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M E D I A R E L E A S E
February 6, 2003

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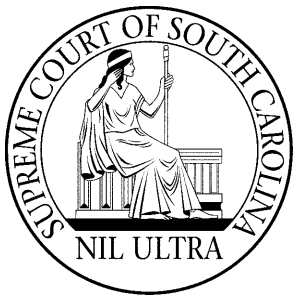

OPINIONS
OF
THE SUPREME COURT
AND
COURT OF APPEALS
OF
SOUTH CAROLINA

FILED DURING THE WEEK ENDING

February 10, 2003

ADVANCE SHEET NO. 5

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.judicial.state.sc.us

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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Allen Lee Hawkins and Gryphon Inc., Respondents,

v.

Bruno Yacht Sales, Inc., Beaufort County, a Political Subdivision of the State of South Carolina, and Joy Logan in the capacity of Treasurer for Beaufort County, South Carolina, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Beaufort County
Thomas Kemmerlin, Jr., Master In Equity

Opinion No. 25592
Heard November 20, 2002 - Filed February 3, 2003

AFFIRMED AS MODIFIED

John Hughes Cooper, of John Hughes Cooper, P.C., of Sullivan's Island; Stephen P. Groves, Sr. and Stephen L. Brown, of Young, Clement, Rivers & Tisdale, L.L.P., of Charleston; Stephen P. Hughes

and Mary B. Lohr, of Howell, Gibson & Hughes, P.A., of Beaufort; all for Petitioners.

Julius H. Hines, of Buist, Moore, Smythe & McGee, P.A., of Charleston, for Respondents.

CHIEF JUSTICE TOAL: This is an action by Respondents, Allen Lee Hawkins ("Hawkins") and Gryphon, Inc. ("Gryphon"), to set aside the delinquent tax sale of Hawkins's sailboat, the "LadyHawk", to Petitioner, Bruno Yacht Sales ("BYS").

FACTUAL / PROCEDURAL BACKGROUND

In December 1986, Hawkins purchased a 52-foot sailboat made by Tayana, a Tawainese company. Hawkins named the boat the LadyHawk, and registered it as a United States vessel with the Coast Guard. In total, Hawkins spent just over $300,000 to purchase the hull and to have the boat fully outfitted.

In December 1989, Hawkins sold the LadyHawk to Gryphon, a close corporation of which Hawkins was the sole shareholder, for ten dollars. In 1992, Gryphon transferred the LadyHawk back to Hawkins.[1] At the time of this sale, the address of both Hawkins and Gryphon was listed as "50 Palmetto Bay Road, Box 200, Hilton Head, South Carolina, 29928."

In 1994, Beaufort County assessed personal property taxes of $2,417.10 on the LadyHawk, and sent a tax bill to Hawkins for that amount at

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[1] Initially, the Coast Guard refused to record the bill of sale from Gryphon, Inc. back to Hawkins because it was not notarized. A new bill of sale was prepared and notarized, but the box for the seller's signature was left blank in the second bill of sale. The Coast Guard recorded it notwithstanding this mistake, and a June 1992 Coast Guard document lists Hawkins as the record owner.

the Palmetto Bay address. Hawkins failed to pay the taxes and was assessed a penalty of $397.57 in addition to the taxes. Hawkins failed to pay either the taxes or the penalty by March 1995. As a result, the Beaufort County Treasurer issued a tax execution on March 17, 1995.

The Deputy Treasurer for Beaufort County ("County"), Herschel Evans ("Evans"), testified that, according to the County's normal procedure, the first notice of delinquent taxes would have been mailed on April 1, 1995, and that the second delinquent notice, a levy by distress, would have been mailed on May 1, 1995, by certified mail. Hawkins testified that he did not receive either of these notices, and there was no documentation to confirm these notices were actually mailed.[2]

In August 1995, the County Treasurer sent Hawkins two notices of delinquent taxes by certified mail, postmarked August 16, 1995, and August 24, 1995, respectively. The Treasurer's file does contain sender's receipts and signed receipt cards for these mailings. Delivery was not restricted to Hawkins, and he did not sign for them, but he did receive them in Florida by forwarded mail at the end of August.[3] Upon receipt of these notices in August, Hawkins retained a Beaufort attorney to contest his liability for the taxes. To that end, his attorney sent a letter to the County Treasurer stating that the LadyHawk had not ever been in South Carolina for more than six months, and that Hawkins was not a South Carolina resident. Hawkins did not receive a response to the letter, and did not make any effort to pay the delinquent taxes.

On September 22, 1995, the Treasurer advertised Hawkins's boat for sale in the Beaufort Gazette. The advertisement listed Hawkins's name and

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[2] Hawkins testified he sailed the LadyHawk from South Carolina to Florida in May 1995, but that he checked his mail at the Palmetto Bay address before he left.

[3] Hawkins testified that the Palmetto Road box belonged to his wife, and that she mailed him a packet of mail at the end of August that contained the two tax notices.

his tax account number, PP550HAWALL, and the sum of taxes due, $2,814.67. A heading at the top of the advertisement indicated that account numbers beginning in "PP" related to boats.

Bruno Yacht Sales ("BYS") was the sole bidder at the October 2, 1995, tax sale. It purchased the LadyHawk for $2,814.67. In December 1995, several deputies forced Hawkins off his boat in Florida and turned possession over to BYS.

On December 19, 1995, Hawkins brought a "petitory" admiralty claim in the United States District Court for the Southern District of Florida, to arrest the LadyHawk and clear its title. Hawkins's counsel argued among other things that the tax sale should have proceeded against Gryphon as the true owner of the LadyHawk, based on the fact that the 1992 bill of sale from Gryphon to Hawkins was invalid, as the seller (Gryphon – owned solely by Hawkins) had not signed it. The District Court found it lacked jurisdiction because Hawkins was neither the current owner nor the real party in interest, and found further that it was not the proper forum to determine the validity of South Carolina taxation decisions. The District Court dismissed the action without prejudice, and noted that its dismissal was not an adjudication of title.

Hawkins brought the instant action in August 1996 to set aside the sale of the LadyHawk and to restrain BYS from selling the LadyHawk. The Master upheld the tax sale of the LadyHawk.[4] The Court of Appeals reversed and remanded, finding the tax sale of the LadyHawk void. *Hawkins v. Bruno Yacht Sales, Inc.*, 342 S.C. 352, 536 S.E.2d 698 (Ct. App. 2000). Petitioners raise the following issues on appeal:

I. Did the Court of Appeals err in finding the tax sale of the LadyHawk void pursuant to S.C. Code Ann. § 12-51-40 (Supp. 1994) because of defects in the levy notice, in the mailing of the notice, or in the description of the LadyHawk in the advertisement?

[4] While the case was pending before the Master-in-Equity, BYS sold the LadyHawk (now named "Mystic") to a third party for $150,000.

II. Did the Court of Appeals err in failing to hold that Hawkins was judicially estopped from asserting ownership of the LadyHawk based on his argument to the contrary before the Florida District Court?

LAW /ANALYSIS

I. Tax Sale

Petitioners argue that the Court of Appeals erred in finding the tax sale of the LadyHawk void under S.C. Code Ann. § 12-51-40 (Supp. 1994). The Court of Appeals found the following three errors in the tax sale: (1) the levy notice included an artificial deadline for payment; (2) the notices should have been mailed restricted delivery; and (3) the LadyHawk was not described sufficiently in the published tax sale advertisement.

A. Artificial Deadline

South Carolina Code Ann. § 12-51-40 controls the procedure for notifying delinquent taxpayers that property will be sold in order to collect delinquent taxes. This Court has held that "[t]ax sales must be conducted in strict compliance with statutory requirements." *Ryan Inv. Co. v. Richland County*, 335 S.C. 392, 394, 517 S.E.2d 692, 693 (1999) (citing *Dibble v. Bryant*, 274 S.C. 481, 265 S.E.2d 673 (1980)). Further, the fact that the defaulting taxpayer has actual notice of the impending tax sale "is *insufficient* to uphold a tax sale absent strict compliance with statutory requirements." *Ryan,* 335 S.C. at 394, 517 S.E.2d at 693 (emphasis added).[5] Finally, failure to give the required notice of a tax sale is a fundamental defect in the tax sale proceedings that renders the proceedings absolutely void. *Rives v. Bulsa,* 325 S.C. 287, 478 S.E.2d 878 (Ct. App. 1996).

[5] The Court granted a motion by BYS to argue against this precedent in favor of a rule that actual notice of delinquent taxes and impending sale is sufficient.

South Carolina Code Ann. § 12-51-40(a) requires the county treasurer to mail a notice as close to April 1st as possible, specifying that "if the taxes, penalties, assessments, and costs are not paid, the property must be advertised and sold to satisfy the delinquency." If the taxes remain unpaid thirty days after the mailing of the April 1 notice, the treasurer is entitled to "take exclusive possession of as much of the defaulting taxpayer's property as is necessary to satisfy the payment of taxes, assessments, penalties, and costs." S.C. Code Ann. § 12-51-40(b). For personal property, this section provides that exclusive possession is taken by mailing the notice of delinquent taxes to the address shown on the tax receipt. The statute mandates that

> all delinquent notices shall specify that if the taxes, assessments, penalties, and costs are not paid ***on or before a subsequent sales date***, the property must be duly advertised and sold for delinquent property taxes, assessments, penalties, and costs.

S.C. Code Ann. § 12-51-40(b) (emphasis added).

The first notice received by Hawkins in August showed the amount due and was stamped with the following statement:

> IF NOT PAID ON OR BEFORE 31 AUGUST THIS PROPERTY WILL BE DULY ADVERTISED AND SOLD FOR DELINQUENT TAXES AS DESCRIBED ABOVE ON THE FIRST MONDAY IN OCTOBER THIS YEAR. RETURN OF THIS "CERTIFIED RECEIPT" SHALL BE DEEMED EQUIVALENT TO "LEVYING BY DISTRESS."

The second notice, dated August 24, was accompanied by a letter from the County Treasurer, Joy Logan. The letter reiterated that the taxes were delinquent, and that the property was subject to sale at the October 2, 1995, tax sale, but stated "[a]ll tax payments must be received by September 15, 1995 to avoid your name and property being advertised in The Beaufort Gazette and The Island Packet."

The Court of Appeals held that these two notices created artificial deadlines for payment before the sales date, and thereby contradicted the statutory language requiring that the notice inform the delinquent taxpayer that the taxes must be paid "before a subsequent sales date." Because the sales date in this instance was October 2, the Court of Appeals found that the August 31 and September 15 deadlines were artificial, and gave the impression that Hawkins had to pay the taxes weeks before the date of sale. We agree with the Court of Appeals' holding on this issue.

The County argues that this reading of section 12-51-40(b) conflicts with the advertising requirements of section 12-51-40(d). We disagree. Section 12-51-40(d) explains how the property must be advertised before auction, and requires that the advertising be published once a week for two consecutive weeks prior to the sale. The County's argument depends on their interpretation of section b that a specified date must pass without payment before the County's authority to advertise is triggered. At trial, however, the Deputy Treasurer, Evans, testified that Hawkins could have paid the delinquent taxes up until the date of the October 2 tax sale, beyond the August 31 and September 15 deadlines set in the two notices. Although we realize the County would rather not advertise until it knows the taxpayer can no longer pay the delinquent taxes, the statute does not provide that the County set a date, other than the sales date, after which the taxpayer can no longer pay his delinquent taxes before the County can begin advertising.

Based on the standing rule that the County must conduct tax sales in "strict compliance with the statutory requirements," we find that the levy notice was not properly worded, and set aside the tax sale on that basis. *Ryan; Dibble.*

B. Restricted Delivery

Petitioners argue that the Court of Appeals erred in finding that a levy notice for a delinquent personal property tax sale must be sent via "restricted delivery" mail in order to be valid. We agree.

Section 12-51-40(b) provides the relevant language to resolve this issue. As discussed, this section provides that the treasurer take exclusive possession of property by sending a notice to the taxpayer. Specifically, it states,

> [i]n the case of real property, exclusive possession is taken by mailing a notice of delinquent property taxes, assessments, penalties, and costs to the defaulting taxpayer at the address shown on the tax receipt or to a more correct address known to the officer, by "certified mail, return receipt requested – deliver to addressee only." In the case of personal property, exclusive possession is taken by mailing the notice of delinquent property taxes, assessments, penalties, and costs to the address shown on the tax receipt or to a more correct address known to the officer. . . . The return receipt of the "certified mail" notice is equivalent to "levying by distress."

S.C. Code Ann. § 12-51-40(b).

The Court of Appeals found that the certified mail and restricted delivery requirements listed for real property also applied to personal property based on the last sentence of section 12-51-40(b): "The return receipt of the 'certified mail' notice is equivalent to 'levying by distress.'" The Court of Appeals also relied on language in S.C. Code section 12-51-40(c) that refers to the procedure for taking possession of real and personal property *when the certified mail notice has been returned*, to find that the legislature intended for the certified mail and restricted delivery requirements for real property in section 12-51-40(b) to also apply to personal property. Although we agree that the legislature intended the certified mail requirements to apply to both real and personal property, prior versions of the statute convince us that the legislature did not intend to require notices on personal property to be mailed restricted delivery. *See* S.C. Code Ann. § 12-51-40(a) (1976); Act No. 378 at § 4, 1971 S.C. Acts 500.[6]

[6] The 1976 version of section 12-51-40(a) did not differentiate between personal and real property for purposes of mailing. It provided,

Although there is no specific mailing requirement for personal property in the statute, it appears that levy notices on personal property must be sent via certified mail, return receipt requested in order to accomplish "levy by distress." 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, 437 S.E.2d 6 (1993). In our opinion, the legislature intended to be able to "levy by distress" on personal property as well as real property, and to do so requires that the notice be mailed by certified mail, return receipt requested. It is not necessary, however, that the notice be sent restricted delivery in order for the County to "levy by distress" under the terms the statute. There is no mention of restricted delivery anywhere in the statute with regard to personal property, and we do not believe the legislature intended that delinquent tax notices for personal property must be sent restricted delivery. Based on the 1976 version of the statute, it appears instead that the legislature intended to relax the notice requirements for personal property by amending the statute to require restricted delivery for real property only.

C. Advertisement

Petitioners argue that the Court of Appeals erred in finding that the advertisement of the LadyHawk was insufficient under S.C. Code Ann. § 12-51-40(d) (Supp. 1994). We agree.

"[A]ll requirements of law leading up to tax sales which are intended for the protection of the tax payer [sic] against surprise or the sacrifice of his

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> On or before April first next following the year in which the taxes became due mail via "Certified Mail, return receipt requested – deliver to addressee only" notice of delinquent property taxes penalties and costs, to the person at the address shown on the tax receipt or at a more correct address known to such officer.

property are to be regarded as mandatory and are strictly enforced." *Rives v. Bulsa,* 325 S.C. 287, 292-93, 478 S.E.2d 878, 881 (Ct. App. 1996) (citing *Dibble,* 274 S.C. 481, 265 S.E.2d 673). South Carolina Code section 12-51-40(d) explains the procedure for advertising which the County is required to follow before selling the delinquent taxpayer's property. It provides, in relevant part,

> The property must be advertised for sale at public auction. The advertisement must be in a newspaper of general circulation . . . and must be entitled "Delinquent Tax Sale." ***It shall include the delinquent taxpayer's name and the description of the property, a reference to the county auditor's map-block-parcel number being sufficient for a description of realty.***

S.C. Code Ann. § 12-51-40(d) (emphasis added).

