The Supreme Court of South Carolina

O R D E R

The attached certificate form is hereby approved for use with Rule 403, SCACR.

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

Columbia, South Carolina

December 17, 2003

The Supreme Court of South Carolina

C E R T I F I C A T E

This certificate is to be used to show completion of the trial experiences required by Rule 403 of the South Carolina Appellate Court Rules (SCACR). The text of this Rule is printed on the back of this form. This Certificate must be submitted in DUPLICATE (the original and one copy) to the Clerk of the South Carolina Supreme Court, P.O. Box 11330, Columbia, SC 29211. Except for the signatures, all entries must be legibly printed or typed.

COURT OF COMMON PLEAS or FEDERAL DISTRICT COURT FOR THE DISTRICT OF SC

1.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

2.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

3.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

COURT OF GENERAL SESSIONS or U.S. DISTRICT COURT FOR THE DISTRICT OF SC

1.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

2.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

3.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

EQUITY TRIAL

Case Name:_____Date:_____ATTEST:_____
Name of Judge and Title:_____ Signature of Judge

FAMILY COURT

1.Case Name:_____Date:_____ATTEST:_____
Name of Judge:_____ Signature of Judge

2.Case Name:_____Date:_____ATTEST:_____
Name of Judge:_____ Signature of Judge

ADMINISTRATIVE HEARING

Case Name:_____Date:_____ATTEST:_____
Name of Presiding Officer and Title:_____ Signature of Presiding Officer

CERTIFICATION BY ATTORNEY

I, _____, hereby certify that I completed one-half of the credit hours needed for law school graduation prior to participating in and/or observing the trials or hearings listed on this form. I further certify that I have observed or participated in the above trials in accordance with the provisions of Rule 403, SCACR.

Signed this _____ day _____, 20_____. _____
SIGNATURE

Revised 12/17/2003

RULE 403
TRIAL EXPERIENCES

(a) General Rule. Although admitted to practice law in this State, an attorney shall not appear as counsel in any hearing, trial, or deposition in a case pending before a court of this State until the attorney's trial experiences required by this rule have been approved by the Supreme Court. An attorney whose trial experiences have not been approved may appear as counsel if the attorney is accompanied by an attorney whose trial experiences have been approved under this rule or who is exempt from this rule, and the other attorney is present throughout the hearing, trial, or deposition. Attorneys admitted to practice law in this State on or before March 1, 1979, are exempt from the requirements of this rule. Attorneys holding a limited certificate to practice law in this State need not comply with the requirements of this rule.

(b) Trial Experiences Defined. A trial experience is defined as the:

(1) actual participation in an entire contested testimonial-type trial or hearing if the attorney is accompanied by an attorney whose trial experiences have been approved under this rule or who is exempt from this rule, and the other attorney is present throughout the hearing or trial; or

(2) observation of an entire contested testimonial-type trial or hearing.

Should the trial or hearing conclude prior to a final decision by the trier of fact, it shall be sufficient if one party has completed the presentation of its case.

(c) Trial Experiences Required. An attorney must complete ten (10) trial experiences. The required trial experiences may be gained by any combination of (b)(1) or (b)(2) but must include the following:

(1) three (3) civil jury trials in a Court of Common Pleas, or two (2) civil jury trials in Common Pleas plus one (1) civil jury trial in the United States District Court for the District of South Carolina;

(2) three (3) criminal jury trials in General Sessions Court, or two (2) criminal jury trials in General Sessions plus one (1) criminal jury trial in the United States District Court for the District of South Carolina;

(3) one (1) trial in equity heard by a circuit judge, master-in-equity, or special referee in a case filed in the Court of Common Pleas;

(4) two (2) trials in the Family Court; and

(5) one (1) hearing before an Administrative Law Judge or administrative officer of this State or of the United States. The hearing must be governed by either the South Carolina Administrative Procedures Act or the Federal Administrative Procedure Act, and the hearing must take place within South Carolina.

(d) When Trial Experiences May be Completed. Trial experiences may be completed any time after the completion of one-half (1/2) of the credit hours needed for law school graduation.

(e) Certificate to be Filed. The attorney shall file with the Supreme Court a Certificate showing that the trial experiences have been completed. This Certificate, which shall be on a form approved by the Supreme Court, shall state the names of the cases, the dates and the tribunals involved and shall be attested to by the respective judge, master, referee or administrative officer.

(f) Attorneys Admitted in Another State. An attorney who has been admitted to practice law in another state, territory or the District of Columbia for three (3) years at the time the attorney is admitted to practice law in South Carolina may satisfy the requirements of this rule by providing proof of equivalent experience in the other jurisdiction for each category of cases specified in (c) above. This proof of equivalent experience shall be made in the form of an affidavit which shall be filed with the Supreme Court.

(g) Circuit Court Law Clerks and Federal District Court Law Clerks. A person employed full time for nine (9) months as a law clerk for a South Carolina circuit court judge or as a law clerk for a Federal District Court Judge in the District of South Carolina may be certified as having completed the requirements of this rule by participating in or observing two (2) family court trials which meet the requirements of (c)(4) above. A part-time law clerk may be certified in a similar manner if the law clerk has been employed as a law clerk for at least 1350 hours. The law clerk must submit a statement from a judge or other court official certifying that the law clerk has been employed as a law clerk for the period required by this rule. A Certificate (see (e) above) must be submitted for the family court trials.

(h) Appellate Court Law Clerks and Staff Attorneys. A person employed full time for eighteen (18) months as a law clerk or staff attorney for the Supreme Court of South Carolina or the South Carolina Court of Appeals may be certified as having completed the requirements of this rule by participating in or observing two (2) trials. Each trial must meet the requirements of (c)(1), (2) or (4) above, and only one (1) family court trial may be used. A part-time law clerk or staff attorney may be certified in a similar manner if the law clerk or staff attorney has been employed as a law clerk or staff attorney for at least 2700 hours. The law clerk or staff attorney must submit a statement from a judge, justice or other court official certifying that the law clerk has been employed as a law clerk or staff attorney for the period required by this rule. A Certificate (see (c) above) must be submitted for the trials.

(i) Federal Bankruptcy Law Clerks. A person employed full time for nine (9) months as a law clerk for a Federal Bankruptcy Judge in South Carolina may be certified as having completed the requirements of this rule by participating in or observing two (2) civil trials which meet the requirements of (c)(1) above, three (3) criminal trials which meet the requirements of (c)(2) above, and two (2) family court trials which meet the requirements of (c)(4) above. A part-time law clerk may be certified in a similar manner if the law clerk has been employed as a law clerk for at least 1350 hours. The law clerk must submit a statement from a judge or other court official certifying that the law clerk has been employed as a law clerk for the period required by this rule. A Certificate (see (e) above) must be submitted for the trials.

(j) Approval or Disapproval. The Court will notify the attorney if the trial experiences submitted in the Certificate or affidavit have been approved or disapproved.

(k) Confidentiality. The confidentiality provisions of Rule 402(i), SCACR, shall apply to all files and records of the Clerk of the Supreme Court relating to the administration of this rule. The Clerk may, however, disclose whether an attorney's trial experiences have been approved and the date of that approval.

Notice of approval or disapproval of the trial experiences should be sent to:

NAME: _____

STREET OR P. O. BOX: _____

STATE and ZIP: _____

TELEPHONE NO. (Home)(_____)_____ (Work)(_____)_____

The Supreme Court of South Carolina

In the Matter of John P. Mann, Jr., Respondent.

ORDER

By order dated October 23, 2003, respondent was placed on interim suspension. The Office of Disciplinary Counsel now seeks the appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

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

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

Mr. Murphy's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

IT IS SO ORDERED.

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

Columbia, South Carolina

December 22, 2003

The Supreme Court of South Carolina

In the Matter of Russell Brown, Respondent.

ORDER

The records of the office of the Clerk of the Supreme Court show that on July 1, 1959, Russell Brown was admitted and enrolled as a member of the Bar of this State.

By way of Agreement for Discipline by Consent and letter of resignation dated June 18, 2003, Mr. Brown agreed to resign from the South Carolina Bar effective December 31, 2003. We accept Mr. Brown's resignation as set forth by this Court in In the Matter of Brown, 356 S.C. 10, 587 S.E.2d 110 (2003).

Mr. Brown shall, within fifteen days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law

in this State. In addition, his name shall be removed from the roll of attorneys in this State.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

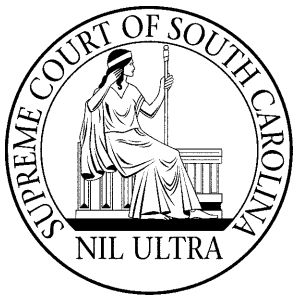
s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

December 31, 2003



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

January 5, 2004

ADVANCE SHEET NO. 1

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

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3673-Zepsa Const. v. Randazzo Pending

3680-Townsend v. Townsend	Denied 12/18/03
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3703-Sims v. Hall	Pending
3705-SCDOT v. Thompson	Pending
3706-Thornton v. Trident Medical	Pending
3707-Williamsburg Rural v. Williamsburg County	Pending
3708-State v. Blalock	Pending
3710-Barnes v. Cohen Dry Wall	Pending
3711-G&P Trucking v. Parks Auto Sales	Pending
3713-State v. Bryson	Pending
3716-Smith v. Doe	Pending
3718-McDowell v. Travelers Property	Pending
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2003-UP-481-Branch v. Island Sub-Division	Pending
2003-UP-533-Buist v. Huggins et al. (Worsley)	Denied 12/19/03
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2003-UP-550-Collins Ent. v. Gardner et al.	Denied 12/19/03
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2003-UP-566-Lancaster v. Benn	Pending
2003-UP-592-Gamble v. Parker	Denied 12/19/03
2003-UP-596-Leon v. S.C. Farm Bureau	Denied 12/19/03
2003-UP-616-State v. Clayton	Denied 12/19/03
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2003-UP-620-Ex parte Reliable Bonding (Sullivan)	Pending
2003-UP-622-State v. Samuels	Denied 12/19/03
2003-UP-633-State v. Means	Denied 12/18/03
2003-UP-634-County of Florence v. DHEC et al.	Pending
2003-UP-638-Dawsey v. New South Inc.	Denied 12/18/03
2003-UP-640-State v. Bobby Joe Brown #1	Pending
2003-UP-641-State v. Bobby Joe Brown #2	Denied 12/19/03
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2003-UP-657-Wood v. Wood	Pending
2003-UP-662-Zimmerman v. Marsh	Pending
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2003-UP-666-Florence Steel Erectors v. S.C. Second Injury Fund	Pending
2003-UP-669-State v. Owens	Pending
2003-UP-672-Addy v. Attorney General	Pending
2003-UP-678-SCDSS v. Jones	Pending
2003-UP-686-Melette v. Hannaford Bros.	Pending
2003-UP-687-State v. Gwinn	Pending
2003-UP-688-Johnston v. SCDLLR	Pending
2003-UP-689-Burrows v. Poston's Auto Service	Pending
2003-UP-694-State v. Stokes	Pending
2003-UP-696-State v. Richardson	Pending
2003-UP-697-Welborn v. Pharr Yarns	Pending
2003-UP-703-Beaufort County v. Town of Port Royal	Pending
2003-UP-705-State v. Floyd	Pending
2003-UP-706-Brown v. Taylor	Pending
2003-UP-711-Cincinnati Ins. Co. v. Allstate Ins.	Pending
2003-UP-716-State v. Perkins	Pending
2003-UP-718-Sellers v. C. D. Walters	Pending
2003-UP-719-SCDSS v. Holden	Pending
2003-UP-723-Derrick v. Holiday Kamper et al.	Pending
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3600-State v. Lewis	Pending
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3604-State v. White	Pending
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3607-State v. Parris	Pending
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3629-Redwend Ltd. v. William Edwards et al.	Pending
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3674-Auto-Owners v. Horne et al.	Pending
3676-Avant v. Willowglen Academy	Pending
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3679-The Vestry v. Orkin Exterminating	Pending
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2002-UP-670-State v. Bunnell	Pending
2002-UP-734-SCDOT v. Jordan	Pending
2002-UP-788-City of Columbia v. Jeremy Neil Floyd	Pending
2003-UP-009-Belcher v. Davis	Pending
2003-UP-111-State v. Long	Pending
2003-UP-112-Northlake Homes Inc. v. Continental Ins.	Pending
2003-UP-113-Piedmont Cedar v. Southern Original	Pending
2003-UP-116-Rouse v. Town of Bishopville	Pending
2003-UP-135-State v. Frierson	Pending
2003-UP-143-State v. Patterson	Pending
2003-UP-144-State v. Morris	Pending
2003-UP-148-State v. Billy Ray Smith	Denied 12/17/03
2003-UP-161-White v. J. M Brown Amusement	Pending
2003-UP-188-State v. Johnson	Granted 12/17/03

