court adopted

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[3] See F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts 41-43 (2d ed.1997) (discussing limits to liability in cases involving emotional distress claims).

a "foreseeability" approach to negligent infliction of emotional distress claims. South Carolina incorporated these factors into a cause of action for the negligent infliction of emotional distress with the following elements:

> (a) the negligence of the defendant must cause death or serious physical injury to another; (b) the plaintiff bystander must be in close proximity to the accident; (c) the plaintiff and the victim must be closely related; (d) the plaintiff must contemporaneously perceive the accident; and (e) the emotional distress must both manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony.

Kinard, 286 S.C. at 582-83, 336 S.E.2d at 467 (emphasis added). With these factors, the court made a policy decision to limit the duty of a tortfeasor to certain foreseeable bystander victims – those who witness the event and are closely related to the victim. Bray is not related to Blackmon, and under a Kinard analysis, it is not foreseeable that she would be injured by witnessing his death. As a bystander, she cannot maintain a negligence action for the infliction of her emotional distress. The fact that the subject of the action is an unsafe product does not change the theory of recovery from that of negligence. See Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1996). Consequently, Kinard is controlling, and the trial court correctly granted summary judgment on this cause of action.

II. Strict Liability Cause of Action

The trial court also ruled that Bray could not maintain a cause of action under a strict liability theory because she failed to meet the requirements of Kinard. Bray asserts that Kinard is inapplicable to her strict liability action. We agree with Bray that the holding in Kinard is not applicable to a cause of action asserting strict liability where she is a user of the product.

In 1974, our Legislature adopted the Defective Products Act ("the Act"). S.C. Code Ann. §§ 15-73-10 to -30 (1976).[4] The Act created a new kind of action. See Schall v. Sturm, Ruger Co., 278 S.C. 646, 647, 300 S.E.2d 735, 736 (1983). In Schall, our supreme court made the following observation regarding section 15-73-10:

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[4] Section 15-73-10 provides as follows:

> Liability of seller for defective product.
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if
>
> (a) The seller is engaged in the business of selling such a product, and
>
> (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in subsection (1) shall apply although
>
> (a) The seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

S.C. Code Ann. § 15-73-10 (1976).

> It is fair to say that an entirely new species of action came into being with the adoption of Restatement 402A by our General Assembly.
>
> . . . .
>
> . . . Neither conduct nor obligation underlie recovery but rather the combination of a defective product with an instance of causally related injury . . . .

278 S.C. at 649, 300 S.E.2d at 736. The Act imposes liability upon the seller and manufacturer of a defective product introduced into the stream of commerce when it causes physical harm to the ultimate user or consumer, or to the property of the user or consumer.

There is no question that Bray was a user of the trash compactor: she operated the controls prior to Blackmon's death. See Curcio v. Caterpillar, Inc., 344 S.C. 266, 273, 543 S.E.2d 264, 267 (Ct. App. 2001) (stating that employee performing maintenance on equipment was a "user" of the product). The defective condition of the trash compactor is not an issue before this Court. The remaining issues for consideration are whether Bray suffered physical harm within the meaning of the Act and whether that harm was proximately caused by the product.

The Act requires that the defect cause the user "physical harm." S.C. Code Ann. § 15-73-10 (1976). We conclude that Bray's alleged physical injuries resulting from emotional trauma constitute physical harm within the purview of the Act. The Padgett line of cases considers such injuries to be physical injuries or harm. See Padgett, 232 S.C. at 605-07, 103 S.E.2d at 271-72; Spaugh, 158 S.C. at 30, 155 S.E. at 147; Mack, 52 S.C. at 335, 29 S.E. at 908. In Mack, our supreme court approved of language using the terms injury and harm interchangeably. 52 S.C. at 335, 29 S.E. at 908 ("If these nerves, or the entire nervous system, are thus affected, there is a physical injury thereby produced; and if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the

mind. . . . The mental condition which super-induced the bodily harm in the foregoing cases was fright, but the character of the mental excitation by which the injury to the body is produced is immaterial." (emphasis added) (quoting Sloane v. Ry. Co., 44 P. 320, 322-23 (Cal. 1896))). It thus appears, by reason of this language, that our supreme court would consider the terms "physical injury" and "physical harm" to be synonymous.

Under any products liability theory of recovery, the plaintiff must also establish that the product defect was the proximate cause of the injury sustained. See Small v. Pioneer Mach., 329 S.C. 448, 462-63, 494 S.E.2d 835, 842 (Ct. App. 1997). Proximate cause requires both cause in fact and legal cause, or foreseeability. Id. The respondents assert the Kinard foreseeability factors should be applied. Bray contends that those factors should not be applied in a strict liability setting.

In support of her position that her injuries were foreseeable and that a user of a product may recover for injuries under these facts, Bray cites decisions from other jurisdictions which have confronted the same issue. See Gnirk v. Ford Motor Co., 572 F. Supp. 1201 (D.S.D. 1983); Kately v. Wilkinson, 195 Cal. Rptr. 902 (Cal. Ct. App. 1984). In Kately, a mother and her daughter witnessed the mutilation and death of the daughter's best friend when the mother lost control of her newly acquired ski boat because the steering column locked, causing the boat to circle back and strike the young skier. Although the mother and her daughter were able to pull her from the water, she bled to death in their arms as the boat circled uncontrollably. Kately, 195 Cal. Rptr. at 904.