In this case, the County advertised the sale of the LadyHawk in the Beaufort Gazette, and included Hawkins's name and the delinquent tax number "PP550HAWALL." Before listing the personal and real property, the advertisement indicated that the accounts beginning in "PP" referred to boats.

The Court of Appeals relied on the definition of "description" in *Black's Law Dictionary* to find this description of the LadyHawk insufficient. "A 'description' is defined as '[a] delineation or account of a particular subject by the recital of its characteristic accidents and qualities.'" *Hawkins,* 342 S.C. at 364, 536 S.E.2d at 704 (citing *Black's Law Dictionary* 445 (6th ed. 1990)). The Court of Appeals reasoned that the description given by the County did not meet this definition, and further, that the description was intended to protect the taxpayer from unfair surprise and sacrifice, and as such, should have included the characteristics of the boat, such as its size. *Id.*

In our opinion, the Court of Appeals' analysis fails to explain why the listing of the taxpayer's name and tax account number, which was listed on the notices of delinquent taxes that Hawkins admitted receiving, is insufficient to alert him to the sale of the LadyHawk. Also, the Court of

Appeals fails to account for the reason such a description is sufficient for real property, but is insufficient for personal property when interested persons can discover the details of both types of property by using the tax account number to look up further information in the county tax assessor's office. *See* S.C. Code Ann. § 12-51-40(d). In fact, Frank Bruno, owner of BYS, was able to discover the specific characteristics of the LadyHawk prior to the sale by entering the tax account number in the County's computer system.

We see no reason why the County should have to use a different method of describing personal property than the method the statute explicitly defines as sufficient for real property when it affords the taxpayer and potential buyer with an opportunity to look up further information. Therefore, we find that the description of the LadyHawk in the tax sale advertisement was sufficient under S.C. Code Ann. § 12-51-40(d).

II. Judicial Estoppel

Petitioners argue that the Court of Appeals erred in failing to find Hawkins was judicially estopped from asserting ownership of the LadyHawk for purposes of this action. We disagree.

As discussed, at some point prior to 1992, Hawkins transferred ownership of the LadyHawk to his corporation, Gryphon. Pursuant to a family court order following his divorce, in 1992, Gryphon transferred the LadyHawk back to Hawkins. Hawkins submitted a bill of sale noting this transfer of ownership to the Coast Guard, but it was not notarized, so Hawkins had to submit a second bill of sale. The Coast Guard accepted the second bill of sale despite its lack of a seller's signature, and recorded Hawkins as the record owner.

After the LadyHawk was sold to BYS, Hawkins brought an action in the Florida Federal District Court to quiet title to the boat in his name. One of the arguments Hawkins presented to the District Court was that the bill of sale from Gryphon to Hawkins was invalid, and, therefore, that Gryphon owned the LadyHawk at the time of the tax sale. If Gryphon owned the LadyHawk, the tax sale presumably would have been void because Gryphon

never received a delinquent notice. The District Court dismissed the action without prejudice, holding that the court had no jurisdiction to quiet title in Hawkins's name, in part, because Hawkins claimed not to be the owner. The court stated, however, "[this] dismissal is not an adjudication of title." Subsequently, Hawkins filed this action in state court.

This Court officially recognized the validity of judicial estoppel in *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997). "Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." *Hayne,* 327 S.C. at 251, 327 S.E.2d at 477. The Court went on to enunciate the purpose of the doctrine, making clear that it is intended "to protect the integrity of courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries." *Id.* The Court limited the doctrine to inconsistent statements of fact, holding that the doctrine does not apply to assertions of legal theories. *Id.* The Court applied judicial estoppel in *Hayne* to prevent the defendant from arguing that he was the owner of certain property when he had *successfully* disclaimed ownership of the same property during his divorce. The defendant even admitted to lying under oath in order to protect his interest in his divorce proceeding. The Court noted, "[a]lthough parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. . . . When 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.* at 252, 489 S.E.2d at 477.

The facts of this case are quite different from the situation in *Hayne.* The record on appeal does not include the transcript of the hearing before the District Court, but Hawkins's attorney stated that Hawkins did not testify before the District Court. Hawkins did not prevail in the District Court – the District Court did not quiet title in his name - by asserting Gryphon owned the LadyHawk. Judicial estoppel comes into play when the court is forced to take a position based on a factual assertion. Here, the District Court did not determine who owned the LadyHawk prior to the tax sale, and stated explicitly that its decision was not an adjudication of title. *See Zimmerman v. Central Union Bank,* 194 S.C. 518, 532, 85 S.E.2d 359, 365 (1940)

("[W]here a party assumes a certain position in a legal proceeding, and ***succeeds*** in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.") (emphasis added).

Further, after hearing the arguments for judicial estoppel based on the District Court action, the Master appears to have proceeded on the basis that everyone agreed that Hawkins was the real party in interest. This discussion in turn led Hawkins to abandon his argument that Gryphon was the true owner.

The question of whether title was transferred from Gryphon to Hawkins in 1992 is a legal, not a factual assertion. There is no evidence that Hawkins claimed that he had no intention of placing ownership of LadyHawk in his own name. He simply argued that the actual transfer was not effective because it was flawed. Therefore, this is not an appropriate case for judicial estoppel.

CONCLUSION

For the foregoing reasons, we **AFFIRM AS MODIFIED** the decision of the Court of Appeals setting aside the tax sale of the LadyHawk.

WALLER, BURNETT, PLEICONES, JJ., and Acting Justice Henry F. Floyd, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Diane Cannon Hardy and James Hardy, **Appellants,**

v.

Shane Courtland Cannon Gunter, Tyler Cannon Gunter, minors and John S. Gunter, Jr., **Respondents.**

Appeal From Oconee County
Tommy B. Edwards, Family Court Judge

Opinion No. 3595
Heard January 14, 2003 - Filed February 3, 2003

AFFIRMED

Raymond William Godwin, of Greenville; for Appellants.

Robert K. Whitney, of Seneca; for Respondents.

ANDERSON, J.: In this termination of parental rights case, Diane Cannon Hardy and James Hardy (mother and stepfather) appeal from an order of the family court denying their plea to terminate the parental rights of John S. Gunter, Jr. (the father) to his two minor children. We affirm.

FACTS/PROCEDURAL BACKGROUND

The mother and father were married in April 1988. They have two children, Shane and Tyler, born on November 18, 1992 and March 1, 1995, respectively. During the marriage, the father retired as a major from the United States Air Force, having earned two master's degrees during his military service.

The mother and father separated in June 1996. During the same month, the father admitted himself to the Anderson Area Medical Center Psychiatric Ward where he was diagnosed with depression and drug addiction.

The parties were divorced by order of the family court dated November 8, 1996. Pursuant to the divorce decree, which embodied the parties' settlement agreement, the mother was granted full custody of the children. Visitation for the father was held in abeyance pending the father's compliance with requirements that he obtain a psychological evaluation from the Veteran's Administration (VA) and approval to visit the children from the guardian ad litem. The order specifically provided that "upon receipt of the recommendation of the Guardian Ad Litem . . . the Court, without further hearing, may review the same and adopt the recommendation . . . as the order of this Court, however, either party may request a hearing on the visitation as recommended within 30 days of the receipt of such recommendation." Determination of the father's child support obligation was held in abeyance.

In December 1996, the father began receiving disability payments totaling $1,345 per month.[1] Simultaneously, the parties' children each began receiving $212 monthly social security checks related to the father's disability status. The father has made no additional support payments for the children.

After the parties' divorce, the father moved to Florida in order to be near and assist his mother, who has been diagnosed with Alzheimer's disease, and his father, who has been diagnosed with congestive heart failure. In addition, the father's son from a former marriage resides in Florida.

Although the divorce degree specifically directed that the father's psychological evaluation be conducted through the VA and the father obtained two evaluations from the VA prior to the entry of the divorce decree, the guardian ad litem desired a doctor independent from the VA to do an evaluation. The father consented to have the evaluation performed by the doctor of the guardian's choosing. The guardian arranged for Dr. Spurgeon Cole to evaluate the father in her office on October 13, 1998. The father arrived at the guardian's office at the appointed time, but Dr. Cole did not appear. The father agreed to reschedule with Dr. Cole; however, at a December 8, 1998 interview with the guardian, he declared his reluctance to be evaluated by a psychologist whose base of operation was in Oconee County and expressed financial concerns about having the evaluation carried out by a doctor not associated with the VA. In August 1999, the father provided the guardian with the notes from a third evaluation administered by Dr. Phillip Tate of the VA in Florida. The father testified that he "was calling [the guardian] at least once every couple weeks . . . to see what [he] could do to hasten the process." The father went on to state: "I know I've made lots of phone calls to try to make appointments, to have her call me. I've left you know, many, many messages and we . . . went through my phone log . . . and I think that she finally said that, 'Yes, you know, you have been trying to get

[1] The father's disabilities include degenerative joint disease, nine knee surgeries, posttraumatic stress disorder, attention deficit hyperactivity disorder, and peripheral nerve damage stemming from his participation in Desert Storm.

in touch with me.'" The guardian admittedly received both the notes from the father's third evaluation and several follow-up telephone calls from the father; however, the guardian never made any proposal to the parties or the family court regarding the father's visitation with the children. The father has not visited with the children since the date of the divorce order holding the issue of visitation in abeyance.

The mother and stepfather were married in September 1997. On December 9, 1999, they instituted the instant action against the father, alleging the father's parental rights be terminated due to willful failure to visit and/or support the children and seeking an order of adoption establishing a parent/child relationship between the stepfather and the minor children. The mother and stepfather's complaint also alleged the father's parental rights should be terminated based on a diagnosable condition (drug addiction and mental illness), which condition was not likely to change within a reasonable time and rendered him unfit to provide minimally acceptable care for the children; however, the mother and stepfather abandoned this ground for termination at trial. Proceeding pro se, the father answered the complaint, denying the mother and stepfather were entitled to the requested relief.

By order dated October 16, 2000, the family court found the father's conduct following his separation and divorce from the mother did not constitute willful failure to visit and support the children. Accordingly, the court denied the mother and stepfather's petition for termination of the father's parental rights and ordered the guardian ad litem to enter a recommendation as to visitation between the father and children within fifteen days of the order. The mother and stepfather's post-trial motion for reconsideration was denied without a hearing.

STANDARD OF REVIEW

In a termination of parental rights case, the best interests of the children are the paramount consideration. South Carolina Dep't of Soc. Servs. v. Cummings, 345 S.C. 288, 293, 547 S.E.2d 506, 509 (Ct. App. 2001); South Carolina Dep't of Soc. Servs. v. Smith, 343 S.C. 129, 133, 538 S.E.2d 285,

287 (Ct. App. 2000); South Carolina Dep't of Soc. Servs. v. Parker, 336 S.C. 248, 254, 519 S.E.2d 351, 354 (Ct. App. 1999). Grounds for termination of parental rights must be proved by clear and convincing evidence. Hooper v. Rockwell, 334 S.C. 281, 297, 513 S.E.2d 358, 366 (1999); South Carolina Dep't of Soc. Servs. v. Broome, 307 S.C. 48, 52, 413 S.E.2d 835, 838 (1992) (citing Santosky v. Kramer, 455 U.S. 745, 747-48, 102 S.Ct. 1388, 1391-92, 71 L.Ed.2d 599, 603 (1982) (The United States Supreme Court held: "Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.")); Cummings, 345 S.C. at 293, 547 S.E.2d at 509; Parker, 336 S.C. at 254, 519 S.E.2d at 354.

On appeal of a termination of parental rights case, the court of appeals may review the entire record to make a determination of the facts according to our view of the evidence. Richland County Dep't of Soc. Servs. v. Earles, 330 S.C. 24, 32, 496 S.E.2d 864, 866 (1998); Cummings, 345 S.C. at 293, 547 S.E.2d at 509. "This Court may review the record and make its own findings whether clear and convincing evidence supports termination." Cummings, 345 S.C. at 293, 547 S.E.2d at 509; accord Parker, 336 S.C. at 254, 519 S.E.2d at 354; South Carolina Dep't of Soc. Servs. v. Humphreys, 297 S.C. 118, 121, 374 S.E.2d 922, 924 (Ct. App. 1988). "Our broad scope of review does not require us to disregard the findings below or ignore the fact the trial judge was in a better position to assess the credibility of the witnesses." Cummings, 345 S.C. at 293, 547 S.E.2d at 509; accord Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996); Berry v. Ianuario, 286 S.C. 522, 525, 335 S.E.2d 250, 251 (Ct. App. 1985).

Our supreme court has held that a finding of a willful failure to visit will not be predicated upon parental conduct that can be reasonably explained. Wilson v. Higgins, 294 S.C. 300, 305, 363 S.E.2d 911, 914 (Ct. App. 1987), rev'd in part on other grounds, Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (2000). A finding of willful failure to support will not be predicated upon parental conduct that can be reasonably explained.

LAW/ANALYSIS

I. Failure to Support

The mother and stepfather claim the family court erred in not finding the father willfully failed to support the children from the time the parties separated in June 1996 until December 1996, and the failure, if proven, should serve as a basis for termination of the father's parental rights. We disagree.

South Carolina Code Annotated section 20-7-1572(4) (Supp. 2001) provides for termination of parental rights upon a finding that termination is in the best interest of the child and:

> The child has lived outside the home of either parent for a period of six months, and during that time the parent has wilfully failed to support the child. Failure to support means that the parent has failed to make a material contribution to the child's care. A material contribution consists of either financial contributions according to the parent's means or contributions of food, clothing, shelter, or other necessities for the care of the child according to the parent's means. The court may consider all relevant circumstances in determining whether or not the parent has wilfully failed to support the child, including requests for support by the custodian and the ability of the parent to provide support.

Whether a parent's failure to support a child is "willful" within the meaning of section 20-7-1572 is a question of intent to be determined by the facts and circumstances of each case. Broome, 307 S.C. at 52, 413 S.E.2d at 838; South Carolina Dep't of Social Servs. v. Wilson, 344 S.C. 332, 336, 543 S.E.2d 580, 582 (Ct. App. 2001); Parker, 336 S.C. at 256, 519 S.E.2d at 355. Generally, the family court is given wide discretion in making this conclusion. However, the element of willfulness must be established by clear and convincing evidence. Broome, 307 S.C. at 52, 413 S.E.2d at 838;

Wilson, 344 S.C. at 336, 543 S.E.2d at 582; Parker, 336 S.C. at 256, 519 S.E.2d at 335.