2003-UP-196-T.S. Martin Homes v. Cornerstone	Pending
2003-UP-205-State v. Bohannan	Pending
2003-UP-228-Pearman v. Sutton Builders	Pending
2003-UP-244-State v. Tyronne Edward Fowler	Pending
2003-UP-245-Bonte v. Greenbrier Restoration	Pending
2003-UP-270-Guess v. Benedict College	Pending
2003-UP-271-Bombardier Capital v. Green	Denied 12/17/03
2003-UP-277-Jordan v. Holt	Pending
2003-UP-284-Washington v. Gantt	Pending
2003-UP-293-Panther v. Catto Enterprises	Pending
2003-UP-316-State v. Nickel	Pending
2003-UP-324-McIntire v. Cola. HCA Trident	Pending
2003-UP-336-Tripp v. Price et al.	Pending
2003-UP-348-State v. Battle	Pending
2003-UP-353-State v. Holman	Pending
2003-UP-358-McShaw v. Turner	Pending
2003-UP-360-Market at Shaw v. Hoge	Pending
2003-UP-376-Heavener v. Walker	Pending
2003-UP-396-Coaxum v. Washington et al.	Pending
2003-UP-397-BB&T v. Chewing	Pending
2003-UP-404-Guess v. Benedict College (2)	Pending

2003-UP-409-State v. Legette	Pending
2003-UP-416-Sloan v. SCDOT	Pending
2003-UP-420-Bates v. Fender	Pending
2003-UP-433-State v. Kearns	Pending
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2003-UP-478-DeBordieu Colony Assoc. v. Wingate	Pending
2003-UP-480-Smalls v. Fuji Photo Film	Pending
2003-UP-483-Lamar Advertising v. Li'l Cricket	Pending
2003-UP-489-Willis v. City of Aiken	Pending
2003-UP-490-Town of Olanta v. Epps	Pending
2003-UP-491-Springob v. Springob	Pending
2003-UP-494-McGee v. Sovran Const. Co.	Pending

2003-UP-503-Shell v. Richland County	Pending
2003-UP-508-State v. Portwood	Pending
2003-UP-521-Green v. Frigidaire	Pending
2003-UP-522-Canty v. Richland Sch. Dt.2	Pending
2003-UP-527-McNair v. SCLEOA	Pending
2003-UP-535-Sauer v. Wright	Pending
2003-UP-549-State v. Stukins	Pending
2003-UP-556-Thomas v. Orrel	Pending
2003-UP-588-State v. Brooks	Pending
2003-UP-635-Yates v. Yates	Pending
0000-00-000-Hagood v. Sommerville	Pending

PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

ReDonna Maxwell and George Maxwell, Respondents,

v.

Beverly M. Genez and John Doe, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25761
Heard November 4, 2003 - Filed December 22, 2003

REVERSED

Charles H. Gibbs, Jr., of Haynsworth Sinkler Boyd, P.A., for Petitioner Beverly M. Genez; Max G. Mahaffee, of Grimball & Cabaniss, L.L.C., for Petitioner John Doe; both of Charleston.

Jeffrey Scott Weathers, of Peagler & Weathers, P.A., of Moncks Corner, for respondents.

JUSTICE BURNETT: The Court granted a writ of certiorari to review the decision of Maxwell v. Genez, 350 S.C. 563, 567 S.E.2d 496 (Ct. App. 2002), in which the Court of Appeals held a motion to restore to the docket must be filed within one year of the order striking the case pursuant to Rule 40(j), SCRCP, but that the motion can be extended for good cause pursuant to Rule 6(b), SCRCP. We reverse.

FACTS

On March 17, 1995, Respondent ReDonna Maxwell was involved in an automobile accident with Petitioners Beverly Genez and John Doe. Mrs. Maxwell and her husband, Respondent George Maxwell, filed suit against Genez and Doe. With Genez's and Doe's consent, the Maxwells moved to have their case stricken from the docket pursuant to Rule 40(j). On April 13, 1999, a circuit court judge granted the motion to strike.

On May 1, 2000, the Maxwells moved to restore the case to the docket. On May 15, 2000, the Maxwells filed a Motion for Enlargement of Time pursuant to Rule 6(b) asserting good cause existed to extend the time in which to file the motion to restore.

Another circuit court judge denied the Maxwells' motions to restore and for an enlargement of time. The order stated the motion to restore was not filed within the one year period provided by Rule 40(j) and the judge lacked authority to extend the time period established by the initial judge's order granting the motion to strike.

The Court of Appeals concluded, if good cause exists, Rule 6(b) permits an extension of time in which to file a Rule 40(j) motion to restore and, further, found the Maxwells established good cause for requesting an extension. Id. The Court of Appeals reversed the order denying the motions to restore and for enlargement of time and remanded the matter to the circuit court with instructions to restore the case to the docket. Id. The Court granted both Genez's and Doe's petitions for a writ of certiorari.

ISSUES

I. Did the Court of Appeals err by holding a motion to restore under Rule 40(j) must be filed within one year of the order striking the claim?

II. Did the Court of Appeals err by holding a motion to restore under Rule 40(j) may be extended for good cause pursuant to Rule 6(b)?

DISCUSSION

In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes. Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 443 S.E.2d 906 (1994). If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced. See Knotts v. S.C. Dept. of Natural Resources, 348 S.C. 1, 558 S.E.2d 511 (2002).

I.

Genez and Doe argue the Court of Appeals erred by holding a motion to restore to the docket pursuant to Rule 40(j) must be filed within one year of the order granting the motion to strike. We agree.

Rule 40(j), SCRCP, provides:

> **Case Stricken from Docket by Agreement.** A party may strike its complaint, counterclaim, cross-claim or third party claim from any docket one time as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any

> unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. A party moving to restore a case stricken from the docket shall provide all parties notice of the motion to restore at least 10 days before it is heard. Upon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule.

(Underline added).

Rule 40(j) does not **require** that a party move to restore the case to the docket within one year after it was stricken. Instead, the unambiguous language provides that, **if** the claim is restored within one year after it is stricken, the statute of limitations is tolled for that period.[1] This conclusion is supported by the Notes to Rule 40 ("Rule 40(j) now requires all adverse parties to consent to the dismissal in writing, but, the consent also operates to toll the statute of limitations for one year after the case is stricken from the docket as to each consenting party.") and language in Graham v. Dorchester County School Dist., 339 S.C. 121, 125, 528 S.E.2d 80, 82 (Ct. App. 2000) (Rule 40(j) requires motions to restore within one year of case being stricken "to take advantage of the tolling of the statute of limitations."). A party can move to restore a case to the docket more than one year after the claim was stricken without running afoul of Rule 40(j); the party simply cannot take advantage of the one year tolling period provided by the rule. Accordingly, the Court of Appeals erred by holding the Maxwells were required to file their motion to restore within one year of April 13, 1999.

II.

Genez and Doe argue the Court of Appeals erred by holding the one year deadline established by Rule 40(j) may be extended for good cause pursuant to Rule 6(b). We agree.

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[1] The order striking the Maxwells' complaint from the docket tracks the language of Rule 40(j).

Rule 6(b), SCRCP, provides:

> **(b) Enlargement.** When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the time may be extended by written agreement of counsel for an additional period not exceeding the original time provided in these rules, or the court for cause shown may at any time in its discretion (1) with or without written motion or notice order the period enlarged if request therefore is made before the expiration of the period as originally prescribed or extended or (2) upon motion made after the expiration of the specified period, for good cause shown, permit the act to be done. . . .

(Underline added).

Rule 6(b) is not applicable to Rule 40(j). The language of Rule 6(b) specifies it applies when there is a deadline. As explained above, Rule 40(j) does not have a deadline during which a motion to restore must be filed. Accordingly, Rule 6(b) is inapplicable.[2]

For the reasons stated above, the decision of the Court of Appeals is **REVERSED.**

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[2] We note the Maxwells assert that, since Genez and Doe agreed to the Rule 40(j) dismissal after the statute of limitations had expired, they waived their right to oppose the motion to restore on grounds of the expiration of the statute of limitations. We disagree. Parties who consent to strike a claim pursuant to Rule 40(j) agree not to challenge the statute of limitations for one year. One year after the Maxwells' complaint was stricken from the docket pursuant to Rule 40(j), Genez and Doe were no longer bound by their agreement not to challenge the Maxwells' action on statute of limitations grounds.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Kenneth Curtis, Appellant.

Appeal From Greenville County
John C. Few, Circuit Court Judge

Opinion No. 25762
Heard October 21, 2003 - Filed January 5, 2004

AFFIRMED

C. Rauch Wise, of Greenwood, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Robert M. Ariail, of Greenville, for Respondents.

JUSTICE WALLER: Kenneth Curtis was convicted of two counts of the sale of urine with the intent to defraud a drug or alcohol test, in violation of S.C. Code Ann. § 16-13-470 (2003). We affirm.

FACTS

In 1994, Curtis started a business known as Privacy Protection Services (PPS) which sells urine substitution kits to individuals. The kits contain urine, a pouch, a tube, a hand-warmer device, duct tape, a pen, instructions for use, two business cards and a "Notice." The instructions advise how to use the heat pack to maintain proper temperature, how to affix the kit to the body for "maximum concealment," and instruct the user to check the temperature strip just before arriving at the collection center and to "dress in loose fitting clothing." The instructions also claim that "after thousands of kits and years of testing, no one has ever failed a test when using our kit." At the bottom of the instructions is a "Disclaimer Statement" which, among other things, states that "Privacy Protection Services does not market this kit for use in 'drug testing.'" A strip of paper, approximately 2" by 8" enclosed in the kits states that "Because of recent changes in South Carolina law, Privacy Protection Services no longer markets this URINE TEST substitution kit for use in 'DRUG TESTING' . . . . THIS PRODUCT IS SOLD AS A NOVELTY ONLY." However, also included in the kits are Privacy Protection Services business cards, stating "Pass Any Drug Test." Curtis was indicted in July 2001, and charged with two counts of violating § 16-13-470.[1] The jury convicted him on both counts.

ISSUES

1. Do the indictments sufficiently allege a crime?
2. Is the term "drug test" impermissibly vague?
3. Did the trial court err in allowing Curtis to be cross-examined regarding pornographic websites accessible from his internet website?

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[1] In 1999, the Legislature enacted S.C. Code Ann. § 16-13-470 which provides, in pertinent part:

> **Defrauding drug and alcohol screening tests; penalty.**
>
> (A) It is unlawful for a person to:
>
> sell, give away, distribute, or market urine in this State or transport urine into this State with the intent of using the urine to defraud a drug or alcohol screening test;

4. Did the court err in denying Curtis' motion for a directed verdict?

1. SUFFICIENCY OF INDICTMENTS

The indictments in this matter allege:

> That KENNETH CURTIS did in Greenville County. . . unlawfully, knowingly, and intentionally operate a business that sold a quantity of urine and a supplemental heating device, with the intent to defraud a drug or alcohol test. This being in violation of § 16-13-470. . .

Curtis asserts the indictments, while alleging his **business** sold urine with the intent to defraud, fail to allege that he, **individually**, had the intent to defraud a drug test. We disagree.

An indictment is sufficient if it apprises the defendant of the elements of the offense intended to be charged and apprises the defendant what he must be prepared to meet. State v. Wilkes, 353 S.C. 462, 464-465, 578 S.E.2d 717, 719 (2003). Further, an indictment is sufficient if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon. Id. An indictment phrased substantially in language of a statute which creates and defines the offense is ordinarily sufficient. State v. Shoemaker, 276 S.C. 86, 275 S.E.2d 878 1981).

The indictment here patently alleges that Curtis knowingly and intentionally operated a business which sold urine with the intent to defraud a drug test. If Curtis **knowingly and intentionally** operated a business which sold urine with the intent to defraud, it is patent that his conduct is within the ambit of the statute. The fact that the indictment does not allege that he personally sold urine with the intent to defraud is not fatal. We find no merit to this contention.

2. IMPERMISSIBLY VAGUE

Curtis next asserts § 16-13-470 is impermissibly vague inasmuch as it fails to define the term "drug test." We disagree.

Statutes are to be construed in favor of constitutionality, and this Court will presume a legislative act is constitutionally valid unless a clear showing to the contrary is made. State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994). A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution. See Westvaco Corp. v. South Carolina Dep't of Revenue, 321 S.C. 59, 467 S.E.2d 739 (1995). The established test for vagueness is whether the statute provides "fair notice to those to whom the law applies." Main v. Thomason, 342 S.C. 79, 92, 535 S.E.2d 918, 925 (2000). A statute is not unconstitutionally vague if a person of ordinary intelligence seeking to obey the law will know, and is sufficiently warned of, the conduct the statute makes criminal. Johnson v. Collins Entertainment Co., Inc., 349 S.C. 613, 564 S.E.2d 653 (2002). As Justice Toal noted in Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001), [a] law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application. . . . One to whose conduct the law clearly applies does not have standing to challenge it for vagueness. 345 S.C. at 72, 549 S.E.2d at 598.