The mother brought an action for negligent infliction of emotional distress against the manufacturer and seller, arguing that she was a bystander who was so close to the victim that she considered her a daughter. Id. at 903. The Kately court refused to expand the "close relation" requirement in order to allow the mother to recover as a bystander. Id. at 907. This kind of claim would have failed in South Carolina also under Kinard. However, the court did allow the mother to proceed under her products liability claim as a user of the product. The court held that it was reasonably foreseeable that "[the mother], as the purchaser and an operator of the defective boat, would suffer emotional distress

when the boat malfunctioned and killed or injured another human being," regardless of the nonfamilial relationship between the mother and the victim. Id. at 909. Therefore, the mother was allowed to proceed, not as a bystander under a claim of negligent infliction of emotional distress, but as a direct victim because she was a user of the defective product.

In Gnirk, the plaintiff exited her vehicle in order to open a gate, leaving her infant son inside. The gears shifted from park into reverse, and the car rolled into a "stock dam." The car became completely submerged, killing the child. 572 F. Supp. at 1202. Interpreting South Dakota law, the district court held that Ford owed the plaintiff an independent legal duty due to her status as a user of the car involved in the incident rather than as a bystander. Id. at 1202-03.

Marathon and ARS assert that South Carolina's foreseeability analysis under Kinard should be applied in a strict products liability setting. As Marathon and ARS point out, other courts have declined to allow recovery in similar instances, applying the same foreseeability requirements in products liability cases as in negligent infliction of emotional distress cases.

Among cases refusing to apply the foreseeability analysis of Kately, Marathon and ARS cite Straub v. Fisher and Paykel Health Care, 990 P.2d 384 (Utah 1999).[5] In Straub, the Utah Supreme Court applied its requirements for a cause of action for negligent infliction of emotional distress to a products liability negligence cause of action. The court declined to adopt the reasoning

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[5] Marathon and ARS also cite Croteau v. Olin Corporation, 704 F. Supp. 318 (D.N.H. 1989), aff'd, 884 F.2d 45 (1st Cir. 1989). In that case, the plaintiff sued in strict products liability for physical injuries sustained from emotional distress caused by a hunting accident. Applying New Hampshire law, the federal court stated that the plaintiff had to prove his injuries were foreseeable by satisfying the Dillon factors. Id. at 320. However, the plaintiff in Croteau failed to raise the argument in the District Court that he was owed a different duty as a "user" of the product, and the case was therefore decided on a bystander basis. 884 F.2d at 46.

of Kately and allow recovery under a products liability theory when recovery would not be allowed under a non-products liability action for negligent infliction of emotional distress. See Straub, 990 P.2d at 388. However, we find this case unpersuasive for several reasons. First, the Utah Supreme Court rejected the reasoning of the California appellate court in Kately because the foreseeability analysis was not compatible with Utah law, which employs the "zone of danger" test of foreseeability. Id. Second, strict liability was judicially adopted in Utah, thereby allowing its supreme court to extend or limit its application without regard to statutory interpretation.

We find cases from other jurisdictions on either side of this issue to be of limited help because South Carolina is one of only a few jurisdictions in which strict liability was adopted by statute rather than judicially. Barnwell v. Barber-Colman Co., 301 S.C. 534, 537-538, 393 S.E.2d 162, 163-164 (1989).

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Charleston County Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). "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).

As noted above, a cause of action in strict liability under section 15-78-10 is a legislatively created "entirely new species of action" which "renders irrelevant the concept of duty in the traditional setting of tort liability, for recovery may be had even though a seller 'has exercised all possible care in the preparation and sale of his product.'" Schall, 278 S.C. at 648-49, 300 S.E.2d at 736 (quoting S.C. Code Ann. § 15-73-10 (1976)). The doctrine of strict liability in tort was not a part of the common law of South Carolina. Hatfield v. Atlas Enters., Inc., 274 S.C. 247, 248, 262 S.E.2d 900, 900-01 (1980). Our supreme court adopted the Kinard analysis expressly in connection with a negligence cause of action.

As our supreme court stated in Barnwell, "[w]here the legislature has, by statute, acted upon a subject, the judiciary is limited to interpretation and construction of that statute." 301 S.C. at 537, 393 S.E.2d at 163. "It is perhaps unnecessary to say that Courts have no legislative powers . . . . They cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself." Id. at 538, 393 S.E.2d at 163. The application of the Kinard requirements in a strict liability cause of action would be impermissible legislating. We therefore decline to apply the Kinard analysis in this setting. To the extent it is desirable public policy to impose the requirement of a close relationship in the context of a strict liability cause of action, that is a decision for our legislature to make.

Because the statute limits liability to the user or consumer, we perceive no need for a limitation on foreseeable victims to avoid disproportionate liability as our supreme court found necessary in a bystander setting. As Bray argues, it is not unreasonable to conclude that the user of a product might suffer emotional damage if the use of the defective product results in death or serious injury to a third person, irrespective of the relationship between the user and the third person. This argument is in accord with the premise underlying the Act, which recognizes that the cost of injuries which flow from a "product defect" should be borne by the manufacturer or seller rather than the ultimate user. Fleming v. Borden, Inc., 316 S.C. 452, 456, 450 S.E.2d 589, 592 (1994).

CONCLUSION

Bray's negligence claim fails to fulfill the requirements of Kinard, and the trial court properly granted summary judgment on that cause of action. However, the trial court erred by superimposing the bystander analysis of Kinard to this statutorily created strict liability cause of action. Therefore, the decision of the trial court is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

CONNOR and HUFF, JJ., concur.