Initially, we note that the six month time period prescribed in section 1572 did not elapse between June 1996, when the parties' separated, and December 1996, when the children began receiving social security payments based on the father's disability status. The evidence is unchallenged that the father was in the process of applying for his social security benefits during that time span and was in fact disabled during that period, although the Social Security Administration had not declared him disabled. It is further undisputed that the children's social security benefits total $424 per month, only $60 short of the amount of the father's support obligation under the Child Support Guidelines. Although the mother and stepfather correctly note that the children's social security benefits are not deducted from the father's benefits, we concur with the family court that the benefits are nonetheless available to the children due to the father's disability status and the father is deemed to have made a material contribution to their upkeep. Moreover, we agree with the family court's holding that even though the father could be ordered to contribute to child support in excess of the children's social security benefits, the family court has not had occasion to rule on the issue because it was not raised by any of the parties in this case.

Under these facts and circumstances, we find no error in the court's conclusion that the father's failure to pay support in addition to the children's social security benefits did not amount to a willful failure to support the children.

II. Failure to Visit

The mother and stepfather next assert the family court erred in failing to determine the father willfully failed to visit the children. We disagree.

Section 20-7-1572(3) provides that parental rights may be terminated if termination is in the best interest of the child and:

> The child has lived outside the home of either parent for a period of six months, and during that time the parent has wilfully failed to visit the child. The court may attach little or no weight to incidental visitations, but it must be shown that the parent was not prevented from visiting by the party having custody or by court order. The distance of the child's placement from the parent's home must be taken into consideration when determining the ability to visit.

As with failure to support, a parent's "willful" failure to visit a child within the meaning of section 20-7-1572 is a question of intent to be resolved by the facts and circumstances of each case. Broome, 307 S.C. at 52, 413 S.E.2d at 838; Wilson, 344 S.C. at 336, 543 S.E.2d at 582; Parker, 336 S.C. at 256, 519 S.E.2d at 355. Ordinarily, the family court has extensive discretion in making this decision. Yet, the requirement of willfulness must be established by clear and convincing evidence. Broome, 307 S.C. at 52, 413 S.E.2d at 838; Wilson, 344 S.C. at 336, 543 S.E.2d at 582; Parker, 336 S.C. at 256, 519 S.E.2d at 335.

In the initial divorce decree, the family court expressly held the issue of visitation in abeyance pending the father obtaining a psychological evaluation from the VA and the guardian providing the court with a recommendation as to visitation. It is uncontested the father obtained the evaluation by the VA in accordance with the order. Nonetheless, the guardian ad litem declined to make a recommendation because she desired an independent evaluation. Particularly in light of the father's initial efforts to comply with the guardian's superfluous requirement that he obtain a psychological evaluation from an "independent" doctor, we cannot conclude the father's failure to ultimately obtain an evaluation from a doctor of the guardian's choice amounted to either a failure to comply with the terms of the court's order or an election to forego his visitation with the children.

We reject the mother and stepfather's contention that the father's failure to request a hearing on visitation despite the lack of a recommendation from the guardian constituted an election not to visit the children. Under the express terms of the divorce decree, a request for a hearing was not to be

made until after the guardian submitted a proposal as to visitation. Significantly, the same family court judge who issued the divorce decree determined in this action that "[s]ince the Guardian made no recommendations, the [father] correctly argues that no request for a hearing was authorized by the Order."

The case of Stefan v. Stefan, 320 S.C. 419, 465 S.E.2d 734 (Ct. App. 1995) is controlling and edifying in regard to the issue of delegating judicial authority to a guardian to recommend the time for visitation. Stefan states:

> The father argues the family court abused its discretion by delegating judicial authority to the parenting specialist and the guardian, and by authorizing the guardian to recommend the time for the resumption of visitation, and modification of visitation. We agree.
>
> In the final analysis it is the family court which is charged with the authority and responsibility for protecting the interest of minors involved in litigation, not the guardian or any other person whom the court may appoint to assist it. While this court can appreciate the frustration of the family court in devising a visitation plan for the husband, it was error to delegate this responsibility to the guardian and the parenting specialist. . . .
>
> . . . In her final order, the trial judge appointed a guardian for the children and directed him to perform certain tasks and to make recommendations prior to the husband's visitation being resumed. This was error.

Id. at 422-23, 465 S.E.2d at 736 (footnote omitted) (emphasis added).

We caution family court judges **NOT** to delegate any responsibility to a guardian in regard to visitation of children with parents. We encourage the Family Court Bench and Bar to strictly adhere to the holding in Stefan.

Because the father was effectively enjoined from visiting the children even after he complied with the terms of the order, we cannot rule that he willfully failed to visit the children during the time the order was in effect.

The mother and stepfather complain that the family court erred in failing to consider the best interests of the children in determining the father's parental rights should not be terminated. We find no reversible error.

Although the family court order does not directly address whether the children's interests would be best served by terminating the father's parental rights, we note that section 20-7-1572 requires both a finding as to the best interests of the child *and* proof of one or more of the enumerated statutory grounds before termination may be ordered. Inasmuch as the mother and stepfather failed to establish the requisite statutory grounds for termination, any error on the family court's part in not expressly ruling on the best interests of the children is of little consequence to the propriety of the court's order.

CONCLUSION

We take this opportunity to remind the Bench and Bar that we disapprove of the length of time from the issuance of the Order, dated November 8, 1996, and the response by the guardian and court on October 16, 2000. Children should not be held in limbo for an inordinate period of time. For the foregoing reasons, the decision of the family court is

AFFIRMED.

HEARN, C.J., and CURETON, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Collins Entertainment Corp., Respondent,

v.

Coats and Coats Rental Amusement, d/b/a Ponderosa Bingo and Shipwatch Bingo, Wayne Coats, individually, and American Bingo & Gaming Corp., Defendants,

Of whom American Bingo & Gaming Corp. is Appellant.

Appeal From Charleston County
Roger M. Young, Master in Equity

Opinion No. 3596
Heard December 10, 2002 – Filed February 3, 2003

AFFIRMED

Timothy G. Quinn, of Columbia; for Appellant.

Stephen L. Brown, Edward D. Buckley, Jr., Donald J. Davis, Jr., and Stephen P. Groves, Sr., all of Charleston; for Respondent.

GOOLSBY, J.: Collins Entertainment Corp. (Collins) brought this action against (1) Coats and Coats Rental Amusement, d/b/a Ponderosa Bingo and Shipwatch Bingo, (2) Wayne Coats, individually, and (3) American Bingo & Gaming Corp. (ABG), alleging various causes of action arising out of ABG's removal of Collins' coin machines from Ponderosa Bingo and Shipwatch Bingo. The case was referred to the Charleston County master-in-equity for trial with authority to enter a final judgment. ABG appeals (1) the master's finding that it intentionally interfered in a lease for the placement of Collins' video poker machines in the two business establishments and (2) the punitive damages award. We affirm.

FACTS

T.A. Coats and his wife Darlene owned or operated a business known as Coats and Coats Rental Amusement. Wayne Coats, their son, also appears to have been involved in the business.

Coats and Coats Rental Amusement operated two bingo halls, Ponderosa Bingo and Shipwatch Bingo, at two different locations. The locations had been procured by T.A. Coats subject to written real estate leases between him and the individual property owners.

On March 28, 1996, Collins entered into a six-year lease agreement with "Coats and Coats Rental Amusements d/b/a Ponderosa Bingo and Shipwatch Bingo and Wayne Coats, individually" for the exclusive right to lease video poker machines at both locations. The parties were to split the revenues from operating the machines. The agreement further provided that, if the premises were sold, the buyer was to assume the lease. Wayne Coats signed the agreement individually and on behalf of Coats and Coats Rental Amusement.

In 1997, ABG entered into negotiations with T.A. Coats to purchase the assets of the Ponderosa and Shipwatch businesses and to assume the ground leases to the properties on which they operated. The purchase and sale agreement required Coats and Coats to indemnify ABG in the event ABG

was sued for interfering with the video poker machine contract. Although T.A. Coats made ABG aware of the agreement with Collins, ABG did not assume the lease and instead removed Collins' machines from the premises.

Collins then brought this action against Coats and Coats, Wayne Coats, and ABG. In its complaint, Collins asserted a claim for breach of contract against Coats and Coats and Wayne Coats. Collins further asserted causes of action for intentional interference with a contract, civil conspiracy, and unfair trade practices against ABG.

At trial, the master dismissed the civil conspiracy cause of action and found in favor of ABG on the unfair trade practices claim. The master, however, determined ABG was liable for intentional interference with Collins' contract and awarded actual damages of $157,449.66 and punitive damages of $1,569,013.00.[1] The master denied ABG's post-trial motions.

LAW/ANALYSIS

I. Motion to Amend Answer

ABG first contends the master erred in denying its motion to amend its answer to conform to the evidence presented at trial. We find no error.

In its answer, ABG stated: "This Defendant admits purchasing the businesses known as Ponderosa Bingo and Shipwatch Bingo from Coats & Coats Rental Agreement and Wayne Coats individually." Before calling any witnesses, Collins' attorney read this statement into the record verbatim without objection from ABG. At trial, however, Wayne Coats testified that he had no ownership interest in either business when ABG acquired them.

After the close of ABG's case, Collins' attorney again read the answer into the record. This time, however, ABG moved to amend the answer to

[1] The master awarded Collins damages for breach of contract against Wayne Coats and Coats and Coats Rental Amusement.

conform to the proof. In support of the motion, counsel for ABG claimed: "At the time the [a]nswer was drafted, that was the information provided us. We would ask that the [p]leadings be conformed to the proof presented."[2] Collins objected to the motion, alleging the entire litigation was based on the admission in ABG's answer. The master denied the motion to amend.

Citing Rule 15(b) of the South Carolina Rules of Civil Procedure, ABG argues the master should have permitted it to amend its answer to conform to the proof offered.[3] We agree, however, with Collins that Rule 15(b) is inapplicable to this situation. As this court stated in Sunvillas Homeowners Ass'n v. Square D Co.:

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[2] At the hearing, ABG never specified exactly how it sought to have the answer amended. On appeal, ABG asserts it purchased the ground leases to the property from T.A. Coats and that Wayne Coats had no interest in the property.

[3] Rule 15(b), SCRCP, states in pertinent part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

> The rule covers two situations. First, if an issue not raised by the pleadings is tried by express or implied consent of the parties the court may permit amendment of the pleadings to reflect the issue. Second, if a party objects to the introduction of evidence as not being within the pleadings the court may permit amendment of the pleadings subject to a right to grant a continuance if necessary.[4]

Here, the issue prompting ABG's motion to amend was raised in the complaint and admitted by ABG; therefore, the first situation did not apply. Moreover, because no objection was made as to any evidence being outside the pleadings, the master could not have permitted an amendment pursuant to the second part of the rule.

II. Interference with Contractual Relations

A.

ABG asserts Collins failed to prove the elements of intentional interference with contractual relations. In our view, however, the record has sufficient evidence to support a finding that Collins proved each of the necessary elements.

"The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages."[5]

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[4] 30l S.C. 330, 334, 391 S.E.2d 868, 870-71 (Ct. App. 1990) (emphasis added).

[5] Camp v. Springs Mortg. Corp., 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993).

At trial, ABG contended (1) the parties to the contracts for placement of the video poker machines at Ponderosa Bingo and Shipwatch Bingo were Collins, Wayne Coats, and an entity called Coats and Coats Rental Amusement owned by Wayne Coats; (2) the entity known as Coats and Coats Rental Amusement that was owned by Wayne Coats was a North Carolina entity and separate and distinct from the Coats and Coats owned by T.A. and Darlene Coats; and (3) T.A. Coats held the ground lease on the properties where the businesses were located. ABG maintained that, because it negotiated with only T.A. Coats for the ground leases, it could not have interfered with the video poker machine agreement giving Collins the exclusive right to place its machines at Ponderosa Bingo and Shipwatch Bingo, as that agreement did not involve T.A. Coats.

The master, however, found that Coats and Coats was a business "consisting of Wayne Coats' mother and father, T.A. Coats, Wayne Coats, and Darlene Coats" and that "T.A. Coats, Darlene Coats, and Wayne Coats operated various aspects of the Ponderosa and Shipwatch businesses under various trade names including Coats and Coats, Coats and Coats Rental Amusements, and Darlene's Rental and Amusements, all of which were run and controlled by T.A. Coats." The master then determined that the "contract between Collins and Coats and Coats was negotiated by T.A. Coats and signed by Wayne Coats at his direction and under the authority of T.A. Coats." Finally, the master concluded that "T.A. Coats ratified this contract by his actions subsequent to the placement of Collins Machines at the Shipwatch and Ponderosa locations."

In his deposition, T.A. Coats testified he negotiated the contracts for the video poker machines to be placed in the Ponderosa and Shipwatch locations.[6] He further explained that, because he was out of town when Collins' representative brought the machines, he instructed Wayne Coats to sign the contracts so the machines could be left on the premises. Finally, T.A. Coats testified that the Coats and Coats entity that was a party to the

[6] T.A. Coats died before the final hearing, and his deposition was made part of the record.

Collins agreement was his business and, furthermore, that the Coats and Coats entity that Wayne Coats established was not in existence at that time.[7]

Based on the foregoing, we hold the record contains evidence to support the master's determination that Collins' contract was with T.A. Coats and not with Wayne Coats. Although Wayne Coats may have signed the agreement, the record supports the finding that he did this only with express authorization from T.A. Coats to act on behalf of T.A. Coats and Coats and Coats Rental Amusement.[8]

B.

ABG next contends it had no knowledge of any contract between Collins and T.A. Coats and was told that Wayne had the video poker lease. The record, however, supports the finding that ABG knew that T.A. Coats was a party to the contract at issue.

T.A. Coats testified that he told Greg Wilson, Roy Stevens, Richard Henry, and Barry Goldstein, all of ABG, that he had a contract with Collins for the video poker machines. In addition, ten of Collins' video poker machines were present in each location and, as required by state law, were

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[7] Indeed, ABG acknowledged in its brief that "[i]n January, 1997 Wayne Coats (the son of T.A. Coats) applied for a business license for a new business known as Coats and Coats Rental Amusements, a North Carolina entity," and a copy of the application appears in the record. Obviously, ABG knew or should have been able to determine that the Coats and Coats business purportedly run by Wayne Coats may not have been in existence in March 1996, when Collins procured the right to place video poker machines at the two bingo halls.

[8] See Townes Assocs. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976) (stating that, in an action at law, on appeal of a case tried without a jury, the findings of fact will not be disturbed on appeal unless found to be without evidentiary support).

clearly marked as belonging to Collins. T.A. Coats further stated he told individuals at ABG that he was not going to breach the agreement and that ABG had to remove Collins' machines and contact Collins. Roy Stevens, ABG's state manager, testified he knew of the video poker lease with Collins and ABG had a copy of the contract to review. Barry Goldstein testified that a copy of the Collins lease was passed around ABG "like the Sunday comic strip."

C.

ABG further asserts there was no evidence presented at trial that it either induced or coerced T.A. Coats or Wayne Coats into breaching the video poker lease. We disagree.

According to Roy Stevens, the purchase and sale agreement was structured in such a way as to circumvent the Collins agreement. Stevens further testified that, if T.A. Coats refused to sell, ABG intended to run him out of business. In addition, Wayne Coats testified that (1) his family never contemplated cancelling the Collins agreement until ABG was involved; (2) an attempt was made to have ABG assume the Collins contract; and (3) a representative from ABG advised his parents that "if they didn't sell out, that American Bingo would eventually run them out."