In Curtis, we upheld § 16-13-470 against challenges of vagueness for failing to define the terms "foil," "spike," "defraud," "bodily fluids," and "adulterate," stating, "all the Constitution requires is that the language convey sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices." Id.

Contrary to Curtis' contention, the term "drug test" clearly has a sufficiently common meaning to put him on notice of the conduct proscribed. Main v. Thomason, supra. Curtis alleges the statute is unduly vague in failing to specify that it is only the sale of urine with the intent to defraud

testing for illegal drug usage which is prohibited. We disagree. Initially, we note that the Legislature, had it chosen to do so, could easily have specified that only the sale with the intent to defraud tests for illegal drugs was prohibited. Its failure to do so indicates its intent that the intent to defraud **any** drug test is illegal. Stardancer Casino v. Stewart, 347 S.C. 377, 556 S.E.2d 357 (2001); Tilley v. Pacesetter, 333 S.C. 33, 508 S.E.2d 16 (1998) (if legislature had intended certain result in statute it would have said so).

Curtis asserts that prohibiting the sale of urine with the intent to defraud **any** drug test is an unwarranted intrusion upon the privacy of those tested and that there is no legitimate purpose in allowing businesses to test employees or others for drugs which are not illegal. Curtis has no standing to assert the privacy rights of persons who are being tested. State v. McKnight, 352 S.C. 635, 576 S.E.2d 168 (2003)(one cannot obtain a decision as to the invalidity of an act on the ground that it impairs the rights of others). To the extent that an employee or person tested wishes to challenge the legitimacy of a certain test, they are free to do so. Further, the statute merely prohibits the sale of urine with the intent to defraud a drug test; it does not give businesses unfettered discretion to test.[2]

We find the term "drug test" sufficiently apprises Curtis of the conduct proscribed by the statute.

3. PORNOGRAPHIC WEBSITE

Curtis next argues the trial court erred in permitting the state to cross-examine him concerning pornographic links on his website.

Curtis' website[3] provides the following information: "Our Complete Urine Test Substitution Kits allow anyone, regardless of substance intake, to pass any urinalysis within minutes." It further states:

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[2] Although not the issue presented today, there are safety concerns which could conceivably justify a businesses' testing for drugs which are not in themselves illegal, but which could impair or hinder an employee's ability to perform a given task.

[3] The website may be found at www.privacypro.com.

> Proven real world protection from urine testing invasions. . . Designed to easily be concealed on the body the kits are complete with chemically reactive supplemental heat sources and temperature monitoring system that insures proper acceptance temperature is maintained (Proper temperature is a critical element for acceptance at any testing site). You can use our kit in a natural urinating position, unisex (male or female), and you cannot be detected even if directly observed. . . .
>
> **Our Kits Work!!!**
> We guarantee 100% satisfaction and 300% results. It works because it's easy to use and gives the piss police what they want. . . .
> After thousands of sales no one has ever failed a test when using our kit.

At trial, the state began its presentation of the case by calling SLED agent West, who investigated the case against Curtis, and inquiring about the contents of the PPS website. A printout from the website was entered into evidence, and Agent West was extensively questioned concerning the contents of the site and the claims therein. The state introduced this information for the purpose of establishing Curtis' intention in selling the urine substitution kits.

After the state rested, the first person called by the defense was Curtis' webmaster, James Turner. Turner was questioned concerning the contents of the website, and whether, at Curtis' request, all references to "drug testing" had been removed from the site subsequent to the passage of § 16-13-470. Counsel then began going through the website with him page by page, beginning with a "Media Archives" section, which included clips of Curtis' appearances on various television shows. The defense then moved to the "Links" section of the website and asked Turner to explain to the jury how they decided what links to incorporate into the site. Turner explained that they had an "open-link" policy, and that anybody who wanted a link on the site could just email him with an address. On cross-examination of Turner, the state queried whether all of the links on the site were subject to Curtis'

approval, and whether there were any sites with which they did not want to be associated. Turner replied that they did not allow pornographic material or links to pornographic material.

Subsequent to Turner's testimony, Curtis was questioned on direct exam about the contents of the website. His attorney asked about the "Links" page and how links get onto the page. Curtis responded that "[w]e have a free association link policy. I do ask not to have pornography sites listed because, first of all, I chose a web server that does not host pornography sites because I personally object to pornography on the web because it often is slipped in." Thereafter, on cross-exam, the state questioned Curtis about his website while actually clicking through it on a computer screen, demonstrating that it was possible to access pornographic links via other links on Curtis' website. The line of inquiry went on for approximately three and one-half transcript pages before defense counsel objected on the basis of relevancy. Curtis was then allowed to explain that he "did not list those things on my site. They are links from someone else's site. They're not- - They have nothing to do with my site." Curtis now asserts the inquiry concerning pornographic websites was irrelevant and misleading. We disagree.

A party cannot complain of an error which his own conduct created. State v. Whipple, 324 S.C. 43, 476 S.E.2d 683, *cert denied* 519 U.S. 1045 (1996) (party cannot complain of error which his own conduct has induced). Given that both Curtis and Turner maintained that PPS did not allow pornographic materials or links on the website, it is patent that they opened the door to this line of inquiry. See State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003)(when a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially). Moreover, counsel raised no objection to the inquiry until several pages of testimony concerning the pornographic links had been taken. We find counsel's objection came too late. State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (contemporaneous objection is required to properly preserve an error for appellate review).

Further, even assuming *arguendo* we were to review the issue, we agree with the state that given Curtis' own testimony that there were no pornographic links on his website, the inquiry was relevant to his credibility. Yoho v. Thompson, 345 S.C. 361, 548 S.E.2d 584 (2001)(a witness may be cross-examined on any matter relevant to any issue in the case, including credibility and considerable latitude is allowed in this regard).

Finally, Curtis was not prejudiced by the inquiry. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000) (error without prejudice does not warrant reversal). Curtis repeatedly testified before the jury that the pornographic links were **not** in fact links from his site, but were links from other links. Accordingly, we find no error.

4. DIRECTED VERDICT

Curtis lastly argues the trial court erred in denying his motion for a directed verdict as the state presented "no evidence that this particular sale was made with the intent to defraud a drug test." We disagree.

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury. State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000).

Curtis argued at trial only that he was entitled to a directed verdict on the basis that he was not directly involved in the sale of the kits in question and that there was no evidence the individual who purchased his urine kits had any intent to defraud a drug test. He now asserts he was entitled to a directed verdict on the ground that there is no evidence the kits were sold

with the intent to defraud. Accordingly his current argument is not preserved for appeal. State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (party cannot argue one basis in support of motion at trial and another ground on appeal).

In any event, there is ample evidence to warrant submission of the case to the jury. As noted previously, the kits which form the basis of this case contain warming devices and temperature indicator devices to ensure the urine is at the proper temperature for acceptance (91-101 degrees).[4] The kit gives instructions, with photos, as to how to affix it to your body for proper temperature transfer and maintenance and stresses that the location between the breast and armpit "allows for maximum concealment, comfort, temperature monitoring, and allows pressure to be applied with the upper arm to assist flow." Although there is a Disclaimer at the bottom of the instructions which indicates that "Privacy Protection Services does not market this kit for use in drug testing," business cards enclosed with the kits state, in bold print, "Pass Any Drug Test." Additionally, the state submitted evidence of an email from Privacy Protection Services to an individual who inquired about selling Curtis' products. In the email, Curtis gives an example of the response they give to inquiries, stating

> "We can provide a COMPLETE KIT that will allow ANYONE regardless of drug intake to pass ANY urine test within minutes after receiving it. . . That being said let me explain what we offer and why it is the only real world answer to the invasion of drug testing. . . . the hardest thing about using this kit is to avoid putting your own sample in the cup."

Further, Curtis' website makes the claim that "Our Complete Urine Substitution Kits allow anyone, regardless of substance intake, to pass any urinalysis within minutes." We find this is ample evidence to submit to the jury on the issue of whether Curtis was selling urine kits with the intent to defraud drug tests. His motion for a directed verdict was properly denied.

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[4] In Curtis, supra, the Court held unconstitutional section 16-13-470's presumption of intent from the sale of a warming device with the urine. However, the sale of a warming device is nonetheless evidence which the jury may consider in determining the defendant's intent.

CONCLUSION

Curtis' convictions for violation of § 16-13-470 are affirmed.[5]

TOAL, C.J., MOORE, and BURNETT, JJ., concur. PLEICONES, J., concurring in result only.

[5] The remaining issue is affirmed pursuant to Rule 220(b), SCACR, and the following authority: Curtis' Issue 3- Ex Parte Littlefield, 343 S.C. 212, 540 S.E.2d 81 (2000)(discretion to prosecute is solely in prosecutor's hands).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

John Boyd Frazier, Appellant.

Appeal From Horry County
Rodney A. Peeples, Circuit Court Judge

Opinion No. 25763
Heard April 22, 2003 - Filed January 5, 2004

REVERSED

L. Morgan Martin and George M. Hearn, Jr., both of Hearn, Brittain & Martin, P.A., of Conway, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor John Gregory Hembree, of Conway, for Respondent.

JUSTICE WALLER: Appellant, John Boyd Frazier (Frazier), was convicted of murder, conspiracy to commit murder, and armed robbery; he was sentenced to concurrent terms of life imprisonment for murder, thirty years for armed robbery, and five years for conspiracy. We reverse.

FACTS

On June 9, 1998, William Brent Poole (Brent) was shot to death while walking on the beach with his wife, Kimberly Renee Poole (Renee), near 81st Avenue North in Myrtle Beach. According to Renee, she and Brent were walking along the beach towards their motel when they were approached by a man wearing black clothes and a ski mask. The man told them to lie face down on the beach and give him their money and jewelry. They complied, whereupon the assailant shot Brent twice in the head and fled.

Shortly after the shooting, Renee indicated to police that she had been having marital problems with Brent and had been "involved" with Frazier. Frazier and Renee were subsequently arrested and charged with Brent's murder. At trial, the state's case against Frazier was largely circumstantial. The only direct evidence placing Frazier near the scene of the crime was the identification testimony of Mark and Donna Hobbs, two passersby who identified Frazier from a photographic line-up as the suspicious-looking man they had seen near the scene of the crime on June 9, 1998. The jury convicted Frazier of murder, conspiracy to commit murder and armed robbery.[1]

ISSUES[2]

1. Did the trial court err in excluding the testimony of appellant's expert, Donald Smith, and a videotape made by Smith depicting the scene of the eyewitness identification?
2. Did the trial court err in excluding portions of the videotaped deposition of Dr. Elizabeth Loftus concerning a "Photo Lineup Study"?

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[1] Renee was convicted of murder and conspiracy to commit murder.

[2] The denial of Frazier's motion for a directed verdict is affirmed pursuant to Rule 220(b), SCACR, and the following authority: State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000) (if there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury).

3. Did the trial court err in allowing the testimony of Frazier's co-worker, Bruce Sovereign?

1. VIDEOTAPE OF CRIME SCENE

At trial, Frazier attempted to introduce a videotape made of the scene of the crime by Donald Smith, a videographer. The purpose of the videotape is to demonstrate the effect of lighting on images at the motel where Mr. and Mrs. Hobbs claimed to have seen Frazier on the night of the crime. Counsel for Frazier was attempting to convey the idea that because the man observed by the Hobbs was backlit by motel lighting, there would have been shadows cast upon him, thus calling into question the reliability of the Hobbses' identification. Smith testified he had made the videotape at 11:30P.M. on February 11, 2000, and that the exterior lighting conditions present at the motel were the same on that date as on the date of the crime. Smith also testified that the effect of a backlit subject would not be affected by the moonlight or the atmospheric conditions or other natural events.

The trial judge refused to qualify Smith as an expert, and ruled the videotape inadmissible stating, "The court is of the view that it is not possible, scientifically human or any other study or discipline, to recreate precisely the lighting that occurred that evening. . . . The ability to comprehend lighting. . . that's subjective, not objective, and that is an intangible. . . I just don't think it's capable of recreation."

In State v. Whaley, 305 S.C. 138, 143, 406 S.E.2d 369, 372 (1991), we recognized that, although the admission of expert testimony is generally a matter within the trial court's discretion, the exclusion of expert testimony on the issue of eyewitness reliability constitutes an abuse of discretion in cases in which, "the main issue is the identity of the perpetrator, the sole evidence of identity is eyewitness identification, and the identification is not substantially corroborated by evidence giving it independent reliability." We find the present case meets these criteria. Accordingly, under Whaley, the trial court abused its discretion in refusing to admit Smith's testimony.

Further, we find the trial court likewise erred in excluding the videotape made by Smith. A trial court's admission or rejection of evidence is generally reviewed for an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000). As noted by this Court in Weaks v. South Carolina State Hwy Dep't, 250 S.C. 535, 542, 159 S.E.2d 234, 237 (1968):

> The rule laid down by this court for the introduction of evidence and an experiment out of court requires that the experiment be made under conditions and circumstances similar to those prevailing at the time of the occurrence involved in the controversy. **It is not required that the conditions be identical with those existing at the time of the controversy; it is sufficient if there is a substantial similarity**.