D.

Finally, ABG argues it was justified in its actions because it believed that the Collins agreement was with Wayne Coats and that T.A. Coats held only the ground leases on the properties. As discussed above, however, there was ample evidence to show that T.A. Coats was a party to the Collins agreement and that ABG was aware of his involvement.

III. Expert Testimony

ABG asserts the testimony from Collins' economic expert, Dr. Woodside, regarding Collins' excess capacity of video poker machines was

hearsay and, therefore, the master improperly relied on this testimony in calculating damages. We hold the admission of Dr. Woodside's testimony was proper.

Dr. Woodside testified that Collins maintained warehouses with additional machines. He testified that, although he did not know exactly how many machines Collins had in its warehouses, individuals with Collins had informed him that Collins had sufficient excess capacity to fulfill both the contract with T.A. Coats and any subsequent contracts. In addition, Dr. Woodside testified Collins routinely rotated machines from one location to another.

ABG argues that what Collins' employees had told Dr. Woodside was hearsay. We agree the information was hearsay, but hold, however, that it was nevertheless admissible under Rule 703 of the South Carolina Rules of Evidence.[9]

The admission or exclusion of expert testimony is a matter within the sound discretion of the trial court.[10] With regard to information on which an expert opinion is based, the South Carolina Rules of Evidence provide as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made

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[9] Dr. Woodside's testimony was also cumulative to other evidence previously admitted into the record without objection. Before Dr. Woodside was called to the stand, Jamie Livingston, an assistant comptroller with Collins, testified that Collins had excess machines numbering "in the thousands" stored in warehouses and that Collins was constantly seeking out new locations to generate money and increase business. See Jackson v. Speed, 326 S.C. 289, 305, 486 S.E.2d 750, 758 (1997) ("Where the hearsay is merely cumulative to other evidence, its admission is harmless.").

[10] Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998).

> known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.[11]

Here, Dr. Woodside relied on the information provided by Collins' employees to determine how to calculate Collins' damages. In order to do this, he needed to assess Collins' excess inventory of machines vis-à-vis the number of locations it had available in which to place these machines. We therefore hold the hearsay testimony was the "type reasonably relied upon by experts in the particular field" when determining how to calculate damages and the master did not abuse his discretion in admitting the testimony.[12]

IV. Lost Volume Seller Doctrine

ABG maintains the master erred in applying the "lost volume seller" doctrine and in holding Collins did not have to mitigate its damages. We disagree.

The theory behind the "lost volume seller" doctrine is as follows:

> If the injured party could and would have entered into the subsequent contract, even if the contract had not been broken, and could have had the benefit of both, he can be said to have "lost volume" and the subsequent transaction is not a substitute for the broken contract. The injured party's damages are then

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[11] Rule 703, SCRE.

[12] ABG also argues the testimony violated Rules 403 and 704, SCRE. Because, however, neither objection was raised at trial, the issues have not been preserved for review on appeal. See McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996) ("Failure to object when the evidence is offered constitutes a waiver of the right to have the issue considered on appeal.").

based on the net profit that he has lost as a result of the broken contract.[13]

South Carolina does not require a party to make an unreasonable effort to mitigate.[14] Moreover, once Collins showed it had sufficient inventory "to place as many [machines] as it could have found customers for,"[15] it likewise established that any other deals it would have made would have been in addition to, rather than instead of, the prior agreement. We therefore affirm the master's use of the "lost volume seller" doctrine in calculating damages in this case.

V. Punitive Damages

ABG contends the master erred in awarding punitive damages because there was no evidence its actions were willful, intentional, or with reckless disregard of Collins' rights. ABG further contends the amount of punitive damages violated the Due Process Clause of the Fourteenth Amendment. We find no error.

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[13] Restatement (Second) of Contracts § 347 cmt. f (1981); see also Gianetti v. Norwalk Hosp., 779 A.2d 847, 852 (Conn. App. Ct. 2001) ("Many state courts, as well as judicial commentators, have determined that in appropriate circumstances, the Restatement's lost volume seller theory should be used in awarding damages."); C.I.C. Corp. v. Ragtime, Inc., 726 A.2d 316 (N.J. Super. Ct. App. Div. 1999) (approving the lost volume doctrine to determine damages relating to coin-operated machine contracts and holding that an instruction on mitigation of damages was reversible error).

[14] See Genovese v. Bergeron, 327 S.C. 567, 572, 490 S.E.2d 608, 611 (Ct. App. 1997) ("A party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances to mitigate damages; however, the law does not require unreasonable exertion or substantial expense for this to be accomplished.").

[15] C.I.C. Corp. v. Ragtime, Inc., 726 A.2d at 320.

A.

"The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future."[16] "Punitive damages also serve to vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party."[17]

South Carolina Code section 15-33-135 provides that "[i]n any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence."[18] Nevertheless, the trial court has considerable discretion regarding the amount of damages, both actual or punitive.[19]

In Gamble v. Stevenson, the supreme court mandated the following procedure for appellate review of an punitive damages award:

> [T]o ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review and may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct;

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[16] Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000).

[17] Id. at 378-79, 529 S.E.2d at 533.

[18] S.C. Code Ann. § 15-33-135 (Supp. 2002).

[19] See Miller v. City of W. Columbia, 322 S.C. 224, 230, 471 S.E.2d 683, 687 (1996) ("The award of actual and punitive damages remains within the discretion of the jury, as reviewed by the trial judge.").

> (7) defendant's ability to pay; and finally, (8) . . . "other factors" deemed appropriate.[20]

The master based his conclusions on his findings that the actions taken by ABG demonstrated ABG's culpability, awareness of the contract and ultimate concealment of its desire to have Collins' contract breached, the harm that was caused, the deterrent effect of a punitive damages award, and ABG's ability to pay.

We hold there was evidence that ABG's conduct was willful, intentional, and in disregard of Collins' rights. Evidence was presented at trial of ABG's intention to run T.A. Coats out of business if he did not agree to its request to purchase his business. ABG was made aware of the agreement between Collins and T.A. Coats, but nevertheless set up the purchase of the Ponderosa and Shipwatch locations in an attempt to avoid having to comply with the provisions of the lease.

As the master noted, ABG was "aware of the fact that Collins would suffer a serious economic loss if its contract was cancelled and Collins' machines were removed." Also, ABG gained from procuring the breach of the contract because it would not have to share the revenues with Collins, but could instead install machines from another source and retain 100 per cent of the profits.

On appeal, ABG focuses on the fact the video poker industry no longer exists and, therefore, there is no opportunity for recidivism. Although the video poker gaming industry is no longer legal in South Carolina, the conduct could nevertheless be continued in other industries. Furthermore, the possibility of future conduct is only one of several factors to consider. Given the egregious conduct by ABG and its total disregard for Collins' rights, we uphold the master's decision to award punitive damages.

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[20] 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991). The "other factors" are discussed in Pacific Mutual Life Insurance v. Haslip, 499 U.S. 1, 20 (1991).

B.

ABG also maintains the amount awarded is excessive and violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Although the punitive damages award greatly exceeded Collins' actual damages, we hold the award does not violate due process.

"Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[21] "Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."[22]

As noted by the Supreme Court, "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."[23] Nevertheless, as one commentator has recently noted, "[g]enerally, attorneys should be cautioned against relying on the ratio of punitive to compensatory damages to argue the constitutionality of awards. Although the ratio is a factor universally argued, there is no consistent pattern in its application."[24]

In BMW of North America v. Gore, the Supreme Court provided the following factors for determining the reasonableness of a punitive damages

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[21] BMW of N. Am. v. Gore, 517 U.S. 559, 568 (1996).

[22] Id.

[23] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. at 18.

[24] G. Ross Anderson, Jr., Punitive Damages: A Funny Thing Happened on the Way to the Courthouse, S.C. Trial Lawyer Bulletin, Fall 2002, at 12, 13.

award: (1) the degree of reprehensibility, (2) the ratio of the punitive damages award to the actual harm inflicted on the plaintiff, and (3) the comparison of the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct.[25]

"Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."[26] In the present case, ABG's conduct was clearly wrongful, calculated, and improper. ABG intentionally interfered with a contract, and this interference inured to the detriment of one of the parties to the contract. Although ABG argues Collins suffered only economic harm, the degree of reprehensibility was still significant. ABG went to great lengths to ensure that it would get out from under the Collins agreement, be able to place its own machines at the Ponderosa and Shipwatch locations, and then be entitled to indemnification if anything went awry. Moreover, in addition to the unusual indemnification provision in the purchase and sale agreement, there was also evidence that ABG further attempted to insulate itself from liability by creating a shell corporation with no assets in case "the deal went sour."

The second factor is the ratio of punitive to actual damages. ABG contends a ratio of 10 to 1 is excessive. We disagree. In his order, the master stated the award was "in part based upon [his] firm conviction that American Bingo and others must not be allowed to profit from misconduct of the type established in this case." Given this reasoning and the ample authority to support it, we hold there was no due process violation.[27]

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[25] 517 U.S. at 575-76; see also Welch v. Epstein, 342 S.C. 279, 307, 536 S.E.2d 408, 422 (Ct. App. 2000) (applying the BMW "guideposts" to an analysis of a punitive damages award).

[26] BMW of N. Am. v. Gore, 517 U.S. at 575.

[27] See TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460 (1993) ("It is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims

V. Motion to Supplement

ABG contends the master erred in failing to allow it to supplement the record with additional testimony regarding its financial condition and more recent financial statements. The record, however, does not indicate that ABG made a proffer of either the contents of the financial records or the testimony or otherwise attempted to include this matter in the record on appeal. This court has no basis for determining whether the records and testimony at issue would have been beneficial to ABG. Consequently, this issue has not been preserved for review.[28]

AFFIRMED.

HUFF and SHULER, JJ., concur.

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that might have resulted if similar future behavior were not deterred.") (emphasis in original), quoted in Hundley v. Rite Aid of S.C., 339 S.C. 285, 315, 529 S.E.2d 45, 61 (Ct. App. 2000).

Although it did not formally designate this as a separate issue, ABG also vigorously argues in its brief that the award was unfair because all the employees involved in the events related to the lawsuit are no longer associated with the company. We agree with Collins, however, that this fact, even if true, is immaterial in view of the fact that ABG, as a corporation, "is a distinct legal entity." Todd v. Zaldo, 304 S.C. 275, 278, 407 S.E.2d 666, 668 (Ct. App. 1991).

[28] See Greenville Mem'l Auditorium v. Martin, 301 S.C. 242, 391 S.E.2d 546 (1990) (stating the failure to make a proffer of excluded evidence precludes review of the evidence on appeal).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tom Anderson,

Appellant,

v.

The Augusta Chronicle, Morris Communications, Inc.,

Respondents.

Appeal From Aiken County
Costa M. Pleicones, Circuit Court Judge

Opinion No. 3597
Heard May 9, 2001 - Filed February 3, 2003

REVERSED and REMANDED

John W. Harte, of Aiken, for Appellant.

James M. Holly, of Aiken; and David Hudson, of Augusta, for Respondents.

SHULER, J.: In this defamation action, Tom Anderson appeals a directed verdict in favor of *The Augusta Chronicle* and Morris Communications, Inc. (collectively "*The Chronicle*"). We reverse and remand for a new trial.

FACTS/PROCEDURAL HISTORY

In 1996, Tom Anderson ran unsuccessfully for a seat in the South Carolina House of Representatives. During the campaign, two hurricanes hit the coast of North Carolina; Anderson, a claims adjuster specializing in natural disasters, traveled to North Carolina to process insurance claims. As a result, Anderson was out of the state for ten weeks of the election season.

The next year, following redistricting, Anderson prepared to run again in a special election for the same House seat. Chad Bray, a reporter for *The Chronicle*, phoned Anderson twice to discuss the previous campaign. On April 6, 1997, *The Chronicle* published an article by Bray concerning the special election and stating in relevant part:

> The Democrats [sic] best hope — other than Mr. Clyburn — may be Tom Anderson. He's expected to seek a rematch against state Rep. Roland Smith, R-Langley, Mr. Brown said.
>
> Mr. Anderson took 32 percent of the vote in District 84 when he ran against Mr. Smith in 1996, even though he was out of the area with the National Guard during the final weeks of the election.

At some point thereafter, Anderson announced his candidacy and again spoke with Bray by phone. According to Anderson, the subject of his absence during the 1996 campaign did not come up during the call. On June 3, *The Chronicle* published another article by Bray about the special election. In pertinent part, the article stated:

> Mr. Anderson, a Bath property appraiser, said he felt

> cheated after being called away for National Guard duty in the last month before the 1996 general election. Mr. Smith eventually won with 67 percent of the vote to Mr. Anderson's 33 percent.

Anderson, who asserts he never told Bray he worked with the National Guard, did not contact *The Chronicle* following publication of either article to request a retraction or correction.

The following September, John Boyette, *The Chronicle*'s Aiken Bureau Chief, contacted Anderson and asked if he was planning to withdraw from the race since he had been "proven" a liar for stating he was working for the National Guard in 1996. Anderson told Boyette Bray must have misunderstood when he said he had worked for the National Flood Insurance Program (NFIP), an insurance adjuster program operated under the auspices of the Federal Emergency Management Agency (FEMA). *The Chronicle* published Boyette's article, headlined "GOP wants Anderson out of House race," on September 18. The subheading read: "Clearwater Democratic candidate is accused of lying about his National Guard service." This article stated in part:

> The South Carolina Republican Party called for Tom Anderson to drop out of the House District 84 race Wednesday, charging that the Clearwater Democrat lied about service in the National Guard.
>
> The South Carolina National Guard has no record of Mr. Anderson's ever serving, said Trey Walker, state GOP executive director. In a faxed statement, Mr. Walker said Mr. Anderson "should immediately dishonorably discharge himself from the race."
>
> *The Augusta Chronicle* reported in June that Mr. Anderson said he felt cheated after being called away for National Guard duty in the last month before the 1996 general election . . . .

> Mr. Anderson, however, denied Wednesday that he ever told *The Chronicle* that he had served in the National Guard. Instead, he said, he spent more than two months in North Carolina doing damage appraisals for the National Flood Insurance Group after two hurricanes hit the coast.
>
> Last fall, National Guard units were called on to assist victims of Hurricane Fran in eastern North Carolina.
>
> . . . .
>
> Mr. Anderson was drafted into the Army, served in the Korean War and, after a two-year stint in Europe, was discharged in 1956.

The same day, an article appeared in the *Aiken Standard* with the headline, "Democrat responds to 'misinformation.'" This article, by senior writer Carl Langley, recorded Anderson's denunciation of *The Chronicle*'s allegations and quoted him as saying: "I've never been in the National Guard, and would have been a fool to make such a statement." The article continued:

> Anderson missed several weeks of the last campaign by working on insurance claims generated from Hurricane Fran in North Carolina.
>
> "I was gone on two occasions during the 1996 campaign, and a lot of the insurance (claims) we worked on involved the National Flood Insurance Program," said Anderson.
>
> He speculated that the reporter for an Augusta newspaper couldn't tell the difference between the national flood insurance program and the National Guard.