(emphasis supplied). As noted previously, the trial judge ruled he did not believe the lighting conditions in effect on the night of the crime were capable of recreation. Weaks, however, requires only a substantial similarity, not a precise recreation. Smith's testimony demonstrated a sufficient degree of similarity to render the videotape admissible. Accordingly, we find the trial court committed an error of law in refusing to admit it.

2. **DR. LOFTUS STUDY**

Frazier also asserts the trial court erred in excluding a portion of Dr. Loftus' videotaped deposition which discusses a "Photo Lineup Study," conducted by Wofford College Professor, Dr. Alliston Reid. We agree and find this study should have been admitted.

The purpose of Dr Loftus' testimony was to impeach the reliability of the Hobbses' identification of Frazier from a photographic lineup. Dr Loftus based her testimony upon a study conducted by Dr. Alliston Reid, a psychology professor at Wofford College. The Hobbses had identified the man they saw on the beach as having a large forehead and large eyes, and Dr. Reid's study was intended to show the lineup procedure used in this case was

unduly suggestive inasmuch as Frazier had larger eyes and a larger forehead than the other subjects in the lineup.

As noted previously, the Hobbses' identification was crucial to the state's case against Frazier. Accordingly, we find that Frazier should have been permitted to impeach the reliability of the identification procedure through Dr. Loftus' testimony. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable). Whaley, supra, specifically permits expert testimony on the issue of eyewitness reliability. As with the testimony and videotape of Donald Smith, Dr. Loftus' testimony demonstrating a lack of reliability in the eyewitness identification of Frazier was essential to the defense and its exclusion cannot, under the facts of this case, be deemed harmless error. Accordingly, the trial court's exclusion of this testimony is reversed.

3. TESTIMONY OF BRUCE SOVEREIGN

Finally, Frazier asserts the trial court erred in admitting testimony of his co-worker, Bruce Sovereign, to the effect that Sovereign overheard Frazier tell Renee during a telephone conversation that "somebody should kill that son-of-a-bitch," and Sovereign's testimony that he considered the statement very serious. We hold the trial court erred in admitting Sovereign's testimony.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding the witness has personal knowledge of the matter. Rule 602, SCRE; State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996).

Here, Sovereign testified that **approximately** four weeks prior to the shooting, Frazier stomped into the room where they worked, having been on the phone with someone Sovereign **believed** to be Renee, and said **either** "somebody should kill that son-of-a-bitch" or "I'm going to kill that son-of-a-bitch." Sovereign "guessed" Frazier had been speaking to Renee and he believed Frazier's statement was serious.

We find Sovereign's testimony is simply beyond the ambit of Rule 602. Sovereign did not know **when** the statement was made, he did not know to **whom** Frazier was speaking, and he could not recall the exact **content** of the statement he attributed to Frazier. Under these circumstances, we hold the testimony was too speculative to be admitted.

Moreover, unlike State v. Williams, supra, we cannot say the erroneous admission of Sovereign's testimony was harmless error. As noted above, there was little direct evidence linking Frazier to the crime, and the trial court erroneously limited Frazier's attempts to impeach the only direct evidence against him, i.e., the eyewitness identification by the Hobbses. Under these circumstances, we simply cannot say that the erroneous admission of statements accusing Frazier of stating "somebody should kill that son-of-a-bitch" constitutes harmless error.

Accordingly, we reverse and remand for a new trial.

REVERSED AND REMANDED.

TOAL, C.J., and MOORE, J., concur. PLEICONES, J., concurring in result and dissenting in part, in which BURNETT, J., concurs.

JUSTICE PLEICONES: I agree with the majority that Mr. Frazier's conviction should be reversed and remanded because the trial court erred in excluding the video tape expert's testimony and erred in allowing the testimony of Mr. Sovereign. However, in my opinion, the trial court properly excluded Dr. Loftus' testimony discussing a "Photo Lineup Study" conducted by Dr. Alliston Reid of Wofford College.

The proffered study reports the results of an experiment conducted by Dr. Reid in which sixty random participants viewed the photographic lineup shown to the Hobbses. The participants were asked to identify the individual who best matched the description "high forehead and large round eyes."[3] Forty-eight of the sixty participants selected appellant's photograph from the line-up. The report concludes the photographic lineup was "strongly biased toward selection of Photo Number 1 [i.e., appellant's photograph]. . . [Photo Number 1] was a better match to the written description of the suspect than was any other photo."

In State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991), we approved the admission, under certain circumstances, of eyewitness reliability testimony by expert witnesses. The Court stated, however, "that nothing in this opinion should be construed as allowing an expert to give his or her opinion of a particular witness' identification." 406 S.E.2d at 372.

The purpose of Dr. Reid's study was to address the reliability of the photographic lineup presented to the Hobbses. Clearly, Dr. Loftus' testimony about the results of the study was an attempt to establish that the Hobbses' identification of appellant was unreliable. The nature of this testimony was specifically precluded in State v. Whaley, 406 S.E.2d at 372.

The trial judge properly excluded Dr. Loftus' testimony concerning the study of the photographic lineup. The participants in Dr. Reid's study were, in effect, instructed to select the photograph of the individual which most

[3] The Hobbses initially described the man they saw on June 9th as having large, round eyes and a high forehead.

closely matched the description "large, round eyes" and "high forehead." The Hobbses, on the other hand, were asked if one of the six photographs in the lineup was the individual they had seen on June 9. In addition to their given description of the individual as having large, round eyes and a high forehead, the Hobbses also had general perceptions of the individual they saw at the Carolina Winds Motel which were not specifically articulated. Accordingly, Dr. Reid's finding of a bias in the photographic lineup did not fairly challenge the reliability of the Hobbses' identification of appellant in the lineup. See Rule 404, SCRE (evidence is relevant if it tends to make the existence of any fact at issue more or less probable).

For the above reasons, the trial judge did not abuse his discretion by refusing to allow Dr. Loftus to testify about Dr. Reid's study.

BURNETT, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Palmetto Homes, Inc., Appellant,

v.

Philip Bradley, Chad Summerall, B&S Masonry, Inc., Bradley and Summerall Masonry, Inc., Respondents.

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

Opinion No. 3717
Submitted September 8, 2003 – Filed December 23, 2003

AFFIRMED AS MODIFIED

H. W. Pat Paschal, Jr., of Greenville, for Appellant.

John R. Devlin, Jr., Christopher R. Antley, both of Greenville, for Respondents.

HOWARD, J.: Palmetto Homes, Inc. ("Contractor") sued Philip Bradley, Chad Summerall, B&S Masonry, Inc., Bradley and

Summerall Masonry, Inc. (collectively "Subcontractor"), asserting causes of action for breach of contract, breach of contract accompanied by a fraudulent act, breach of warranty, and negligence. In response, Subcontractor pled a previously obtained arbitration award as a bar to Contractor's causes of action, simultaneously moving to confirm the arbitration award. The circuit court confirmed the arbitration award and entered judgment in favor of Subcontractor. Contractor moved to vacate the award and compel another arbitration, arguing it had not been provided notice of the arbitration proceeding and thus had not appeared to defend it. The circuit court denied the motion to vacate the arbitration award, ruling Contractor had been provided notice. Additionally, the court granted Subcontractor's motion to dismiss Contractor's claims, ruling they were barred by res judicata. Contractor appeals. We affirm as modified.

FACTUAL/PROCEDURAL BACKGROUND

Contractor is a residential homebuilder. Contractor entered into a contract with Subcontractor, whereby Subcontractor agreed to provide the masonry work on a residential homebuilding project. The contract between the parties provided for the arbitration of disputes with the American Arbitration Association ("AAA"). Specifically it read:

> ARBITRATION: SHOULD A DISPUTE ARISE BETWEEN THE CONTRACTOR AND SUB-CONTRACTOR AS TO ANY MATTER CONCERNING THE WITHIN SUB-CONTRACTOR AGREEMENT AND OR ANY WORK PERFORMED, MATERIALS FURNISHED ON PAYMENT MADE OR REQUESTED FOR SAME, SAID DISPUTE SHALL BE RESOLVED IN ACCORDANCE WITH THE RULES AND REGULATIONS OF THE AMERICAN ARBITRATION ASSOCIATION.

(emphasis as in original).

Following Subcontractor's completion of the masonry work, Contractor asserted there were defects in the masonry work and refused to pay Subcontractor. Subcontractor then filed a demand for arbitration with the AAA, asserting a claim for a mechanic's lien. Contractor never responded to the demand for arbitration.

After numerous notices were mailed and faxed to Contractor by the AAA, the arbitration took place without the participation of Contractor, and the arbitrator issued an award in favor of Subcontactor.

Following the arbitration award, Contractor brought this action asserting causes of action for breach of contract, breach of contract accompanied by a fraudulent act, breach of warranty, and negligence.

Subcontractor filed a Petition to Confirm Arbitration Award, and the circuit court issued an order confirming the arbitration award and entering judgment. Contractor then filed and served a motion to vacate the arbitration award and compel another arbitration of the dispute, arguing Rule 4, South Carolina Rules of Civil Procedure, applied, and Contractor never received proper notice of the arbitration proceedings. Subcontractor then filed and served its motion to dismiss Contractor's action on the grounds that res judicata barred the suit.

The circuit court denied Contractor's motion to vacate, ruling numerous attempts were made to serve and provide notice of the arbitration proceedings, but Contractor intentionally avoided service. Additionally, the circuit court granted Subcontractor's motion to dismiss Contractor's causes of action on the grounds of res judicata.

LAW/ANALYSIS

I. Contractor's Motion to Vacate the Arbitration Award

Contractor argues the circuit court erred by finding Contractor received service of process because the service did not comply with

Rule 4, South Carolina Rules of Civil Procedure.[1] We hold Palmetto received sufficient service of process and affirm as modified.

An appellate court may affirm the circuit court's ruling using any sustaining grounds that are both raised by the respondent's brief and found within the record. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

In the present case, the contract signed by the parties specifically stated the rules and regulations of the AAA apply to the arbitration. Thus, we analyze whether service of process was effected pursuant to the AAA rules. See Dowling v. Home Buyers Warranty Corp. II, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993) (holding an agreement to arbitrate is a contract, and the parties are free to determine its terms); see also Simmons v. Lucas & Stubbs Assocs., Ltd., 283 S.C. 326, 332-33, 322 S.E.2d 467, 470 (Ct. App. 1984) (holding arbitration is a matter of contract, and the range of issues that can be arbitrated is restricted by the terms of the agreement); Marolf Const. Inc. v. Allen's Paving Co., 572 S.E.2d 861, 863 (N.C. Ct. App. 2002) (holding parties may alter statutory service of process rules through valid arbitration agreements).

The AAA publication of the Construction Industry Dispute Resolution Procedures (1999) contains Rule R-40, which states:

> Each party shall be deemed to have consented that any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection therewith; or for the entry of judgment on any award made under these rules, may be served on a party by mail addressed to the party or its representative at the last known address or by personal service.

[1] Rule 4 requires service of process on a corporation by personal service or by "registered or certified mail, return receipt requested and delivery restricted to the addressee."

Additionally, the rule provides for the following methods of service: "The AAA, the parties, and the arbitrator may also use overnight delivery, electronic facsimile (fax), telex, and telegram." Rule R-40.

The record indicates Subcontractor utilized regular mail as provided by the AAA rules for the service of the demand for arbitration. Subsequent notices sent by the AAA were sent by certified mail, regular mail, and facsimile. Sometimes the same notice was sent by more than one method.

The record also indicates the facsimiles were transmitted properly. Additionally, there is no evidence the regular mail was returned as undeliverable or for any other reason. The certified mail was returned. However, it was returned because its acceptance was refused or it went unclaimed. [2]

Given the facts of this case, we hold service of process was effected pursuant to the AAA rules. Thus, Contractor received proper service of process.[3]

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[2] As an ancillary argument, Contractor contends the circuit court erred by ruling Contractor received service of process pursuant to Patel v. Southern Broker's Ltd., 277 S.C. 490, 493-95, 289 S.E.2d 642, 644-45 (1982) (holding a defendant cannot avoid process of the court by intentionally avoiding service). However, having ruled service of process was sufficient pursuant to the AAA rules, we need not address this issue.

[3] Contractor also argues the circuit court erred by denying Contractor's motion to vacate the arbitration award because: 1) Subcontractor was required to file a motion to compel arbitration prior to proceeding with the arbitration in its absence; 2) the arbitration award was obtained through undue means; 3) the arbitration award was rendered by a partial arbitrator; and 4) the arbitrator refused to postpone the proceedings for good cause resulting in prejudice to Contractor. However, these issues were not ruled on by the circuit court. Furthermore, Contractor did not raise these issues in a post-trial

II. Subcontractor's Motion to Dismiss

Contractor argues the circuit court erred by granting Subcontractor's motion to dismiss, ruling Contractor's causes of action for breach of contract accompanied by a fraudulent act and negligence were barred by principles of res judicata. We disagree.