. . . .

> Anderson said he told the reporter that during the last election he had to go to North Carolina in July and again in September and October to work on the insurance claims.

Other local papers also published articles concerning the controversy.

On September 26, Anderson received a telephone call from Pat Willis. Willis told Anderson she was working on an article for *The Chronicle* and requested proof that he was a government-approved insurance adjuster and that he had worked in North Carolina in 1996. Anderson subsequently faxed Willis several documents, including a letter on FEMA/NFIP stationery approving his application for NFIP certified adjuster status.

Despite this information, on October 1 *The Chronicle* published an editorial with the headline "Let the liar run." Written by Phil Kent, *The Chronicle*'s editorial page editor, the piece stated in full:

> Clearwater Democrat Tom Anderson, running in November's court-ordered special election for South Carolina's House District 84 seat, has been exposed as a liar.
>
> He told this newspaper he was called away to National Guard duty in the last weeks of the 1996 election, his first race against incumbent state Rep. Roland Smith, R-Langley. (Anderson lost by a decisive margin.)
>
> It turns out, however, the state Guard has no record of Anderson ever serving — either then or any other time.
>
> State GOP director Trey Walker, saying Anderson has dishonored himself and the National Guard, demands

> that the Democrat withdraw from the race. Walker's right about the dishonor, but what about the withdrawal?
>
> If Anderson is the best Democrats can come up with, they still have every right to run him. There's nothing in the election rules that says a political party can't nominate for public office a candidate who, in effect, lies on his resume.
>
> We are confident that an informed electorate won't vote into office a proven prevaricator. After all, he doesn't even have the long robes of one of Al Gore's Buddhist monks to hide behind!

The morning following publication, Anderson tried to reach Kent to demand a retraction or clarification. After several attempts, Anderson eventually spoke with a woman named Tara in *The Chronicle*'s editorial department.[1] Tara informed Anderson that Kent "wouldn't talk" to him, but stated that if Anderson faxed a rebuttal letter it would be printed. In the meantime, Republican Party officials mailed copies of the editorial to district voters.

The Chronicle subsequently printed a "Clarification" on October 29:

> Tom Anderson, Democratic candidate in this year's special election for the South Carolina House District 84 seat, said he was called away from the Aiken area just before the 1996 election for the post to work for the National Flood Insurance Program. Mr. Anderson also said he was misquoted in [the] June 2 story in The Augusta Chronicle.

The paper also published Anderson's response as a Letter to the Editor on

[1] Tara Harbin is Phil Kent's assistant at *The Chronicle*.

November 2.

Anderson ultimately filed a complaint for libel, amended March 8, 1999, alleging *The Chronicle* published false statements in Kent's editorial dated October 1, 1997. At a trial held October 11, 1999, *The Chronicle* moved for a directed verdict at the close of Anderson's case. The trial court orally granted the motion on October 12, finding Anderson failed to show constitutional malice, and thereafter filed a form order judgment. This appeal followed.

LAW/ANALYSIS

Standard of Review

When deciding a motion for a directed verdict, the trial court "must view the evidence and all reasonable inferences in the light most favorable to the non-moving party." Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 476, 514 S.E.2d 126, 130 (1999); see Bell v. Evening Post Pub. Co., 318 S.C. 558, 459 S.E.2d 315 (Ct. App. 1995). If the evidence presented yields only one inference such that the trial court may decide the issue as a matter of law, the decision to grant the motion is proper. See Swinton, 334 S.C. at 476, 514 S.E.2d at 130. On the other hand, a directed verdict motion on liability for libel is properly denied where evidence exists justifying submitting the issue to the jury. See Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 513, 506 S.E.2d 497, 503 (1998).

Whether a plaintiff has presented evidence sufficient to constitute actual malice is, in the first instance, a question of law for the trial court. See Elder v. Gaffney Ledger, 341 S.C. 108, 533 S.E.2d 899 (2000); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986) ("When determining if . . . actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under New York Times."); Bose Corp. v. Consumers Union, 466 U.S. 485, 511 (1984) ("Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing

proof of 'actual malice.'"). Similarly, the appellate court is obliged to independently examine the entire record on appeal and decide, *de novo,* whether the evidence presented below is of sufficient quantity and character to sustain a finding of actual malice. See Elder, 341 S.C. at 113-114, 533 S.E.2d at 902; Miller v. City of West Columbia, 322 S.C. 224, 471 S.E.2d 683 (1996); see also Bose, 466 U.S. at 512 ("Appellate judges . . . must exercise independent judgment and determine whether the [entire] record establishes actual malice with convincing clarity."). In all cases the court must ask "whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." Anderson, 477 U.S. at 255-56.

Discussion

The tort of defamation exists to redress injury to the plaintiff's reputation arising from the defendant's publication of a false and defamatory statement. See Holtzscheiter, 332 S.C. at 508, 506 S.E.2d at 501; Swinton, 334 S.C. at 484, 514 S.E.2d at 133. Proof of the tort requires the plaintiff to show the defendant was at fault in publishing a false and defamatory statement concerning him to a third party that either caused him special harm or was actionable irrespective of harm. See Fleming v. Rose, Op. No. 25500 (S.C. Sup. Ct. filed July 22, 2002) (Shearouse Adv. Sh. No. 25); Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001).

Although defamation is substantively a matter of our state common law, the federal Constitution "may reshape the common-law landscape to conform to the First Amendment." Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986). Thus, when a public figure or official[2] claims defamation by

[2] Anderson concedes he is a public figure for defamation purposes. See, e.g., Monitor Patriot Co. v. Roy, 401 U.S. 265, 271 (1971) ("[I]t might be preferable to categorize a candidate as a 'public figure,' if for no other reason than to avoid straining the common meaning of words. But the question is of no importance so far as the standard of liability . . . is concerned . . . . That [New York Times] itself was intended to apply to

speech of public concern, the Constitution requires him "to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law." Id.; see Beckham v. Sun News, 289 S.C. 28, 30, 344 S.E.2d 603, 604 (1986) ("[I]n libel actions brought by public officials and public figures the traditional burdens of proof are necessarily altered by the constitutional protections afforded the press."). Part of this "higher barrier" is the degree of fault by the publisher that the plaintiff must prove. See Herbert v. Lando, 441 U.S. 153, 171-72 (1979) ("[S]ome error is inevitable; and the difficulties of separating fact from fiction convinced the Court . . . to limit liability to instances where some degree of culpability is present in order to eliminate the risk of undue self-censorship and the suppression of truthful material."); see also Fleming, Op. No. 25500 (S.C. Sup. Ct. filed July 22, 2002) (Shearouse Adv. Sh. No. 25 at 35); Beckham, 289 S.C. at 30, 344 S.E.2d at 604.

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and its progeny prescribe the requisite fault to be proved by a public figure. Under this standard, the plaintiff must show an allegedly libelous statement was published with "actual malice." Id. at 279-280; see George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001); Elder, 341 S.C. at 113, 533 S.E.2d at 901. Proof of actual malice requires the plaintiff to demonstrate, by clear and convincing evidence, that the publisher made the statements either knowingly or with reckless disregard for their truth or falsity. George, 345 S.C. at 456, 548 S.E.2d at 876; Elder, 341 S.C. at 114, 533 S.E.2d at 902. Clear and convincing evidence may be defined as "'that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established.'" Peeler v. Spartan Radiocasting, Inc., 324 S.C. 261, 269 n.4, 478 S.E.2d 282, 286 n.4 (1996) (citation omitted). It is an intermediate measure of proof, i.e., "'more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal.'" Id.

Actual malice is "a *subjective* standard which tests the defendant's good

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candidates, in spite of the use of the more restricted 'public official' terminology, is readily apparent from that opinion's text and citations to case law.") (footnote omitted).

faith belief in the truth of [its] statements." George, 345 S.C. at 456, 548 S.E.2d at 876; see Peeler, 324 S.C. at 266, 478 S.E.2d at 284. Hence, absent proof of a knowing falsehood, the plaintiff must establish a defendant "'in fact entertained serious doubts as to the truth of his publication'" or possessed a "'high degree of awareness'" of probable falsity. George, 345 S.C. at 456, 548 S.E.2d at 876 (citations omitted); see Holtzscheiter, 332 S.C. at 512-13, 506 S.E.2d at 503 (proving constitutional actual malice requires a showing that the publisher either "realized the statement was false" or "had serious reservations about its truth"). Recklessness presupposes "an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Peeler, 324 S.C. at 266, 478 S.E.2d at 284.

Without question, "'public discussion of the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the New York Times rule.'" George, 345 S.C. at 454, 548 S.E.2d at 875 (quoting Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 686 (1989)); see Patriot Monitor Co. v. Roy, 401 U.S. 265, 271-72 (1971) ("[If] the First Amendment was 'fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people,' then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.") (internal citation omitted). Indeed, the actual malice standard "is premised on our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" George, 345 S.C. at 456-57, 548 S.E.2d at 876 (quoting New York Times, 376 U.S. at 270).

The First Amendment, however, does not afford defamatory political speech absolute immunity. See id. at 455, 548 S.E.2d at 876; Stevens v. Sun Publ'g Co., 270 S.C. 65, 71, 240 S.E.2d 812, 815 (1978) ("An individual's status as a public figure does not immunize a publisher from liability when it prints defamatory articles with malice."); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989) ("We have not gone so far . . . as to accord the press absolute immunity in its coverage of public figures or

elections."). As the Supreme Court has stated:

> That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas . . . ." Hence the knowingly false statement and the false statement made with reckless disregard of the truth[] do not enjoy constitutional protection.

Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (citation omitted); see Curtis Publ'g Co. v. Butts, 388 U.S. 130, 150 (1967) ("[T]hat dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean . . . that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others.").

The sole basis of the trial court's decision to direct a verdict in *The Chronicle*'s favor, and the only question before this Court, is whether Anderson presented sufficient evidence to create a jury question on the constitutional malice element of defamation. We therefore assume for purposes of this opinion that *The Chronicle* published "Let the liar run" and that it contained false and defamatory statements. See George, 345 S.C. at 456 n.7, 548 S.E.2d at 876 n.7 ("Because summary judgment was granted solely on the issue of actual malice, we assume *arguendo* that the statements were false and defamatory."). Moreover, since "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict," the evidence presented by Anderson "is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); see Masson v. New Yorker Magazine, Inc., 501

U.S. 496, 520 (1991) ("[W]e must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence.").

As an initial matter, it is important to recognize the presumptively false and defamatory statements contained in "Let the liar run" may constitute libel in two separate ways. First, the statement that Anderson "told this newspaper he was called away to National Guard duty in the last weeks of the 1996 election" could cause injury by attributing to Anderson a statement of fact he did not make. See Masson, 501 U.S. at 511 ("A fabricated quotation may injure reputation . . . [and] giv[e] rise to a conceivable claim of defamation . . . because it attributes an untrue factual assertion to the speaker."); White v. Wilkerson, 328 S.C. 179, 184, 493 S.E.2d 345, 347 (1997) (holding a statement is defamatory "if the words used . . . convey to the minds of those to whom they are addressed . . . the impression that the plaintiff has done wrong" when considered in the context of the entire publication) (internal citation omitted). Such a statement is defamatory *per quod*, because its defamatory meaning is derived from facts extrinsic to the statement itself, in this case Anderson's denial that he ever said what the editorial claims. See Holtzscheiter, 332 S.C. at 509, 506 S.E.2d at 501 ("If the defamatory meaning is not clear unless the hearer knows facts or circumstances not contained in the statement itself, then the statement is defamatory *per quod*.").

Second, the statements that Anderson "has been exposed as a liar," is a "proven prevaricator," and effectively "lies on his resume" are actionable in their own right as being defamatory *per se*. See id. at 508-09, 506 S.E.2d at 501 ("The defamatory meaning of a message or statement may be obvious on the face of the statement, in which case the statement is defamatory *per se*."). Thus, we must look to each potential libel and determine if Anderson presented sufficient evidence to permit us to conclude a reasonable jury could have found *The Chronicle* acted with actual malice in publishing the statements. Viewed in the light most favorable to Anderson, the evidence reveals the following.

Anderson denies he ever told Chad Bray or anyone at *The Chronicle* that he left his district during the 1996 general election to serve in the National

Guard, and we must presume his denial is correct. See Masson, 501 U.S. at 520-21 ("[W]e must assume . . . petitioner is correct in denying that he made the statements attributed to him . . . . [Author] contests petitioner's allegations, and only a trial on the merits will resolve the factual dispute."). Instead, Anderson asserts that in a telephone interview in the spring of 1997, he told Bray he had been out of the area working for various insurance companies. When Bray, who appeared unfamiliar with the property insurance industry, asked him to describe what a property company does and to name one, Anderson recounted several, including the National Flood Insurance Program. According to Anderson, Bray confused this reference to *National Flood* with the *National Guard*.

After two brief mentions of Anderson and the National Guard in articles written by Bray the previous April and June, on September 17, 1997, *The Chronicle*'s John Boyette telephoned Anderson and inquired if he was planning to withdraw from the special election race because he had lied about being in the National Guard. Anderson contends he gave Boyette "the facts" at this time, i.e., that he had been working for various insurance companies in North Carolina, not the National Guard, and we assume Anderson's version of this telephone conversation is accurate. See id.

Despite Anderson's express disavowal, Boyette authored the September 18 article in which he repeated the National Guard statement along with Anderson's denial and explanation for his absence, and *The Chronicle*, now obviously aware of the denial, published Kent's editorial on October 1.[3]

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[3] Although *The Chronicle* concedes Phil Kent authored the editorial, it argues Anderson "presented no evidence on who wrote the editorial or who . . . had responsibility for publication of the editorial." This contention is belied not only by *The Chronicle*'s admission, but also by Anderson's trial testimony and a letter from Kent to Anderson's son Mark. On re-direct, in response to a question concerning who was "responsible for the creation of the [editorial]," Anderson replied, "Phil Kent and *The Augusta Chronicle*." In addition, the letter, on *Chronicle* stationery listing "Philip Kent" as the "Editorial Page Editor" and admitted into evidence without objection, includes his statement that "[m]y responsibility is solely for the opinion

Although *The Chronicle* subsequently printed a "Clarification" and Anderson's Letter to the Editor, the paper never retracted its assertion that Anderson had claimed to be in the National Guard or its conclusion that he was a liar.

The Supreme Court has held that the "deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of [actual malice], unless the alteration results in a material change in the meaning conveyed by the statement." Masson, 501 U.S. at 517 (internal citations omitted). Anderson, however, does not contend Bray intentionally altered his statement concerning National Flood. Instead, Anderson argues he carried his burden on actual malice by showing *The Chronicle* knew of the alleged inaccuracy and chose to ignore it.

In conducting our independent examination of the record, we concentrate on evidence of *The Chronicle*'s "conduct and state of mind." Herbert, 441 U.S. at 160; see Butts, 388 U.S. at 152-53 ("[New York Times] makes clear . . . that neither the interests of the publisher nor those of society necessarily preclude a damage award based on improper conduct which creates a false publication. It is the conduct element, therefore, on which we must principally focus . . . .").

The law of libel recognizes the subjective nature of a media defendant's intent may be very difficult to prove. Because a plaintiff "will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself," any direct or indirect evidence relevant to the defendant's state of mind is admissible to demonstrate actual malice. Herbert, 441 U.S. at 170; see Harte-Hanks, 491 U.S. at 668 ("[A] plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence . . . .") (internal citations omitted); Zerangue v. TSP Newspapers, Inc., 814 F.2d 1066, 1070 (1987) ("Although the defendant's state of mind is a subjective fact, it can be shown by indirect or circumstantial evidence."). Moreover, since "[t]he finder of fact must determine whether the publication was indeed made in good faith," a plaintiff's presentation of competent circumstantial evidence of bad faith may establish actual malice despite a defendant's claim that a publication was made "with a

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pages, including letters to the editor."

belief that the statements were true." St. Amant v. Thompson, 390 U.S. 727, 732 (1968); see McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501, 1510 (recognizing a plaintiff is "entitled to an aggregate consideration" of evidence of actual malice"); Tavoulareas v. Piro, 817 F.2d 762, 789 (D.C. Cir. 1987) ("[A] plaintiff may prove the defendant's subjective state of mind through the cumulation of circumstantial evidence."); Zerangue, 814 F.2d at 1070 (stating sufficient indirect evidence of actual malice can negate a defendant's assertion that he acted in good faith).

"Reckless disregard" is a term of art that "cannot be fully encompassed in one infallible definition." St. Amant, 390 U.S. at 730. To the contrary, the recklessness standard is formed as case law evolves. Id.; see Harte-Hanks, 491 U.S. at 686 ("[O]nly through the course of case-by-case adjudication can we give content to these otherwise elusive constitutional standards."). Hence, beginning with New York Times, where the plaintiff's case was unsuccessful because "the record failed to show that the publisher was aware of the likelihood that he was circulating false information," St. Amant, 390 U.S. at 731, the Supreme Court has continually refined the standard's parameters to guide the state and lower federal courts in making independent determinations on actual malice.

Although a publisher's "[f]ailure to investigate does not in itself establish bad faith," id. at 733, the Court has articulated several instances where recklessness might be shown. One of these is "where there are obvious reasons to doubt the veracity of [an] informant *or the accuracy of his reports*." St. Amant, 390 U.S. at 732-33 (emphasis added); see Herbert, 441 U.S. at 156 (stating a court may find "'subjective awareness of probable falsity'" if "'there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.'") (citations omitted); Harte-Hanks, 491 U.S. at 688 (same).

While we recognize the opinions in St. Amant, Herbert, and Harte-Hanks were referring to a publisher's outside source, we see no legitimate reason why the analysis would not apply with equal force to a newspaper's own reporter, particularly when the evidence points to a mistake or misunderstanding between the reporter and his interview subject. In fact, in considering the Masson case

on remand from the Supreme Court, the Ninth Circuit Court of Appeals so held. See Masson v. New Yorker Magazine, Inc., 960 F.2d 896, 900 (9th Cir. 1992) (stating where direct proof of a publisher's actual state of mind is missing, the jury may nevertheless infer awareness of falsity if it finds circumstances which "gave the publisher 'obvious reasons to doubt'" the "accuracy of facts and quotations" in an author's article and the publisher "failed to take reasonable steps to dispel those doubts"); see also Speer v. Ottaway Newspapers, Inc., 828 F.2d 475, 477 (8th Cir. 1987) (treating reporter who supplied false information but had no input into defamatory editorial as "outside source" for purposes of actual malice determination based on the newspaper's alleged recklessness). Similarly, our supreme court has declared that "actual malice may be present where the defendant fails to investigate *and there are obvious reasons to doubt the veracity* of the *statement* or informant." George, 345 S.C. at 459, 548 S.E.2d at 878 (additional emphasis added); see Zerangue, 814 F.2d at 1070 ("[C]ourts have upheld findings of actual malice when a defendant failed to investigate a story weakened by . . . apparently reliable contrary information.").[4] In our view, the facts of this case amply demonstrate "obvious reasons to doubt" the truth of the National Guard statement reported by Bray.

To begin, *The Chronicle* unquestionably knew Anderson disputed Bray's version of their conversation,[5] as it had published Boyette's article containing

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[4] We agree with the court in Masson, which explained that Harte-Hanks and other Supreme Court precedent stand for the proposition "that a publisher who does not already have 'obvious reasons to doubt' the accuracy of a story is not required to initiate an investigation that might plant such doubt. Once doubt exists, however, the publisher must act reasonably in dispelling it. Thus, where the publisher undertakes to investigate the accuracy of a story and learns facts casting doubt on the information contained therein, it may not ignore those doubts, even though it had no duty to conduct the investigation in the first place." Masson, 960 F.2d at 901.

[5] Although the record before us indicates Bray "stands by his story on the National Guard issue," the determination of what Anderson actually said is uniquely a question for the trier of fact. See Masson, 501 U.S. at 521

an express denial less than two weeks before "Let the liar run." Indeed, *The Chronicle*'s primary argument before the trial court and now as respondent is that Anderson cannot show actual malice because Kent, as editor, simply chose to believe Bray rather than Anderson. But unlike Speer, supra, this was not a case of a publisher's failure to guess accurately among conflicting accounts of a perceived event. In Speer, the court found no clear and convincing evidence of actual malice when a newspaper failed to investigate a reporter's information that had been disputed by others because the editorial staff "already knew both versions" of the incident and "at least two eyewitnesses had corroborated [the reporter's] version." Speer, 828 F.2d at 478. Here, however, Kent never spoke with Anderson to obtain his side of the story.

Furthermore, our supreme court's decision in Peeler, supra, is similarly unavailing. The Peeler court ruled that subjective awareness of probable falsity is not shown with convincing clarity by evidence indicating a publisher and plaintiff "disagreed with respect to their perceptions of events which they both observed." Peeler, 324 S.C. at 266-67, 478 S.E.2d at 285. As *The Chronicle* recognizes, though neither Peeler nor the Wyoming opinion quoted therein so states, this language effectively recites the "rational interpretation" doctrine outlined by the Supreme Court in Time, Inc. v. Pape, 401 U.S. 279 (1971), and Bose, supra. These cases held that where a publisher chooses "one of a number of possible rational interpretations" of an event "bristl[ing] with ambiguities," the choice, even if it reflects a misconception, is protected under the First Amendment. Pape, 401 U.S. at 290; Bose, 466 U.S. at 512. *The Chronicle* contends that because Kent "was presented in the preceding articles with a rational account of what [Anderson] said to Bray and why he said what he did," Anderson cannot establish actual malice.

Masson, however, explicitly rejected "rational interpretation" protection for defamatory statements in the context of alleged misquotations. See Masson, 501 U.S. at 518. There, the Court unequivocally stated that "[t]he protection for

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(stating that, although the article's author contested the plaintiff's allegations that he was misquoted, "only a trial on the merits will resolve the factual dispute").

rational interpretation serves First Amendment principles by allowing an author the interpretive license that is necessary when relying upon *ambiguous* sources." Id. at 519 (emphasis added). As the Court noted:

> Were we to assess quotations under a rational interpretation standard, we would give journalists the freedom to place statements in their subjects' mouths without fear of liability. . . . Not only public figures but the press doubtless would suffer under such a rule. Newsworthy figures might become more wary of journalists, knowing that any comment could be transmuted and attributed to the subject, so long as some bounds of rational interpretation were not exceeded. We would ill serve the values of the First Amendment if we were to grant near absolute, constitutional protection for such a practice.

Id. at 520. As in Masson, the significance of *The Chronicle*'s unqualified statement that Anderson "told this newspaper" he was in the National Guard is to inform the reader he is reading Anderson's statement, not *The Chronicle*'s "rational interpretation of what [Anderson] said or thought." Id. at 519-20. We therefore reject *The Chronicle*'s contention that any part of "Let the liar run" is protected under the doctrine of "rational interpretation."[6]

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[6] We further note this case is factually distinguishable from both Peeler and its source for the rationality principle, McMurry v. Howard Publ'ns, Inc., 612 P.2d 14 (Wyo. 1980). Not only did Peeler involve a situation in which a discrepancy emerged between what several listeners, including the reporter, thought they heard a third party say, there was absolutely *no* evidence suggesting the reporter or publisher had reason to doubt the truth of the statements at issue *before* publication. McMurry, on the other hand, is clearly a case where several parties heard the plaintiff *say* the same thing, but interpreted the *meaning* of what was said differently; the statement, therefore, properly was protected under a rational interpretation principle.

Turning to the evidence at hand, the record reflects that in addition to Anderson's emphatic denial that he ever claimed to be in the National Guard, *The Chronicle* knew Anderson thought Bray had confused National Flood with National Guard. Anderson testified he told John Boyette he had been in North Carolina working for various insurance companies. Boyette's September 18 article confirms this, referencing not only Anderson's denial but also his assertion that he actually said he spent two months working in North Carolina for National Flood. According to Anderson's testimony, he contacted *The Chronicle* to dispute Boyette's article and was under the impression Boyette had the situation "covered" and "put to rest."

However, on September 26 Anderson received a call from *The Chronicle*'s Pat Willis, who said she was working on an article about candidates in the upcoming special election. Anderson testified Willis specifically asked him for proof that he was a federally-approved insurance adjuster and that he had worked in North Carolina the year before. In response, Anderson faxed Willis seven pages of information along with a cover sheet which read:

> To: Pat Willis
> Fr: Tom Anderson
>
> National Flood info to follow – Proves I am certified to handle their claims – Ask John to have retraction run prior to 11-4-97.
>
> NFIP Info – 3 pages
> Resume – 2 pages
> [E]lection info – 2 pages
> 8 pages

The transmission included a letter from the supervisor of the NFIP's claims field operations, dated September 11, 1996 and addressed to Anderson on National Flood Insurance Program stationery, that stated in part: "We are pleased to advise you that your application for NFIP Adjuster Certification has been

approved."[7] As indicated on the cover sheet, Anderson also faxed a resume he prepared and used during his campaign for House Seat 84.[8]

Replete with references to his work in flood insurance and related matters, the resume noted Anderson had been 1) commended for supervising flood restoration projects in four states; 2) responsible for "approximately 200 contractors, workmen and damage assessors in efforts to house 4500 flood inundated families"; 3) a program chief in Johnstown, Pennsylvania following a destructive flood; 4) a contract coordinator in Los Angeles after mudslides in 1979; 5) a work supervisor following flooding in Winslow, Arizona; and 6) an appraiser of "property damage for various insurance companies and government agencies following hurricanes Andrew, Hugo, Alicia, Freddie, Camille, [and] Betsy. . . ." Thus, Anderson not only directly contradicted Bray's initial reports in *The Chronicle*, he furnished the newspaper, *at its request*, with documentary evidence to support his denial.

Although Anderson's age was not listed on the resume, it did refer to his military service in the Korean War. Boyette's article also stated Anderson "was drafted into the Army, served in the Korean War and, after a two-year stint in Europe, was discharged in 1956." Because military records are public and easily verifiable, we believe a jury could have concluded *The Chronicle*, in full possession of this information, should have realized Anderson's purported statement was highly improbable, particularly in light of his advanced age and the fact such a claim was obviously inconsistent with his resume, which listed

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[7] Anderson testified the letter, which specifically authorized him to "handle residential, commercial and condominium losses," reflected a renewal of his status as a certified adjuster for National Flood. According to Anderson, the agency had certified him "five or six times" before 1996.

[8] Although *The Chronicle* now asserts the documents faxed to Willis were "confusing," the paper made no attempt to contact Anderson for an explanation or to request additional information.

military service but made no mention of the National Guard.[9]

The above-stated facts about Anderson, known to *The Chronicle* before publication of "Let the liar run," support our conclusion that a reasonable jury could have found the newspaper had "obvious reasons to doubt" Bray's recollection of his conversation with Anderson. Without question, the phone call from Pat Willis clearly evidences some doubt at *The Chronicle* as to whether Bray accurately attributed the National Guard remark to him. Not only did Anderson deny the remark, he offered a logical explanation for Bray's confusion supported by documentary evidence. In light of these facts, we believe *The Chronicle*'s failure to undertake a reasonable investigation into the matter creates a jury question as to whether it published the editorial with actual malice.[10] See St. Amant, 390 U.S. at 731 ("Publishing with [obvious] doubts shows reckless disregard for truth or falsity and demonstrates actual malice."); Butts, 388 U.S. at 169-70 (Warren, C.J., concurring in result) ("Suffice it to say that little investigative effort was expended initially, and no additional inquiries were made even after the editors were notified by respondent and his daughter that the account to be published was absolutely untrue. Instead, the Saturday Evening Post proceeded on its reckless course with full knowledge of the harm that would likely result from publication of the article."); Masson, 960 F.2d at 900-01 (holding evidence which could sustain a jury verdict as to actual malice included knowledge on the part of the publisher that the plaintiff disputed the

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[9] *The Chronicle*'s assertion that "evidence concerning whether or not [Anderson] could have served in the National Guard does not establish what [he] said to reporter Bray during their two telephone interviews" misses the point. The issue involved in the actual malice inquiry is not what Anderson said, but whether *The Chronicle* had reason to doubt the accuracy of Bray's report or its own conclusion that Anderson was a liar based on that report.

[10] As noted in Masson on remand, "[i]t is not . . . the failure to act reasonably in itself that establishes malice; that failure is only a link in the chain of inferences that could (but need not) lead a jury to conclude that the publisher failed to conduct an investigation because it was already pretty much aware of the falsity." Masson, 960 F.2d at 900.

accuracy of a quotation attributed to him along with the fact that the publisher did not dismiss the plaintiff's charge of inaccuracy out of hand).

Furthermore, Anderson's trial evidence circumstantially supports an inference of actual malice in this case. Without objection, Anderson entered into evidence an editorial by Senior Writer Carl Langley that appeared in the *Aiken Standard* on September 21, 1997. Langley wrote:

> A year ago, and shortly before the November elections, Anderson, a semi-retired insurance claims adjuster, was asked by a group of independent insurance companies to help process claims from hurricane damage in North Carolina.
>
> A large number of the claims were made under the National Flood Insurance Program, *which Anderson referred to in his conversations with me and which he told me he gave to another reporter*.
>
> (*He not only furnished that information last year, but again this past June* after I asked why he did not campaign before the 1996 election.)

Anderson supported this affirmation by introducing a brief clip from the *Aiken Standard* dated September 27, 1996 and headlined "Candidate leaves area to help Fran victims." In relevant part, the article stated:

> Aiken County House candidate Tom Anderson has had to break off his campaign for House District 84 to help process insurance claims resulting from Hurricane Fran's destruction in North Carolina.
>
> Anderson, the Democratic candidate in House District 84, was called out of town and is now working on claims in North Carolina and Virginia, a Democratic

Party official said.

A jury could reasonably infer from this evidence that Anderson had in fact said National Flood, or that even a cursory investigation of his denial would have revealed the likelihood of a misunderstanding.