A. Scope of the Arbitration Agreement

As a threshold matter, Contractor contends its causes of action for breach of contract accompanied by a fraudulent act and negligence are not within the scope of the arbitration agreement, and thus, the arbitration award cannot bar the claims.[4]

South Carolina law favors arbitration of disputes. Tritech Elec., Inc. v. Frank M. Hall & Co., 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000). Arbitration is a matter of contract, and the range of issues that can be arbitrated is restricted by the terms of the agreement. Simmons, 283 S.C. at 332-33, 322 S.E.2d at 470.

"To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration

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motion. Therefore, these issues are not preserved for appellate review. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.")

[4] Contractor's Summons and Complaint stated causes of action for breach of contract, breach of contract accompanied by a fraudulent act, breach of warranty, and negligence. The circuit court dismissed all of Contractor's claims, ruling the causes of action were barred by res judicata. Contractor has only appealed the dismissal of its causes of action for breach of contract accompanied by a fraudulent act and negligence. Therefore, the dismissal of Contractor's other causes of action are not before us on appeal.

clause . . . . [U]nless the court can say with positive assurance the arbitration clause . . . [does] not cover[] the dispute, arbitration should be ordered." South Carolina Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc., 312 S.C. 559, 563, 437 S.E.2d 22, 25 (1993).

The arbitration agreement states, "ANY MATTER CONCERNING THE WITHIN SUB-CONTRACTOR AGREEMENT AND OR ANY WORK PERFORMED" will be subject to arbitration. (emphasis as in original).

The parties' agreement provided Subcontractor would perform masonry work for Contractor's homebuilding project. Contractor's causes of action for breach of contract accompanied by a fraudulent act and negligence essentially allege Subcontractor defectively installed the masonry work on a residential homebuilding project.[5] These claims

[5] Contractor's cause of action for breach of contract accompanied by a fraudulent act alleges:

> [Subcontractor] did commit an act of fraud by installing the brick veneer and other brick masonry products on a dwelling without adequate code required wall ties, by using and installing mortar mix which was mixed incorrectly, with the wrong material ratios, this creating a defective, substandard, non-structural 'soft mortar,' not suitable for the veneer application, and not in accordance with standards of the industry or structurally safe and per manufacturer's recommendations, by omitting the 'air space' between house wall and brick veneer, by omitting flashing above doors/windows as well as intentional defective sub-standard brick veneer construction and installation process while concealing the same from the Plaintiff.

are matters concerning the agreement or the work performed. Therefore, the claims are within the scope of the arbitration agreement. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597-98, 553 S.E.2d 110, 119 (2001) (holding where the partnership agreement provided all claims arising from the partnership agreement were to be arbitrated, any torts related to the partnership agreement were also matters for arbitration); Long v. Silver, 248 F.3d 309, 316 (4th Cir. 2001) (holding claims are within the scope of the arbitration clause if a "significant relationship" exists between the asserted claims and the contract in which the arbitration clause is contained).

B. The Doctrine of Res Judiciata

Contractor next argues the circuit court erred by ruling res judicata bars his claims for breach of contract accompanied by a fraudulent act and negligence. We disagree.

"Under the doctrine of res judicata, '[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.'" Plum Creek Dev. Co., Inc. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (quoting Hilton Head Ctr. of South Carolina, Inc. v. Pub. Serv. Comm'n of South Carolina, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). "The doctrine requires three essential elements: (1) the judgment must be final, valid and on the merits; (2) the parties in the subsequent action must be identical to those in the first; and (3) the second action must involve matter properly included in the first action." Town of Sullivan's Island v. Felger, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995).

Initially, we note, an arbitration award is a final, binding award on the merits. See Pittman Mortg. Co. v. Edwards, 327 S.C. 72, 76, 488 S.E.2d 335, 337 (1997) ("Generally, an arbitration award is

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Contractors' cause of action for negligence alleges "[Subcontractor] . . . w[as] negligent and reckless in the construction of the masonry product and the use of defective masonry process."

conclusive and courts will refuse to review the merits of an award."); Trident Technical Coll. v. Lucas & Stubbs, Ltd., 286 S.C. 98, 111, 333 S.E.2d 781, 788-89 (1985) (holding an arbitration award is meant to signify the end, not the commencement, of litigation; thus, arbitration awards are presumptively correct). Furthermore, it is uncontested the parties in the first arbitration proceeding are the same parties in this litigation. Thus, we need only determine if the causes of action for breach of contract accompanied by a fraudulent act and negligence involved matter properly included in the first action.

Contractor, by its own admission, began discovering defects in the brick work in the fall of 2000. It was subsequently served process of the arbitration proceedings over the course of several months beginning in December of 2000, and the arbitration award was granted in April 2001. Contractor did not participate in the proceedings, and thus, it did not present any of its claims to the arbitrators.

Contractor's failure to participate in the proceedings did not preclude its claims from being submitted to the arbitration proceeding. Rather, pursuant to the contract, all claims arising from the agreement were to be submitted to arbitration. See District of Columbia v. Bailey, 171 U.S. 161, 171 (1898) (holding a submission is an agreement between two or more parties to refer a dispute to a third party and be bound by the third parties' decision); H.S. Cramer & Co. v. Washburn-Wilson Seed Co., 195 P.2d 346, 349 (Idaho 1948); 4 Am. Jur. 2d Alternative Dispute Resolution § 85 (1995) (stating a matter is submitted to arbitration when "two or more parties agree to settle their respective legal rights and duties by referring the disputed matters to a third party . . ."); Id. § 88 (holding an agreement to arbitrate all issues arising from a contract submits all issues within the scope of the contract to the arbitrators).

As previously noted, Contractor's claims arose from the Subcontractor agreement, and thus, its claims were within the scope of arbitration. Therefore, when the arbitration proceedings began, all claims arising from the contract were submitted to the arbitration proceeding, and, as with civil litigation, Contractor was procedurally

required to arbitrate all claims arising therefrom or be barred by res judicata. See 4 Am. Jur. 2d Alternative Dispute Resolution § 214 (1995) ("The award of the arbitrators acting within the scope of their authority determines the rights of the parties as effectually as a judgment secured by regular legal procedure . . . . [Thus,] [i]f otherwise sufficient, an arbitration award is conclusive and binding . . . as to all matters submitted to the arbitrators, even though one of the parties neglects to present portions of his claim.") (emphasis added); see Rodgers Builders, Inc. v. McQueen, 331 S.E.2d 726, 730 (N.C. Ct. App. 1985) (holding res judicata applies to bar arbitration of claims actually arbitrated, as well as claims that could have been arbitrated in the prior proceeding); Lee L. Saad Construc. Co. v. DPF Architects, P.C., 851 So.2d 507, 517-18 (Ala. 2002) (holding an arbitrator's award is res judicata as to a subsequent claim if the original claim was within the scope of the arbitration agreement and all of the other elements of res judicata are met); Springs Cotton Mills v. Buster Boy Suit Co., 275 A.D. 196, 199-200 (N.Y. App. Div. 1949) (holding an arbitrator's award is res judicata as to all matters reasonably submitted, and thus, where one party does not participate in the arbitration proceedings, its claims, if they otherwise meet the elements of res judicata, will be barred); Hurley v. Fox, 587 So.2d 1 (La. Ct. App. 1991).

Notwithstanding the traditional res judicata analysis, Contractor argues, in an arbitration setting, res judicata only bars claims that were actually arbitrated, not claims that merely could have been arbitrated. In that regard, Contractor predicates its contention on Renaissance Enterprises, Inc. v. Ocean Resorts, Inc., 330 S.C. 13, 496 S.E.2d 858 (1998).

In Renaissance, our supreme court stated in a footnote:

> Res judicata can only apply to those matters included within the submission agreement. 4 Am. Jur. 2d Alternative Dispute Resolution § 214 (1995) (arbitrator is limited to decide only those issues submitted by the parties and res judicata may bar only issues submitted). The

> issue of . . . [plaintiff's] right to future fees was not submitted for arbitration in the prior proceeding. Therefore, . . . [plaintiff] is not precluded from raising this issue once it becomes entitled to the fees . . . .

Id. at 17, 496 S.E.2d at 860. Contractor contends this passage establishes that res judicata only applies to issues actually litigated in an arbitration proceeding and not to issues that could have been litigated. We do not read Renaissance so broadly.

In Renaissance, the plaintiff arbitrated its disputes against the defendant for breaches of the contract that occurred prior to the arbitration. The arbitrator then issued an award encompassing the breaches occurring prior to the arbitration but did not rule the contract was rescinded. Subsequently, the plaintiff brought another action against Defendant to recover damages for the breaches of contract occurring after the original arbitration award. In response, the Defendant moved for summary judgment, claiming res judicata barred the action because the prior arbitration award terminated the contract. The circuit court dismissed the action, ruling the arbitration award terminated the contract.

On appeal, this Court reversed and remanded, ruling further inquiry into the facts and circumstances surrounding the arbitration award was necessary to clarify the application of the law, and thus, summary judgment was inappropriate. On writ of certiorari, our supreme court vacated this Court, ruling the issue was not properly preserved at the trial level.

Reading Renaissance as a whole, we believe the supreme court's footnote merely reflected that the plaintiff could not have been required to submit issues, or arbitrate breaches of contract, that had not yet occurred. In the present case, Contractor's claims existed at the time of the original arbitration and thus could have been arbitrated in the original proceeding. Consequently, Renaissance is inapposite.

CONCLUSION

For the foregoing reasons, the decision of the circuit court is

AFFIRMED AS MODIFIED.

STILWELL and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Roy McDowell, Appellant,

v.

Travelers Property & Casualty Company, and Travelers Indemnity Company of Illinois, Respondents.

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

Opinion No. 3718
Heard October 7, 2003 – Filed December 22, 2003

AFFIRMED

James C. Spears, Jr., of Spartanburg, for Appellant.

Robert D. Moseley, Jr., of Greenville, for Respondents.

HOWARD, J.: Roy McDowell was injured in a motor vehicle collision while driving a tractor-trailer owned by his employer, Goodyear Tire & Rubber Company ("Goodyear") and insured by

Travelers Property & Casualty Company and Travelers Indemnity Company of Illinois (collectively "Travelers"). McDowell brought this declaratory judgment action against Travelers seeking to reform the insurance contract, alleging Travelers failed to make a meaningful offer of underinsured motorist ("UIM") coverage to Goodyear. The circuit court granted summary judgment to Travelers, concluding, under any view of the evidence, a meaningful offer of UIM coverage was made to and knowingly rejected by Goodyear. McDowell appeals, arguing the circuit court erred in granting summary judgment to Travelers. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

McDowell's suit arises from a traffic accident in which he received injuries rendering him totally and permanently disabled. At the time of the accident, McDowell was operating a tractor-trailer owned by Goodyear.

The insurance company for the at-fault driver paid McDowell $49,000. Because McDowell alleged damages exceeding this amount, McDowell sought to recover UIM coverage under Goodyear's policy with Travelers. Travelers denied the claim, alleging Goodyear had rejected UIM coverage. McDowell then brought this declaratory judgment action, alleging Travelers failed to make a meaningful offer of UIM coverage to its insured, and thus, the policy should be reformed to provide UIM coverage in the amount of the liability limits of the policy.

Travelers moved for summary judgment, arguing it made a meaningful offer of UIM coverage pursuant to both South Carolina Code Annotated section 38-77-350 (A) (Supp. 2002) and State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987).

In granting summary judgment to Travelers, the circuit court held Travelers made a meaningful offer of UIM coverage which Goodyear rejected. McDowell appeals.

STANDARD OF REVIEW

"Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; South Carolina Prop. and Cas. Guar. Assoc. v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). To determine whether any material fact exists, "the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." Yensen, 345 S.C. at 518, 548 S.E.2d at 883. "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." Id. "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court." Id.

LAW/ANALYSIS

McDowell argues the circuit court erred by holding Travelers made a meaningful offer of UIM coverage as required by South Carolina Code Annotated section 38-77-160 (Supp. 2002). McDowell contends Travelers' failure to list the range of premiums for the available limits on its form offering UIM coverage to Goodyear, as is required in section 38-77-350(A), required reformation of the policy to include UIM coverage in the amount of the liability limits. Although we agree Travelers did not meet the requirements of section 38-77-350(A), we disagree with McDowell's assertion that this alone denotes failure to make a meaningful offer warranting reformation of the policy. Furthermore, viewing the evidence in a light most favorable to McDowell, we find the circuit court correctly held Travelers made a meaningful offer of UIM coverage to Goodyear, which Goodyear rejected.