Other documentary evidence includes Anderson's cancelled check, dated October 10, 1996 and payable to an inn in Jacksonville, N.C., that bore the notation "lodging—Fran 9/9 to 10/10/[9]6." Certainly, if *The Chronicle* had inquired further, it would have discovered Anderson could in fact prove he was working on hurricane-related claims in North Carolina just before the November election. Moreover, a reasonable jury could infer that claims of inaccuracy from a candidate running for public office would be taken seriously by a newspaper purporting to publish the truth. *The Chronicle*'s failure to do so provides a legitimate basis for a jury to conclude "Let the liar run" was published with actual malice because it evinces an intent to avoid the truth. See Harte-Hanks, 491 U.S. at 692-93 ("[I]t is likely that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [its editorial]. . . . Although failure to investigate will not alone support a finding of actual malice . . . the purposeful avoidance of the truth is in a different category. . . . [E]vidence of an intent to avoid the truth was not only sufficient to convince the plurality [in Butts] that there had been an extreme departure from professional publishing standards, [] it was also sufficient to satisfy the more demanding [New York Times] standard . . . ."); Masson, 960 F.2d at 901 (stating that even in the absence of proof of a conscious decision to alter a quotation on the publisher's part, a jury could still conclude the publisher had obvious reasons to doubt the quote's accuracy but, "in an effort to purposefully avoid the truth, failed to conduct a reasonable investigation" of the plaintiff's claims of inaccuracy) (citations omitted); Elder, 341 S.C. at 114, 533 S.E.2d at 902 (finding actual malice may be established when there is at least some evidence that "the defendant purposefully avoided the truth").

Further support is found in the fact that the editorial was not "hot news." The phone conversation in which Bray claimed Anderson stated he was in the National Guard occurred at some point prior to Bray's first article, which

appeared in *The Chronicle* on April 6, 1997. Kent did not publish "Let the liar run" until October 1, nearly six months later. Undoubtedly, if *The Chronicle* suspected Anderson lied to Bray, it had ample opportunity to investigate the matter before publishing the editorial; evidence of intentional avoidance can itself lead to a reasonable conclusion of recklessness. See Stevens, 270 S.C. at 72, 240 S.E.2d at 815 (finding reckless disregard where the defamatory matter was not "hot news" and the newspaper failed to verify it despite warnings concerning its falsity). Indeed, a jury logically could infer some measure of reckless conduct from the fact *The Chronicle* chose to wait and publish the opinions of Kent, whose political bias was evident in the editorial's tone, until just a few weeks before the special election.[11]

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[11] We recognize a defamatory item published in an editorial/opinion column may in some circumstances militate against a finding of actual malice. See Elder, 341 S.C. at 118 n.9, 533 S.E.2d at 904 n.9 ("The 'form and content of [a] story are relevant . . . to the question of actual malice.'") (quoting Harte-Hanks, 491 U.S. at 695). However, "where a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals [can recover if they] show that such statements were made with knowledge of their false implications or with reckless disregard of their truth." Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990). As noted in Milkovich:

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar."

Finally, *The Chronicle*'s publication of a "Clarification" on October 29, 1997 is susceptible of an inference bolstering a finding of reckless disregard. The clarification was published nearly a month after the editorial defaming Anderson. Although it also noted Anderson's assertion he had been misquoted in the June 2 article by Bray, this was six weeks after Anderson told Boyette about the mistake. Inferentially, a jury could find *The Chronicle*'s lackluster "clarification" was merely an attempt to avoid liability for "Let the liar run" rather than a sincere effort at rectifying the harm done to Anderson's reputation. See, e.g., Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 46 (1971) ("Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story."). The reasonableness of such a conclusion is buttressed by the fact the "Clarification" did not clarify anything; it failed to put the issue in context by referencing either the editorial or previous articles by Boyette and Bray. More important, it was neither a correction nor a retraction of the allegedly false statements. See Zerangue, 814 F.2d at 1071 ("Refusal to retract an exposed error tends to support a finding of actual malice.").

Taken as true, we think Anderson's testimony, combined with the irrefutable documentary evidence in the record, is sufficient to permit a jury to decide whether *The Chronicle* published the statements in "Let the liar run" with actual malice. See Masson, 501 U.S. at 510 (stating a plaintiff's sworn denial of the defamatory statements attributed to him, combined with such additional evidence as the resemblance of the statements to what was actually said, the absence of a tight deadline affording the author a practical ability to investigate, and the opportunity to make corrections along the way, created a jury question

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Id. at 18-19. Thus, the mere fact that an item appears on the editorial page and is couched in terms of an "opinion" does not relieve the speaker or publisher from liability. See id.; see also Goodwin v. Kennedy, 347 S.C. 30, 41, 552 S.E.2d 319, 325 (Ct. App. 2001) (applying Milkovich to uphold the trial court's denial of a requested jury instruction that "appear[ed] to exempt all opinion as non-defamatory comment without qualification"). To the contrary, the same constitutional analysis applies to statements of opinion that imply an assertion of fact, unless, of course, the statement is not capable of being proved either true or false.

as to whether the defendant published the statements with actual malice). At the time of publication, *The Chronicle* had no more reason to believe Bray and his report of Anderson's statement than Anderson's denial. As the lower court observed in Masson, in the absence of independent evidence, it is not unreasonable to expect a publisher to investigate an alleged alteration in a quotation by confronting the author and asking him to verify the statement's accuracy by producing notes or other supporting materials. Masson, 960 F.2d at 902.

Moreover, even if the statement "[Anderson] told this newspaper he was called away to National Guard duty" were found to be true, a reasonable jury could infer it was at most a "slip of the tongue" and not an intentional attempt to mislead. Thus, if the editorial correctly attributed the National Guard statement to Anderson but the jury determined he was not a liar, Anderson would still be entitled to recover for defamation. See Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1097 (1991) ("[A] defamatory assessment of facts can be actionable even if the facts underlying the assessment are accurately presented.").

The Supreme Court has stated repeatedly that "there is no constitutional value in false statements of fact." Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); see Herbert, 44 U.S. at 171 ("Spreading false information in and of itself carries no First Amendment credentials."). The Court also has noted that "quotations may be a devastating instrument for conveying false meaning." Masson, 501 U.S. at 517. Because "a person's reputation is invaluable," Miller, 322 S.C. at 231, 471 S.E.2d at 687, "[t]hose who publish defamatory falsehoods with the requisite culpability . . . are subject to liability, the aim being not only to compensate for injury but also to deter publication of unprotected material threatening injury to individual reputation." Herbert, 441 U.S. at 172.

> First [A]mendment cases are unique because our society places a high value on free discussion of public issues, and those who engage in that discussion are protected even when they make careless errors. However, reputation is also a value, and the courts

> attempt, where possible, to protect both freedom of speech and reputation. Balancing these two interests mandates that a publisher have clear [F]irst [A]mendment protection from liability for the *first* nonmalicious publication of an erroneous story. However, once the publisher knows that the story is erroneous . . . the argument for weighting the scales on the side of [F]irst [A]mendment interests becomes less compelling. . . . At some point, the effort required of the publisher is so slight, and the helplessness of the victim so great, that the balance of the scales tips.

Zerangue, 814 F.2d at 1072 (internal citations omitted). Accordingly, although the actual malice standard "offers substantial protection to the critic of a public figure," it "should not be taken as a signal that 'All is fair' in politics." George, 345 S.C. at 462, 548 S.E.2d at 879-80.

The evidence in the record before us supports an inference *The Chronicle* went beyond the "sloppy journalism" found in Peeler when it published "Let the liar run." We are satisfied this evidence, viewed in the light most favorable to Anderson, is of a convincing clarity sufficient to justify sending the question of actual malice to a jury. See Anderson, 477 U.S. at 257 (declaring it the duty of the reviewing court to determine "whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity"). The trial court, therefore, erred in directing a verdict on this ground.

REVERSED and REMANDED.

GOOLSBY, J., concurs.

HEARN, C.J., dissents in a separate opinion.

HEARN, C.J., dissenting: Because I believe Anderson failed to

present clear and convincing evidence that *The Chronicle* acted with actual malice, I respectfully dissent.

In defamation actions involving "public figures," the plaintiff bears the burden of proving the statement was made with actual malice – that is, with either knowledge the statement is false or reckless disregard for its truth. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S.Ct. 710, 726 (1974); Elder v. Gaffney Ledger, 341 S.C. 108, 113, 533 S.E.2d 899, 901 (2000). Whether the evidence is sufficient to support a finding of actual malice is a question of law. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 685, 109 S.Ct. 2678, 2694 (1989). An appellate court must independently review the record to determine whether the evidence presented at trial is sufficient to support a finding of actual malice. Elder, 341 S.C. at 113-14, 533 S.E.2d at 902; Miller v. City of West Columbia, 322 S.C. 224, 228, 471 S.E.2d 683, 685 (1996). In all cases, the court must determine whether the evidence in the record could support a reasonable jury finding that plaintiff proved actual malice **by clear and convincing evidence**. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986) (emphasis added).

Actual malice is the subjective standard testing the publisher's good faith belief in the truth of his or her statements. Peeler v. Spartan Radiocasting, Inc., 324 S.C. 261, 478 S.E.2d 282 (1996). Therefore, in order to prevail, Anderson must present clear and convincing evidence establishing *The Chronicle* had no good faith belief in the truth of its statements, and thus acted with reckless disregard for the truth when publishing "Let the Liar Run." "A 'reckless disregard' for the truth, however, requires more than a departure from reasonably prudent conduct." Elder, 341 S.C. at 114, 533 S.E.2d at 902. Instead, the plaintiff must present "sufficient evidence that the defendant **in fact entertained serious doubts as to the truth** of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (emphasis in original). "There must be evidence the defendant had a '**high degree of awareness of . . . probable falsity.**'" Elder, 241 S.C. at 114, 533 S.E.2d at 902 (quoting Garrison v. Louisiana, 379 U.S. 64, 74, 85 S.Ct. 209, 216 (1964) (emphasis in original). To prove such, Anderson must present evidence, from a subjective standpoint, which demonstrates what *The Chronicle* knew with regard to the alleged falsity

of its statements. It is insufficient to show the defendant made an editorial choice or merely failed to investigate; there must be evidence at least that the defendant **purposefully avoided the truth**. Id. (citations omitted) (emphasis added).

I believe there is insufficient evidence in the record to establish *The Chronicle* acted with actual malice in publishing the editorial written by Kent. After Bray first interviewed Anderson, *The Chronicle* published an article stating Anderson was in the National Guard. When Anderson announced he would again run as a candidate, he spoke with Bray once more, and a second article was published in which *The Chronicle* referenced Anderson's alleged service in the National Guard. Anderson never requested a retraction or correction of either publication. It was not until Boyette contacted Anderson about the GOP's request for Anderson to withdraw from the race that Anderson denied having made such statements to Bray. Furthermore, *The Chronicle* reported Anderson's version of why he was in North Carolina and that Anderson denied telling *The Chronicle* he served in the National Guard in its article discussing the GOP's sentiments.

Prior to the publication of "Let the Liar Run," *The Chronicle's* Pat Willis contacted Anderson and informed him that she was working on an article and requested proof that he was a government-approved insurance adjuster and that he had worked in North Carolina in 1996. A reasonable jury might view this investigation as subjective evidence that *The Chronicle* did not believe Anderson was so licensed and that he had in fact allowed Bray to believe he was serving in the National Guard. Though Anderson was able to prove his status as a certified insurance adjuster, this fact does not establish that he accurately communicated to Bray his reason for being in North Carolina and that *The Chronicle* purposefully avoided the truth when publishing "Let the Liar Run." Moreover, from the subjective point of view of *The Chronicle*, its position that Anderson had stated he was in the National Guard is strengthened by Anderson's failure to object to *The Chronicle's* two prior reports and Bray's continued belief in his version of the interview with Anderson.

The majority places emphasis on the fact that *The Chronicle* was aware that Anderson disputed Bray's assertion that Anderson stated he served in the National Guard. However, this evidence fails to demonstrate *The Chronicle* in fact knew the falsity of its editorial "Let the Liar Run." Rather, this fact demonstrates only that *The Chronicle* knew of Anderson's disagreement with Bray's version of the interview – a fact *The Chronicle* had published as well. Moreover, evidence that Anderson disputed Bray's version of their conversation says nothing about *The Chronicle's* knowledge as to the truth of the matter, especially considering that Bray stood behind his recollection of the interview.

The only evidence presented at trial was Anderson's own testimony about his conversations with reporters from *The Chronicle*. Because the test for actual malice is subjective as to the knowledge of the publisher, evidence of Anderson's personal recollection of the interviews fails to shed light on what *The Chronicle* believed in good faith about the truth of the statements it published. Anderson presented no evidence regarding the standards and practices of the newspaper industry nor did he present any evidence that *The Chronicle* in fact knew Anderson did not tell Bray he had served in the National Guard. Furthermore, Anderson's challenge to the publication came only after the Republican Party asked him to withdraw from the race. As a public figure, Anderson bore the burden of proof to establish actual malice by clear and convincing evidence. Peeler, 324 S.C. at 266, 478 S.E.2d at 84. Because I believe the evidence presented by Anderson falls far short of establishing *The Chronicle* published "Let the Liar Run" with a high degree of knowledge as to its probable falsity, I would affirm the trial court's directed verdict in favor of the publisher.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Stewart Belton, Appellant,

v.

Cincinnati Insurance Company, Respondent.

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

Opinion No. 3598
Heard November 5, 2002 – Filed February 3, 2003

REVERSED AND REMANDED

Frank Anthony Barton and Wayne Floyd, both of West Columbia, for Appellant.

Russell D. Ghent and Mark Trapp, both of Greenville; and S. Jahue Moore, of West Columbia, for Respondent.

CURETON, J.: Stewart Belton filed this action alleging breach of contract and bad faith refusal to pay insurance proceeds. Cincinnati Insurance Company (Cincinnati) moved for summary judgment. The circuit court granted Cincinnati's motion. Belton appeals. We reverse and remand.

FACTS

Stuart Belton and Grady Query signed an agreement captioned "Lease Option to Buy" dated October 5, 1997. The agreement was a simple handwritten contract specifying a purchase price of $280,000 with a $50 down payment. The contract further provided for a note for $280,000 at 8% interest and lease payments of $1200 per month with eighty percent of each payment to be applied to the purchase price. The note was never executed.

The contract further provided the purchase was to be completed by November 1, 2002 with payment of the balance due at that time. The contract allowed Belton to improve the property before the closing only with Query's approval.

Belton fell behind almost immediately on his lease payments. On January 16, 1998, Belton wrote Query claiming the November 1997 payment was "moved up to December due to a miscommunication." Belton also claimed he was repairing the roof in lieu of rental payments for January and February. Query wrote Belton a letter on January 23, 1998, stating he was terminating the agreement and advising him to immediately vacate the premises. Belton did not vacate, and Query wrote another letter on February 18, 1998, again advising Belton he was terminating the agreement and advising Belton to vacate the premises.

Belton did not vacate, and Query filed a rule to vacate or show cause dated February 25, 1998. Query alleged Belton had not paid December, January, or February lease payments. Belton also failed to make payments in March and April of 1998. By petition dated April 24, 1998, Belton filed for bankruptcy and received protection from eviction due to the resulting automatic stay.