South Carolina law requires automobile insurance carriers to offer "at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist." S.C. Code Ann. § 38-

77-160 (Supp. 2002). "If the insurer fails to comply with its statutory duty to make a meaningful offer to the insured, the policy will be reformed, by operation of law, to include UIM coverage up to the limits of liability insurance carried by the insured." Butler v. Unisun, 323 S.C. 402, 405, 475 S.E.2d 758, 760 (1996). When an insurer fails to make a meaningful offer, the insured is entitled to reform the policy to reflect coverage in an amount equal to the liability limits on the insured's policy. Todd v. Federated Mut. Ins. Co., 305 S.C. 395, 399, 409 S.E.2d 361, 364 (1991).

All insurers must complete a form approved by the insurance commissioner when making the required offer of optional coverage to applicants for automobile insurance policies. S.C. Code Ann. § 38-77-350(A) (Supp. 2002). The form must include:

> (1) a brief and concise explanation of the coverage,
> *(2) a list of available limits and the range of premiums for the limits,*
> (3) a space for the insured to mark whether the insured chooses to accept or reject the coverage and a space for the insured to select the limits of coverage he desires,
> (4) a space for the insured to sign the form which acknowledges that he has been offered the optional coverages,
> (5) the mailing address and telephone number of the Insurance Department which the applicant may contact if the applicant has any questions that the insurance agent is unable to answer.

Id. (emphasis added). The statute further provides:

> If this form is properly completed and executed by the named insured it is conclusively presumed that there was an informed, knowing selection of coverage and neither the insurance company nor any insurance agent has any liability to the named insured or any other insured under the

> policy for the insured's failure to purchase any optional coverage or higher limits.

S.C. Code Ann. § 38-77-350(B) (Supp. 2002). Therefore, an insurer who uses a properly executed offer form that complies with section 38-77-350(A) enjoys a conclusive presumption a meaningful offer was made. Id.; Antley v. Nobel Ins. Co., 350 S.C. 621, 632, 567 S.E.2d 872, 878 (Ct. App. 2002). However, the insurer may not benefit from the protections of section 38-77-350(B) if the form does not comply with the statute. Osborne v. Allstate Ins. Co., 319 S.C. 479, 486, 462 S.E.2d 291, 295 (Ct. App. 1995).

To avoid the necessity of having to comply with the array of self-insurance requirements from state to state, Goodyear entered into a contract with Travelers whereby Travelers issued certificates of insurance allowing Goodyear to comply with the insurance regulations of the various states in which it operated while remaining ultimately liable for one-hundred percent of the claims paid. Under this contract, Goodyear pays Travelers an administrative fee and reimburses Travelers one-hundred percent of the amount paid in adjusting its claims during the policy period. In essence, the contract serves as a pass-through accounting mechanism to assist Goodyear in its claims management process.[1]

When Travelers and Goodyear signed this contract, Travelers provided a form offering UIM coverage to Goodyear. The form included an explanation of UIM insurance, ranges of limits, and instructions for seeking limits not shown. The form had blanks for

[1] This arrangement allowed Goodyear to meet these various state insurance requirements without qualifying as self-insured in each state by reporting Travelers as its insurer. However, in rendering summary judgment, the circuit court concluded the contractual arrangement between Travelers and Goodyear did not constitute an insurance policy because there was no transfer of risk to Travelers. On appeal, McDowell contends the circuit court erred by reaching this conclusion. Because we hold a meaningful offer was made in any event, we need not address this issue.

listing premium amounts for the various limits. Travelers did not fill in these blanks as required by subsection (A)(2). Thus, the form did not comply with the statute and Travelers does not enjoy the statutory presumption that it made a meaningful offer of UIM. See S.C. Code Ann. § 38-77-350(B); Antley, 350 S.C. at 632, 567 S.E.2d at 878. However, failing to comply with the statute does not necessarily require reformation of the policy. Rather, the insurer bears the burden of establishing it made a meaningful offer of UIM pursuant to section 38-77-160 and Wannamaker. See Butler, 323 S.C. at 405, 475 S.E.2d at 760 (holding the insurer has the initial burden of proving that a meaningful offer of optional coverage had been made to the insured.); Antley, 350 S.C. at 632, 567 S.E.2d at 878 ("The burden of proving a meaningful offer of optional coverage was made rests with the insurer.").

Our Supreme Court has adopted a four-part test to determine whether an insurer's offer of optional UIM coverage is sufficiently meaningful to satisfy the requirements of section 38-77-160. To constitute a meaningful offer of UIM coverage, "(1) the insurer's notification process must be commercially reasonable, whether oral or in writing; (2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms; (3) the insurer must intelligibly advise the insured of the nature of the optional coverage; and (4) the insured must be told that optional coverages are available for an additional premium." Wannamaker, 291 S.C. at 521, 354 S.E.2d at 556.

McDowell's only contention under the Wannamaker analysis is that Travelers failed to provide the premium amounts for the optional UIM coverage. Although the offer form contained no premium amounts in the blanks provided, the contractual agreement between Goodyear and Travelers includes a detailed formula for calculating the premium for UIM coverage. Both Goodyear and Travelers contend under this mathematical formula the premiums were readily ascertainable because the amount paid by Goodyear would have been equal to the amount of the claims Travelers paid for underinsured

motorist benefits on Goodyear's behalf, together with an administrative fee.

Eldrich Carr, Goodyear's Global Risk Manager responsible for ensuring Goodyear's company vehicles comply with state insurance requirements, averred he is experienced in matters dealing with liability, UIM coverage, and other types of vehicle insurance, and is fully aware of the nature and purpose of UIM coverage. In his affidavit, Carr acknowledged that any premium for UIM coverage quoted on the UIM offer form would necessarily be zero because the premium is equivalent to one-hundred percent of the claims paid during the period of the contract. Therefore, Carr stated Goodyear was fully aware of the costs of the coverage and the available amounts, and thus, "Goodyear made a knowing and informed decision in rejecting underinsured motorist coverage." Carr further explained Goodyear elected not to obtain UIM coverage in South Carolina because Goodyear provides workers' compensation and other benefits for employees injured on the job. Essentially, Goodyear viewed UIM coverage as an additional employee benefit it did not want to provide.

The arrangement between Goodyear and Travelers clearly demonstrates Goodyear understood the limits of optional coverage and the costs associated therewith, as required by Wannamaker. Therefore, the circuit court did not err by granting summary judgment.

CONCLUSION

Although Travelers' offer failed to meet the requirements of section 38-77-350(A) and Travelers is not entitled to the statutory presumption that a meaningful offer was made, Carr's uncontroverted affidavit on behalf of Goodyear affirming a meaningful offer was made and acknowledging Goodyear made a knowing and informed decision to reject UIM coverage conclusively satisfies Travelers' burden of proof.

Therefore, the decision of the circuit court is

AFFIRMED.

STILWELL and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wayne Schmidt and Terri J. Schmidt,

Appellants,

v.

Michael C. Courtney and Kemper Sports of Crowfield, Inc. d/b/a Crowfield Golf & Country Club and Westvaco Development Corporations,

Of Whom Kemper Sports of Crowfield, Inc. d/b/a Crowfield Golf & Country Club, is,

Respondent.

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

Opinion No. 3719
Heard December 9, 2003 – Filed December 22, 2003

REVERSED and REMANDED

Joseph F. Kent, of Mt. Pleasant, for Appellants.

Stephen E. Darling and C. Bowen Horger, II, of Charleston, for Respondent.

ANDERSON, J.: Wayne Schmidt (Schmidt) and Terri J. Schmidt initiated a negligence action against Michael Courtney for injuries Schmidt sustained when he was struck in the head by a golf ball while roofing a house located adjacent to a golf course. Kemper Sports of Crowfield, Inc. (Kemper Sports) was later joined on claims of negligent design, operation, and maintenance of the golf course. The circuit court judge granted Kemper Sports' motion for summary judgment. Schmidt appeals. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

On August 27, 1998,[1] Schmidt was roofing a house located at 113 Waveney Circle in the Hamlets section of the Crowfield Development in Goose Creek, South Carolina. The home is adjacent to the Crowfield Golf and Country Club, which is owned and operated by Kemper Sports. Several oak trees stand between the house and golf course.

While Schmidt was roofing, Courtney was playing golf at the Crowfield Golf and Country Club. When Courtney made his tee shot on the Number 11 fairway, he hooked his ball, causing it to fly out of the boundaries of the course and over to the house where Schmidt was working. The golf ball struck Schmidt in the back of his head and knocked him unconscious. A fellow worker caught Schmidt and prevented him from falling off the roof. Schmidt suffered permanent brain damage from the injury and has been unable to work since the accident.

Schmidt initially filed a negligence suit against Courtney. Schmidt later joined Kemper Sports in the action, alleging negligent design, construction, operation, and maintenance of the golf course. After filing its answer, Kemper Sports then moved for summary judgment.

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[1] The order of the circuit judge, as well as the first and second amended complaints, reference August 27, 1998, as the date Schmidt was hit by the errant golf ball. However, the Appellants' brief and the Respondent's brief provide that August 28, 1998, was the date Schmidt was injured.

At the summary judgment hearing, Schmidt's counsel, Joseph F. Kent, presented information regarding an expert witness he located on May 7, 2002, just a few weeks after Kent received notice of the motion for summary judgment. The expert witness, Gerald W. Pirkl, specializes in golf course safety, design, and maintenance. Kent professed: "We were very long in finding this gentleman, Your Honor. I believe that before the case is over that it is going to turn out that Mr. Pirkl is the most experienced person by way of expert witnesses in this area." Kent requested the court consider his affidavit which identified Pirkl and set forth what Pirkl would likely state during testimony. In his affidavit, Kent declared:

> I, Joseph F. Kent, counsel for the Plaintiffs in this action, having been duly sworn do depose and state as a proffer of evidence in this case, as follows:
>
> 1. Full and complete diagnosis of the closed head brain injuries sustained by Wayne Schmidt while working at the residence known as 113 Waveney was not accomplished until about the first of December 1999.
>
> 2. Counsel knows of no cases in this jurisdiction concerning the liability for negligent golf course design, maintenance or operation.
>
> 3. Counsel has found relatively few cases arising in the country from claims of negligent golf course design, maintenance or operation resulting in personal injuries to innocent parties outside of the bounds and property of golf courses.
>
> 4. Counsel has testimony of experienced golfers and an expert in the design of golf courses that foreseeable fields of play for tee shots often extend beyond the bounds of certain fairway boundaries and that such an extended field of play was foreseeable for the fairway and tee boxes in this case.
>
> 5. Counsel has retained an expert in golf course design, Gerald W. Pirkl, of Dana Point, California who counsel believes will

testify that the design of the fairway and tee boxes in this case bring the house at 113 Waveney Circle into a foreseeable area of play as counsel understands that area to be defined by the United States Golf Association.

6. Counsel believes that the constructed contour and topography of the fairway in this case eliminates or substantially reduces the opportunity to play a first shot on the subject hole on the design centerline of the fairway.

7. Counsel believes that the said expert will further testify that tee shots from the most distant tee box position at the fairway in question reduces the available shot angle for fairway center line both as that line was designed and perceived by golfers in the tee boxes.

8. Counsel believes that the evidence in this case will be that together with the house location of the house in the predictable field of play for this fairway, that the golf course operator failed to provide adequate screening or fairway map information to reasonably guard and protect against innocent parties outside of the golf course coming within the predictable flight of tee shots from the fairway in this case.

9. Counsel has already begun to shoot aerial photographs of the subject fairway and tee boxes necessary for a written opinion with specifications concerning the deficiencies of the design, maintenance and operation of the Defendant Kemper in this case.

10. Counsel anticipates a first written report from his expert landscape architect within about two weeks and supplemental discovery responses of aerial photography on May 13, 2002.

Kent explained that he expected a final report from Pirkl "before the end of th[e] month." The judge determined the issue of the expert witness was not before the court because Kent did not timely file the affidavit.

The circuit judge granted Kemper Sports' motion for summary judgment. Schmidt filed a motion to reconsider, which the court denied.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 584 S.E.2d 375 (2003); Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002); Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003); Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Sauner v. Public Serv. Auth., 354 S.C. 397, 581 S.E.2d 161 (2003); Hendricks v. Clemson Univ., 353 S.C. 449, 578 S.E.2d 711 (2003); McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998); see also Laurens Emergency Med. Specialists, 355 S.C. at 108, 584 S.E.2d at 377 (stating that in reviewing summary judgment motion, facts and circumstances must be viewed in light most favorable to non-moving party). If triable issues exist, those issues must go to the jury. Baril v. Aiken Reg'l Med. Ctrs., 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Russell v. Wachovia Bank, N.A., 353 S.C. 208, 578 S.E.2d 329 (2003); Regions Bank, 354 S.C. at 659, 582 S.E.2d at 438; Rule 56(c), SCRCP. All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); see also Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d

94, 96 (2002) ("On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.").

Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Regions Bank, 354 S.C. at 659, 582 S.E.2d at 438; Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank, 354 S.C. at 660, 582 S.E.2d at 438. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990); Peterson v. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999); Rule 56(c), SCRCP. The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001).

LAW/ANALYSIS

Schmidt argues the trial court erred in granting summary judgment to Kemper Sports on this novel claim prior to the opportunity for full and fair discovery. We agree.

I. CONTINUANCE

Kemper Sports alleges in its brief that Schmidt's counsel failed to request a continuance to develop documentation in opposition to summary judgment. Although Kent did not specifically ask for a continuance, it is clear from the transcript of the hearing the trial judge was fully aware of the importance of having expert testimony for this case, and that Kent had recently located a qualified expert. The judge stated: "As a general rule, we've got to establish all aspects of this case through expert testimony."

Then, instead of asking Kent if he would like to move for a continuance, the trial judge directed his query to Kemper Sports' attorney, Stephen E. Darling. The judge, referring to the affidavit prepared by Kent which contained the expert witness information, questioned Darling: "Do you—out of an abundance of caution, do you want to allow it to be heard or continue the Motion?" Darling responded: "No, sir." This dialogue suggests the trial court understood Kent, as counsel for Schmidt, desired a continuance to obtain the expert's affidavit but refused to grant him one because Darling, as counsel for Kemper Sports, objected to the motion being continued to a later date.

II. SUMMARY JUDGMENT

We find it extremely troubling this case was resolved on a summary judgment basis, especially considering the injury to Schmidt and the novel issue involved in this case. No South Carolina cases discuss the issue of personal injury from the impact of errant golf shots.

Many South Carolina cases point out summary judgment is a "drastic remedy" which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003); Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 563 S.E.2d 331 (2002); Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002); Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003); Baril v. Aiken Reg'l Med. Ctrs., 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002); Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001); Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001); McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a "full and fair opportunity to complete discovery." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003); Lanham, 349 S.C. at 363, 563 S.E.2d at 334; Doe v. Batson, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001); Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Lanham, 349 S.C. at 362, 563 S.E.2d at 333; Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000); Mosteller v. County of Lexington, 336 S.C. 360, 520 S.E.2d 620 (1999); Redwend Ltd. P'ship, 354 S.C. at 468, 581 S.E.2d at 501; Baril, 352 S.C. at 280, 573 S.E.2d at 835; Trivelas, 348 S.C. at 130, 558 S.E.2d at 273; Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002); Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999); Middleborough Horizontal Prop. Regime Council v. Montedison, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995). "Summary judgment is inappropriate when further development of the facts is desirable to clarify the application of the law." Lee v. Kelley, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Redwend Ltd. P'ship, 354 S.C. at 468, 581 S.E.2d at 501; Baril, 352 S.C. at 280, 573 S.E.2d at 835; Hall, 349 S.C. at 173-74, 561 S.E.2d at 656; Glasscock, Inc. v. United States Fid. & Guar. Co., 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001); Stewart v. State Farm Mut. Auto. Ins. Co., 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000); see also Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 584 S.E.2d 375 (2003) (noting that summary judgment should not be granted even when there is no dispute as to evidentiary facts, if there is dispute as to conclusions to be drawn therefrom). Although the facts regarding Schmidt's injury are not disputed, application of the law to the facts is disputed, and is a novel issue.

Rule 56(f), SCRCP, provides:

> **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or

depositions to be taken or discovery to be had or may make such order as is just.

Our Supreme Court, in Doe v. Batson, 345 S.C. 316, 548 S.E.2d 854 (2001), discussed the efficacy of Rule 56(f):

> Rule 56(f) applies when it appears "*from the affidavits* of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition." Rule 56(f), SCRCP (emphasis added). In such a case, "the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just." Id. Thus, Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery.

Id. at 321, 548 S.E.2d at 857. The affidavit submitted by Kent is a Rule 56(f) paradigmatic affidavit.

The analysis of Rule 56(f) as juxtaposed to the factual scenario in this case involves whether:

(1) the word "party" encompasses an "attorney";

(2) the affidavit is conclusory;

(3) the two-day rule as articulated in Rule 56(c) does **NOT** apply to a Rule 56(f) affidavit; and

(4) the judge abused his discretion because he did not consider the affidavit.

Party/Attorney

The rule utilizes the word "party" as the entity filing the affidavit under Rule 56(f). Schmidt asserts that the rule allows for an affidavit to be

submitted by the attorney. In the instant case, the attorney is intimately familiar with the reasons and justification for being unable to file an affidavit of the expert witness. Clearly, the attorney is in the best position to file this affidavit rather than a party filing the affidavit on information provided by the attorney.

We conclude that Rule 56(f) does allow and permit an "attorney" to file an affidavit averring "that he cannot for reasons stated present by affidavit facts essential to justify his opposition." This construction is consonant with the expressed intent of the rule to provide a procedure "[w]hen [a]ffidavits [a]re [u]navailable."

Affidavit/Conclusory

A review of the affidavit filed by Kent reveals gargantuan specificity of facts and circumstances. There is nothing in the affidavit that falls within the definition of "conclusory."

Rule 56(c)/Rule 56(f)

Kemper Sports argues that the Kent affidavit was untimely because it did not comply with the two-day rule mandated by Rule 56(c). We reject this contention. The etymological format of Rule 56 demonstrates that a time limit application is neither proper nor justified.

Abuse of Discretion

At the conclusion of the summary judgment hearing, the judge found:

> [T]he affidavit has been reviewed. **The Court finds that it was not timely submitted.** . . . **But, primarily, the Court doesn't have to get there because there's no affidavit that's been filed timely, pursuant to the Rules.** . . . **You didn't file it timely. It's that simple.**

A circuit court's failure to exercise discretion is itself an abuse of discretion. In re Robert M., 294 S.C. 69, 362 S.E.2d 639 (1987); State v.

Smith, 276 S.C. 494, 280 S.E.2d 200 (1981); Fields v. Regional Med. Ctr. Orangeburg, 354 S.C. 445, 581 S.E.2d 489 (Ct. App. 2003); State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000); Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990). Here, the circuit court failed to exercise discretion. See Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); Balloon Plantation, 303 S.C. at 155, 399 S.E.2d at 441 ("It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly."). The judge was mandatorily required to at least evaluate and consider the affidavit.

The non-moving party in a motion for summary judgment "must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (internal quotation marks omitted). In Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991), the plaintiffs brought an action against a refinery operator, alleging personal injury caused by pollution from the refinery. Based on an opinion letter by an expert that the injuries were consistent with exposure to toxic substances, our Supreme Court ruled the trial judge's grant of summary judgment was premature because further discovery, such as testing and analysis of the medical conditions, would likely reveal additional relevant evidence. Id. at 112-13, 410 S.E.2d at 544.

Similarly, Kent's assertions at the hearing regarding the need for Pirkl's expert opinion, and the judge's statement that expert testimony must be used in this case, demonstrate the need for further discovery.

In finding summary judgment was premature, the Baughman Court considered the fact that the plaintiffs "were not dilatory in seeking discovery . . . but have been reasonably diligent in pursuit of a qualified expert to substantiate their claims." Id. at 113, 410 S.E.2d at 544. The Court referenced the plaintiffs' inability to obtain satisfactory responses to their interrogatories, as well as the overall complexity of the case, which contributed to the difficulty in finding an expert. Id.

The trial judge in the present case did not feel Kent was "dilatory" in finding Pirkl. As in Baughman, Schmidt did not receive responses to his discovery requests. In addition, the unusual facts of the case made it difficult to locate an appropriate expert. Kent declared that Pirkl, who resides in California, "has only had a website for a few months . . . [and he] didn't know of [Pirkl] but since the beginning of last week."

In Middleborough Horizontal Prop. Regime Council v. Montedison, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995), Montedison contended the trial court's grant of summary judgment was inappropriate inasmuch as it did not have a full and fair opportunity to conduct discovery. This Court disagreed:

> Montedison advances no good reason why four months was insufficient time . . . to develop documentation in opposition to the motion for summary judgment. . . . Further, the record discloses Montedison made no formal motion for a continuance or pointed out in any specific manner how it would be prejudiced by its inability to conduct discovery.

Id. at 479-80, 465 S.E.2d at 771.

In contrast, Kent asserted the difficulty in finding an expert on golf course design and highlighted the inability to obtain responses to discovery requests. Kent pointed out it would be prejudicial to grant summary judgment on this novel issue when he had an expert ready to testify.

Because this is a negligence claim, it is important to note that, "[g]enerally, negligence claims are not susceptible of summary adjudication because of the many questions normally present in such cases concerning the reasonableness of a party's conduct, foreseeability, and proximate cause." Folkens v. Hunt, 290 S.C. 194, 199, 348 S.E.2d 839, 842 (Ct. App. 1986). Concomitantly, we reverse the grant of summary judgment.

III. NEGLIGENCE

At the time the trial court prematurely granted summary judgment, a genuine issue of material fact existed as to the negligence of Kemper Sports.

In a negligence action, a plaintiff must show the (1) defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages. Andrade v. Johnson, Op. No. 25738 (S.C. Sup. Ct. filed October 27, 2003) (Shearouse Adv. Sh. No. 39 at 15); Sabb v. South Carolina State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002); Thomasko v. Poole, 349 S.C. 7, 561 S.E.2d 597 (2002); Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999); Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003); see also Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001) (amplifying that elements for negligence cause of action are: (1) duty of care owed by defendant to plaintiff; (2) defendant's breach of that duty by negligent act or omission; and (3) damages to plaintiff proximately resulting from breach of duty).

To sustain an action for negligence, it is essential the plaintiff demonstrate the defendant breached a duty of care owed to the plaintiff. Sabb, 350 S.C. at 429, 567 S.E.2d at 237; Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998); Parks v. Characters Night Club, 345 S.C. 484, 548 S.E.2d 605 (Ct. App. 2001). Generally, duty is defined as the obligation to conform to a particular standard of conduct toward another. Huggins v. Citibank, N.A., 355 S.C. 329, 585 S.E.2d 275 (2003); Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977); Hubbard v. Taylor, 339 S.C. 582, 529 S.E.2d 549 (Ct. App. 2000). The existence of a duty owed is a question of law for the courts. Doe v. Batson, 345 S.C. 316, 548 S.E.2d 854 (2001); Washington v. Lexington County Jail, 337 S.C. 400, 523 S.E.2d 204 (Ct. App. 1999). In a negligence action, if no duty exists, the defendant is entitled to judgment as a matter of law. Huggins, 355 S.C. at 332, 585 S.E.2d at 277; Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 533 S.E.2d 312 (2000).

Kemper Sports maintains it did not owe Schmidt a duty. Kemper Sports relies on the proposition that golf courses are not liable to those injured by errant golf shots as long as the course is not unreasonably unsafe. A common theme runs throughout the cases cited by Kemper Sports. The cases involve injury to fellow golfers.

For example, in Campion v. Chicago Landscape Co., 14 N.E.2d 879 (Ill. App. Ct. 1938), a golfer was injured when another golfer hooked his ball, causing it to come into the fairway where the plaintiff was standing and strike him in the eye. The court explained: "Persons operating any golf course may reasonably expect that because of the somewhat dangerous nature of the game, accidents may occur at any time; but to subject them to liability for such an accident would make them insurers of all players on the course. This is not the law." Id. at 883 (emphasis added). The operative word in the court's statement is "players." Because the Campion case involved another player being injured, it is not comparable to the facts of the instant case.

In Petrich v. New Orleans City Park Improvement Ass'n, 188 So. 199 (La. Ct. App. 1939), the plaintiff was playing golf when a ball driven from a nearby tee struck and injured her. The court held: "[T]he universally recognized custom and rule required each golfer to give warning before driving a ball into the direction of someone else on the course, and the [golf course operator] was justified in assuming that each golfer would recognize and obey this custom." Id. at 201 (emphasis added). The Petrich court emphasized the fact that the plaintiff was a golfer, suggesting she assumed the risk of injury.

Trauman v. City of New York, 143 N.Y.S.2d 467 (N.Y. Sup. Ct. 1955), cited by Kemper Sports, involved an action by a golfer. In contrariety, the case sub judice involves a third party on adjacent premises.

Likewise, in Baker v. Thibodaux, 470 So. 2d 245 (La. Ct. App. 1985), a golfer brought an action against the golf club and another golfer for injuries sustained when he was struck in the eye by a golf ball. The court observed that the plaintiff, who was playing the 15th hole at the time of the accident, had actual knowledge the defendant was ahead of him on the 16th tee. Id. at 249. The court noted: "[T]he risk of being struck by an errant shot hit by a

player on a contiguous or adjacent fairway is 'a risk all golfers must accept.'" Id. (emphasis added). The facts of Baker differ substantially from those in the case at bar. Baker stands for the proposition that golfers assume the risk.