On July 24, 1998, Query filed a motion in the bankruptcy court seeking to lift the stay. Belton, as advised by his bankruptcy attorney, sought to obtain property insurance on the building. On August 5, 1998, the Livingston Agency issued a binder from Cincinnati. On August 14, 1998, an intentional fire destroyed the building. The bankruptcy court granted Query's motion to lift the automatic stay on August 21, 1998.

Belton filed a claim with Cincinnati for insurance proceeds on the building. Cincinnati refused to pay the claim based upon the absence of a binding insurance contract and fraud. Belton sued Cincinnati asserting breach of contract and bad faith refusal to tender insurance proceeds. Cincinnati moved for summary judgment on September 8, 2000. A hearing on the motion was held on October 23, 2000. The trial court granted Cincinnati's motion for summary judgment on all of Belton's causes of action, ruling that Belton's insurance contract was invalid at the time of its making and at the time of the fire because Belton did not have an insurable interest in the building at either time.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. Conner v. City of Forest Acres, 348 S.C. 454, 462, 560 S.E.2d 606, 610 (2002). When determining whether triable issues of fact exist, all evidence and inferences drawn from the evidence are viewed in the light most favorable to the nonmoving party. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

LAW/ANALYSIS

Belton contends the circuit court erred in granting summary judgment on his breach of contract and bad faith refusal to pay insurance proceeds causes of action. We agree.

In order to have an insurable interest in property under contract for purchase, there must be a valid contract in existence both at the time the

policy was issued and became effective, and at the time of the loss. South Carolina Ins. Co. v. White, 301 S.C. 133, 138, 390 S.E.2d 471, 475 (Ct. App. 1990); Powell v. Ins. Co. of North America, 285 S.C. 588, 590, 330 S.E.2d 550, 552 (Ct. App. 1985). When a contract to purchase property terminates, the purchaser's insurable interest is extinguished. White, 301 S.C. at 138, 390 S.E.2d at 471. Where an insurable interest does not exist at the time the contract for insurance was made, the insurance contract is void from its inception. Abraham v. New York Underwriters Ins. Co., 187 S.C. 70, 78, 196 S.E. 531, 534 (1938).

The trial court concluded the entire contract terminated upon Query's attempted cancellation of the contract by letters dated January 23 and February 18, 1998. The contract did not provide terms for ejectment. Accordingly, the statutory grounds for ejectment of a tenant under a lease would apply. Section 27-37-10 of the South Carolina Code provides: "(A) The tenant may be ejected upon application of the landlord or his agent when (1) the tenant fails or refuses to pay the rent when due or when demanded, (2) the term of tenancy or occupancy has ended, or (3) the terms or conditions of the lease have been violated." S.C. Code Ann. § 27-37-10 (Supp. 2001). "[T]he Legislature enacted section 27-37-10 to give the lessor a right not recognized at common law, the right to terminate a lease in the absence of a contractual provision." Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275-76, 440 S.E.2d 364, 366 (1994). Therefore, even without specific terms for ejectment in the parties' contract, the application of section 27-37-10 may have been sufficient to evict Belton and terminate the lease portion of the contract.

However, the termination of the lease would not *ipso facto* terminate Belton's option to purchase the property. The determination of whether terms in a contract are severable depends on the intent of the parties, which requires a factual determination. Williams v. Riedman, 339 S.C. 251, 277, 529 S.E.2d 28, 41 (Ct. App. 2000). Belton testified in deposition he recognized the contract was a lease with an option to purchase but believed the right to purchase the property existed even at the time of the hearing. Query acknowledged he remained willing to honor Belton's option to purchase the property. We find a factual issue exists as to whether Belton's right to

purchase the property under the option was severable from his rights as a lessee. Accordingly, we reverse the trial court's finding that the entire contract terminated due to Belton's failure to make lease payments.

The trial court further found, however, that even if the option was severed from the lease, Belton had no insurable interest as he held a mere expectancy to purchase property that did not qualify as an insurable interest.

In Benton & Rhodes, Inc. v. Boden, this court defined an insurable interest:

> It may be said, generally, that any one has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction. An insurable interest in property is any right, benefit or advantage arising out of or dependent thereon, or any liability in respect thereof, or any relation to or concern therein of such a nature that it might be so affected by the contemplated peril as to directly damnify the insured.
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> The term 'interest,' as used in the phrase 'insurable interest,' is not limited to property or ownership in the subject matter of the insurance . . . . [A]n insurable interest in property may arise from some liability which insured incurs with relation thereto. . . . Such liability may arise by force of statute or by contract, or may be fixed by law from the obligations which insured assumes.
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> Moreover, an insurable interest in property does not necessarily imply a property interest in, or a lien

> upon, or possession of, the subject matter of the insurance, and neither the title nor a beneficial interest is requisite to the existence of such an interest, it is sufficient that the insured is so situated with reference to the property that he would be liable to loss should it be injured or destroyed by the peril against which it is insured. For instance, although a person has no title, legal or equitable, in the property, and neither possession nor right to possession, yet he has an insurable interest therein if it is primarily charged in either law or equity with a debt or obligation for which he is secondarily liable.

310 S.C. 400, 403-04, 426 S.E.2d 823, 825-26 (Ct. App. 1993) (internal citations omitted).

There is no South Carolina case expressly considering the insurable interest of a party holding an option to purchase. When there is no South Carolina case directly on point, our court may look to other jurisdictions for persuasive authority. See Williams v. Morris, 320 S.C. 196, 200, 464 S.E.2d 97, 99 (1995) (applying the law of foreign jurisdictions in the absence of governing South Carolina law).

At least one legal commentator has concluded that a party with an option to purchase property has an insurable interest in the property. See Lee R. Russ & Thomas F. Segalla, 3 Couch on Insurance 3d § 42:64, at 42-80 (1997) ("The holder of an option to purchase has an insurable interest in the property to which the option extends."). See also 43 Am.Jur.2d Insurance § 965 (1982) ("If the price at which one has an option to purchase property is less than the market value of the property, he has such an interest in the property as to allow him to insure it. An absolute and exclusive option to purchase real estate confers an equitable title upon the owner thereof which will support insurance taken out by him covering buildings upon the premises.").

However, this general proposition is not unanimously accepted. See 44 C.J.S. Insurance § 229 (1993) ("One in possession under an option to purchase has an insurable interest in the property . . . providing the option is timely exercised, but it has been held that an unexercised option is a mere expectancy and does not qualify its holder for an insurable interest."). See generally Jeffrey F. Ghent, Annotation, Insurable Interest in Property of Lessee with Option to Purchase Property, 74 A.L.R.4th 883 (1989) (collecting and analyzing cases in which courts have discussed whether a lessee with an option to purchase property has an insurable interest in the property).

We recognize the conflict among jurisdictions regarding this issue. See Neuman v. Travelers Indem. Co., 319 A.2d 522, 531 (Md. 1974) (stating that a "lessee has an insurable interest in property leased under certain circumstances, as . . . where he has an option to purchase."); G.M. Battery & Boat Co. v. L.K.N. Corp., 747 S.W.2d 624, 625-27 (Mo. 1988) (en banc) (rejecting the argument that a lessee with only an unexercised option to purchase has no insurable interest in the leased property); B.J. Morris v. Clay County Mut. Ins. Co., 1996 WL 251832 (Neb. Ct. App. 1996) (finding summary judgment based on lack of insurable interest inappropriate against plaintiffs who had been making payments on an oral option to purchase property). But see Allstate Ins. Co. v. Thompson, 297 S.E.2d 520, 522 (Ga. Ct. App. 1982) (finding an option to purchase land before exercise of the option is not an insurable interest); Harris v. North Carolina Farm Bureau Mut. Ins. Co., 370 S.E.2d 700, 703 (N.C. Ct. App. 1988) (finding an unexercised option to purchase is a mere expectancy and does not qualify as an insurable interest); Gossett v. Farmers Ins. Co. of Washington, 948 P.2d 1264, 1272 (Wash. 1997) (en banc) (finding that prior to the exercise of the option, an optionee under an ordinary option contract, has no insurable interest).

We conclude a party holding an option to purchase has an insurable interest. Under South Carolina law, however, a party may not recover insurance proceeds in excess of their interest in the property. Singletary v. Aetna Cas. & Sur. Co., 316 S.C. 199, 202, 447 S.E.2d 869, 870 (Ct. App. 1994). We thus make no determination regarding the extent of Belton's

insurable interest. It may well be minimal or nonexistent. We find, however, the determination of the extent of the interest is a question of fact.

Accordingly, we reverse the order granting summary judgment on Belton's causes of action for breach of contract and bad faith refusal to pay insurance proceeds and remand for proceedings consistent with this opinion.[1]

REVERSED AND REMANDED.

ANDERSON, J. concurs.

HEARN, C.J., dissents in a separate opinion.

HEARN, C.J., dissenting: Because I believe an unexercised option to purchase real estate does not qualify as an insurable interest, I respectfully dissent. As the majority noted, South Carolina appellate courts have yet to consider this particular issue. However, our courts have emphatically stated that to have an insurable interest in property, one must derive a benefit from its existence or suffer a loss from its destruction. Benton & Rhodes, Inc., v. Boden, 310 S.C. 400, 403, 426 S.E.2d 823, 825 (Ct. App. 1993).

An option to purchase property imposes no obligation on the optionee. See Faulkner v. Millar, 319 S.C. 216, 220, 460 S.E.2d 378, 380 (1995) ("[W]hile [a contract to sell and purchase real property] creates a mutual obligation . . ., [an] option merely gives the right to purchase, at a fixed price, within a fixed time, without imposing any obligation to do so.") As an optionee with no obligation to exercise his option, Belton did not stand to gain a pecuniary benefit or suffer a pecuniary loss because of the fire. Therefore, his unexercised option to purchase was a mere expectancy and did not qualify as an insurable interest. See Harris v. North Carolina Farm Bureau Mutual Ins. Co., 370 S.E.2d 700, 703 (N.C. App. 1988); Travelers Indem. Co. v. Duffy's Little Tavern, Inc., 478 So.2d 1095, 1096 (Fla. App. 5th Dist. 1985), *rev. denied*, 488 So.2d 68 (Fla. 1986); Erie-Haven, Inc. v. Tippmann Refrigeration Const., 486 N.E.2d 646, 650 (Ind. App. 3d Dist.

[1] In light of our disposition, we need not address Belton's remaining arguments.

1985); Allstate Ins. Co. v. Thompson, 297 S.E.2d 520, 522 (Ga. App. 1982); Vendriesco v. Aetna Cas. & Surety Co., 414 N.Y.S.2d 64, 65 (1979); Christ Gospel Temple v. Liberty Mut. Ins. Co., 417 A.2d 660, 663 (Pa. Super 1979), *cert. denied sub nom*., Presbyterian Church of Harrisburg v. Liberty Mut. Ins. Co., 449 U.S. 955 (1980). See also, Gossett v. Farmers Ins. Co. of Washington, 948 P.2d 1264 (Wash. 1997) (en banc) ("[H]ope and expectations of acquiring the property in the future are insufficient to constitute an insurable interest.")

Two fundamental purposes of the doctrine of insurable interest are to prevent insurance contracts from becoming gambling devices and to discourage the intentional destruction of property. Robert E. Keeton & Alan I. Widiss, *Insurance Law, A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices, Practitioner's Edition* § 3.1(c), at 136-138 (1988). Allowing the holder of an option to purchase insurance prior to his exercise of the option invites the very misbehavior the doctrine of insurable interest endeavors to prevent. Belton's situation is the perfect case in point. Here, Belton purchased insurance after he failed to make numerous payments toward his lease with option to purchase, after he received notice that his lease had been terminated, and after he was asked to vacate the premises. For Belton to receive any money now that the property is destroyed would put him in a better position than he was in prior to the fire. Such a result, in my opinion, could well encourage fraudulent and even criminal conduct.

The majority cites Neuman v. Travelers Indem. Co., 319 A.2d 522 (Md. 1974), for the proposition that the holder of an unexercised option to purchase property has an insurable interest in that property. I decline to read Neuman so broadly. In Neuman, the lessees of a warehouse had an insurance policy that covered tangible property. During the lease, a wall of the warehouse collapsed, and the lessees argued that their loss of use of the warehouse for the remainder of the lease's term ought to be covered by their insurance because it constituted tangible property. Although the issue in Neuman did not involve the insurability of an option to purchase, the court did state that it was "familiar with the fact that **[a] lessee** has an insurable interest in property leased under certain circumstances, as where he has

covenanted to return it in good order at the end of the term, has orally agreed to keep the premises insured, or where he has an option to purchase." Id. at 531 (citing 3 G. Couch, Cyclopedia of Insurance Law § 24:60 (2d ed. R. Anderson 1960)) (emphasis added). Notably, this statement was not outcome-determinative in the case. Moreover, the Maryland court only refers to a *lessee* who has an option to purchase, not someone like Belton who was merely a holder of an option. Finally, the statement does not shed any light on whether the holder of an *unexercised* option to purchase property would have an insurable interest.

The majority next cites G.M. Battery & Boat Co. v. L.K.N. Corp., 747 S.W.2d 624 (Mo. 1988) (en banc) (5-2 decision), to support its conclusion that Belton's option to purchase gave him an insurable interest in the property. However, L.K.N.'s lease with option to purchase is significantly different from Belton's lease. In G.M. Battery & Boat, Co., the terms of L.K.N.'s lease required L.K.N. to obtain an insurance policy naming G.M. Battery as the loss payee. L.K.N. did obtain insurance, but it named itself as the loss payee. When a fire destroyed the building, L.K.N.'s insurance carrier refused to pay for any part of the building loss, claiming that L.K.N. had no insurable interest in the building. The Supreme Court of Missouri disagreed and found that because L.K.N. "had bound itself to furnish insurance payable to GMB" and because L.K.N. "stood to lose the remaining six months on the lease, as well as the utility of the option and the rent credit on the option price," it indeed had an insurable interest in the property. Id. at 627. Unlike L.K.N.'s lease, Belton's lease did not require him to purchase insurance. Furthermore, because Belton's lease was already terminated, he did not stand to lose any time remaining on the lease as was the case for L.K.N.

Finally, the majority relies on Morris v. Clay County Mutual Ins. Co., 1996 WL 251832 (Neb. Ct. App. 1996), a case which has not been approved for publication. In the Morris case, the lower court granted the insurance company's motion for summary judgment. The appellate court reversed, finding that because the Morrises presented evidence that they had an option contract to buy property **and had been performing that contract by making $75 monthly payments**, a finder of fact could determine the

Morrises had an insurable interest in the property. Id. at *4 (emphasis added). Unlike the Morrises, Belton had not been performing on his lease with option to purchase.

Taking into consideration the purpose behind the doctrine of insurable interest and cases from other jurisdictions, I do not believe Belton had an insurable interest. Belton's lease was terminated months before he obtained fire insurance. At the time of the fire, Belton merely had an obligation-free, unexercised option to purchase the building. Therefore, Belton derived no benefit from the property's existence nor suffered any loss upon its destruction. Accordingly, Belton had no insurable interest, and the judgment of the trial court should be affirmed.