In contrast to these cases involving golfer-plaintiffs, Schmidt was not playing golf at the time he was struck by the golf ball. In fact, Schmidt testified he does not play golf at all. Additionally, Schmidt stated during the time he worked on the house, he never saw "any other golf balls come near [him]." Thus, it would be error to conclude Schmidt assumed the risk of being struck by a golf ball. There was no reason to believe a golf ball would strike him while he was roofing the house.

In addition to the requirement that Schmidt prove the existence and breach of a duty, Schmidt must show that Kemper Sports' negligence was the proximate cause of Schmidt's injury. See Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998); Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). To prove causation, a plaintiff must demonstrate both causation in fact and legal cause. Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001); Parks v. Characters Night Club, 345 S.C. 484, 548 S.E.2d 605 (Ct. App. 2001); Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). Causation in fact is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's negligence. Trivelas, 348 S.C. at 136, 558 S.E.2d at 276; McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). This Court, in Trivelas, summarized the law regarding legal cause:

> Legal cause turns on the issue of foreseeability. An injury is foreseeable if it is the natural and probable consequence of a breach of duty. Foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the alleged breach. It is not necessary for a plaintiff to demonstrate the defendant should have foreseen the particular event which occurred but merely that the defendant should have foreseen his or her negligence would probably cause injury to someone.

Id. at 136, 558 S.E.2d at 276 (internal citations and quotations omitted).

Because we find further discovery, especially expert testimony, is essential to determine whether: (1) Kemper Sports owed a duty to Schmidt and (2) Kemper Sports' negligence was the proximate cause of Schmidt's injury, the grant of summary judgment is reversed.

CONCLUSION

Although Kent did not specifically ask for a continuance, it is obvious the trial judge understood the need for expert testimony in this case. In totality, we come to the ineluctable conclusion that genuine issues of material fact exist in regard to the existence of any duty owed by Kemper Sports to Schmidt and whether negligence on the part of Kemper Sports was the proximate cause of Schmidt's injury. Because additional discovery, especially in the form of expert opinion, is needed to determine these issues, the trial court erred in granting Kemper Sports' motion for summary judgment. Accordingly, the decision of the trial judge is

REVERSED and REMANDED.

GOOLSBY, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Keith P. Quigley and Donna Quigley, individually and Donna Quigley, the duly appointed Guardian ad Litem for Kealy Quigley, a minor under the age of fourteen years, Appellants,

v.

John A. Rider, M.D. and Medical Park Pediatricians, P.A., Respondents.

Appeal From Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 3720
Heard October 9, 2003 – Filed December 22, 2003

AFFIRMED

James Edward Bell, III, of Sumter; for Appellants.

Hugh W. Buyck, Robert H. Hood, Roy P. Maybank, Deborah H. Sheffield, all of Charleston; for Respondents.

HOWARD, J.: Keith P. Quigley, individually, and Donna Quigley, individually and on behalf of her minor child, Kealy Quigley ("Kealy"), brought this medical malpractice suit against John A. Rider, M.D. and Medical Park Pediatricians, P.A. (collectively "Rider"), alleging Rider committed malpractice by negligently administering a second and third diptheria-pertussis-tetanus ("DPT") shot to Kealy after she displayed an adverse reaction to the first shot.[1] The circuit court dismissed the suit, holding the court did not have subject matter jurisdiction because Kealy's injuries were vaccine-related and were thus barred by the National Childhood Vaccine Injury Compensation Act, 42 U.S.C.A. § 300aa-1 to 300aa-34 (1988 as amended) ("the Act"). Donna Quigley appeals on behalf of Kealy ("Quigley"), arguing Kealy's injuries were not vaccine-related and Rider is equitably estopped from asserting the Act as a bar to the litigation. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Rider gave Kealy her first DPT shot in December 1988. Shortly thereafter, Kealy had adverse reactions to the shot. Quigley alleges that Rider knew of these adverse reactions but administered a second and third DPT shot to Kealy, both of which manifested corresponding adverse reactions. Subsequently, Kealy was diagnosed with severe

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[1]Keith and Donna Quigley sued Rider in their individual capacities. The circuit court dismissed their claims for failure to comply with the applicable statute of limitations. Neither Keith nor Donna Quigley filed an appeal from the dismissal of their claims. Thus, although Keith and Donna Quigley are listed as Appellants in their individual capacity, only Kealy's negligence claims are the subject of this appeal. Therefore, Keith and Donna Quigley's individual negligence claims against Rider are not addressed. See Bell v. Bennett, 307 S.C. 286, 294, 414 S.E.2d 786, 791 (Ct. App. 1992) (holding an issue which is not argued in the brief is deemed abandoned on appeal); Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

mental and physical retardation, which Quigley attributes to the DPT shots.

Quigley filed this action, alleging Rider was negligent by administering the second and third DPT shots. Additionally, the complaint alleged Rider negligently failed to: 1) notify the Secretary of the Department of Health and Human Services ("the Secretary") regarding Kealy's reactions to the shots pursuant to 42 U.S.C.A. §§ 300aa-25(a) & (b);[2] and 2) inform Quigley of the dangers of the vaccine pursuant to 42 U.C.S.A. §§ 300aa-26(c) & (d).[3]

Rider moved for dismissal, arguing the circuit court lacked subject matter jurisdiction over the claim. The court granted the motion, ruling the Act required Quigley to file a petition with the Federal Claims Court prior to seeking state court remedies. Quigley appeals.

LAW/ANALYSIS

I. General Overview of the Act

Congress created the Act in 1986 for the purpose of establishing an efficient scheme of recovery for injuries and deaths traceable to vaccines, while providing protection for manufacturers and administrators of the vaccines. See H.R. Rep. No. 99-908, at 4 (1986),

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[2] Pursuant to the Act, vaccine administrators are required to make a permanent record of the vaccination. § 300aa-25(a). Additionally, they are required to report to the Secretary "the occurrence of any event set forth in the Vaccine Injury Table . . . the occurrence of any contraindicating reaction to a vaccine which is specified in the manufacturer's package insert . . . and such other matters as the Secretary may by regulation require." § 300aa-25(b).

[3] The Act requires vaccine administrators to provide information to the legal guardians of any child receiving a DPT shot. The information must include the benefits of the vaccine, the risks associated with the vaccine, and the availability of the Act. §§ 300aa-26(c) & (d).

reprinted in, 1986 U.S.C.C.A.N. 6344, 6345 ("While most of the Nation's children enjoy greater benefit from immunization programs, a small but significant number have been gravely injured. These children are often without a source of payment or compensation for their medical and rehabilitative needs, and they and their families have resorted in greater numbers to the tort system for some form of financial relief."); Shalala v. Whitecotton, 514 U.S. 268, 269-70 (1995) (citing H.R. Rep. No. 99-908, at 3-7 (1986)) ("For injuries and deaths traceable to vaccinations, the Act establishes a scheme of recovery designed to work faster and with greater ease than the civil tort system."); Schafer v. American Cyanamid Co., 20 F.3d 1, 4 (1st Cir. 1994) ("The Act seeks to achieve its cost-reducing purpose, not by denying compensation to victims . . . but by reducing the litigation and insurance costs related to lengthy, complex tort procedures and random large tort awards. The Act therefore imposes substantive and procedural limitations upon tort actions."); see also H.R. Rep. No. 99-908, at 6-7 (1986), reprinted in, 1986 U.S.C.C.A.N. 6344, 6348-49 (stating one of the primary purposes of the Act is to protect the vaccine market against the instability and uncertainty of tort litigation).

To meet the clearly stated goals of Congress, the Act provides a remedial scheme whereby a person who sustains vaccine-related injuries after the effective date of the Act must apply to the Federal Claims Court for compensation pursuant to the Act prior to seeking traditional tort remedies through state and federal courts. §§ 300aa-11(a)(2)(A)(i) and (ii); see Shalala, 514 U.S. at 270 (citing § 300aa-11) ("A claimant alleging that more than $1,000 in damages resulted from a vaccination after the Act's effective date in 1988 must exhaust the Act's procedures and refuse to accept the resulting judgment before filing any *de novo* civil action in state or federal court.") (emphasis as in original). However, once an injured person has appropriately applied to the Federal Claims Court under the Act and received a judgment, the person may choose to accept the judgment or pursue traditional tort remedies in state and federal court. See § 300aa-21(a).

II. Vaccine-Related Injury

Quigley argues the circuit court erred by dismissing Kealy's claims because Kealy's injuries are not "vaccine-related injuries" within the scope of the Act. Quigley contends although Kealy's injuries from the first DPT shot were "vaccine-related injuries," Kealy's injuries from the second and third DPT shots were not because Rider's administrations of the second and third DPT shots were intervening and superseding factors, breaking the causal chain between the DPT shots and Kealy's injuries. We disagree.

When the terms of a statute are clear and unambiguous, our inquiry ends, and we are required to enforce the terms of the statute as Congress drafted it. See United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241-42 (1989).

Section 300aa-11(a)(2)(A) states the Act only applies to a vaccine-related injury. The Act defines "vaccine-related injury" as "an illness, injury, condition, or death associated with one or more of the vaccines set forth in the Vaccine Injury Table . . ." § 300aa-33(5) (emphasis added).

DPT is a vaccine listed within the Vaccine Injury Table. § 300aa-14. Furthermore, even under Quigley's arguments, Kealy's injuries are "associated with" the DPT shots.[4] Thus, under any view of the negligence alleged, Kealy's injuries are "vaccine-related injuries" within the scope of the Act. See Amendola v. Secretary, Dep't of Health and Human Servs., 989 F.2d 1180, 1186-87 (Fed. Cir. 1993) (holding injuries arising from allegations of medical malpractice stemming from multiple administrations of a vaccine within the Act are vaccine-related injuries subject to the Act). Therefore, we reject Quigley's assertion the claim against Rider is not vaccine-related.

[4] During oral arguments, Quigley acknowledged Kealy's injuries are associated with the DPT shots but argued Rider's negligence was the paramount cause of Kealy's injuries.

III. Subject Matter Jurisdiction

Quigley argues the circuit court erred by ruling the Act deprives state courts of subject matter jurisdiction. Quigley contends the statute merely creates a remedial process that must ordinarily be exhausted prior to a vaccine-related injury being brought in state court, and because Rider failed to comply with §§ 300aa –25(d) and –26(c) & (d), he is equitably estopped from asserting the statute as a defense. We disagree.

Where a state statute conflicts with or frustrates federal law, the former must give way. Maryland v. Louisiana, 451 U.S. 725, 746 (1981). In the interest of avoiding unintended encroachment on the authority of the states, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption. Thus, preemption will not lie unless it is the clear and manifest purpose of Congress. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Evidence of preemptive purpose is sought in the text and structure of the statute at issue. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983).

Federal law may preempt state law in three ways: first, Congress may expressly define the extent to which it preempts state law; second, Congress may occupy a field of regulation, impliedly preempting state law; and third, a state law may be preempted to the extent it conflicts with federal law. Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984).

The Act provides:

> (2)(A) No person may bring a civil action for damages in an amount greater than $1,000 or in an unspecified amount against a vaccine administrator . . . in a State . . . court for damages arising from a vaccine-related injury . . . associated with the administration of

> a vaccine after October 1, 1988 . . . unless a petition has been filed, in accordance with section 300aa-16 of this title . . . (B) If a civil action which is barred under subparagraph (A) is filed in a State or Federal court, the court shall dismiss the action.

§ 300aa-11(a). (emphasis added).

We believe the statute states a clear and manifest purpose of Congress to occupy and regulate the field of vaccination litigation unless and until a plaintiff files suit in the Federal Claims Court and receives a judgment. Thus, it is unnecessary to determine if the statute removes subject matter jurisdiction from state courts or merely requires an exhaustion of remedies. Rather, regardless of the characterization, the clear, unambiguous language of the statute requires state courts to dismiss an action within the scope of the Act unless the action has first been brought before the Federal Claims Court. See Shalala, 514 U.S. at 270 ("A claimant alleging that more than $1,000 in damages resulted from a vaccination after the Act's effective date in 1988 must exhaust the Act's procedures and refuse to accept the resulting judgment before filing any *de novo* civil action in state or federal court.") (citing § 300aa-11); Strauss v. American Home Prod. Corp., 208 F. Supp. 2d 711, 714 (2002) ("Simply put, individuals who qualify as Program claimants *must* file petitions in the Vaccine Court in order to pursue any vaccine-related claims at all.") (emphasis as in original).

In the present case, it is uncontested Rider is a vaccine administrator within the meaning of the Act. Furthermore, it is uncontested Quigley is attempting to bring a civil action for damages in excess of $1,000 in state court, without having filed a petition pursuant to section 300aa-16, for injuries sustained by Kealy after the effective date of the Act. Consequently, the Act required the circuit court to dismiss Quigley's claims. Because the circuit court complied with the Act, we hold the circuit court did not err.

CONCLUSION

For the foregoing reasons, the decision of the circuit court, dismissing Quigley's claims is

AFFIRMED.

GOOLSBY and HUFF, JJ., concur.