The Supreme Court of South Carolina

RE: Interest Rate on Money Decrees and Judgments

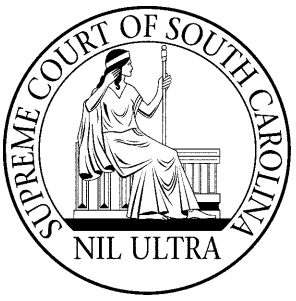
ORDER

S.C. Code Ann. § 34-31-20 (B) (Supp. 2006) provides that the legal rate of interest on money decrees and judgments "is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. The South Carolina Supreme Court shall issue an order by January 15 of each year confirming the annual prime rate. This section applies to all judgments entered on or after July 1, 2005. For judgments entered between July 1, 2005, and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points."

The Wall Street Journal for January 2, 2008, the first edition after January 1, 2008, listed the prime rate as 7.25%. Therefore, for the period January 15, 2008, through January 14, 2009, the legal rate of interest for judgments and money decrees is 11.25% compounded annually.

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

Columbia, South Carolina
January 4, 2008



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 1

January 7, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Harry Montgomery, Respondent,

v.

CSX Transportation, Inc., Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Orangeburg County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 26411
Heard October 18, 2007 – Filed January 7, 2008

AFFIRMED AS MODIFIED

Mark C. Wilby and Amy R. Snell, of Fulcher Hagler LLP, of Augusta, Georgia, for Petitioner.

Robert A. McKenzie, of McDonald, McKenzie, Rubin, Miller & Lybrand, of Columbia, and W. C. Tucker, Jr., of Lucas, Petway, Tucker, and Wash, PC, of Birmingham, Alabama for Respondent.

JUSTICE WALLER: We granted petitioner's request for a writ of certiorari to review the Court of Appeals' opinion in Montgomery v. CSX Transp., Inc., 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004). We affirm as modified.

PROCEDURAL BACKGROUND

Respondent Harry Montgomery, a railroad employee of petitioner CSX Transportation, Inc. (CSX), was injured while using a manual track wrench to tighten a bolt on a railroad track. Respondent brought a negligence action against CSX under the Federal Employers' Liability Act (FELA).[1] CSX moved for summary judgment. The evidence presented included deposition testimony of respondent and two of his CSX supervisors, as well as affidavits from two experts for respondent. After a hearing, the trial court granted CSX's motion. On appeal, the Court of Appeals reversed and remanded for trial; Judge Goolsby dissented.

FACTS

Respondent was injured on July 13, 1999. At that time, he was employed as a track inspector and had been working for CSX for over 22 years. He attained the title of foreman in 1994.

CSX owns and operates two mainline tracks north of Charleston: the "A-line" and the "S-line." The A-line is made of "welded rail," which is continuous, quarter-mile rail sections welded together. There are "connected joints" on the A-line which means that bolts are put in place temporarily to hold the quarter-mile sections together, but those are later removed by a welding process. The S-line, on the other hand, is made up of "jointed rail" which is comprised of 39-foot rail sections held together by "rail joints." In one mile, there are approximately 130 joints on each rail, with six track bolts per joint. Given that there are two rails on a track, there are about 1,560 track bolts per mile on the S-line. The upshot is that there are many more track bolts on the S-line, and comparatively very few on the A-line.

[1] 45 U.S.C. § 51 *et seq.* (2000).

Additionally, the A-line is a higher class line which handles more active railroad traffic. About 16 trains run per day on the A-line, which includes a high-speed passenger train, while the S-line runs only six trains per day, all local freight trains.

For both the A-line and the S-line, there were two track inspectors – respondent and a man named Ussery who had worked for CSX for two years. Respondent's immediate supervisor was roadmaster James Reed; Darrell Crook was CSX's assistant division engineer and Reed's supervisor.

Respondent explained that a track inspector's "main purpose is to look for anything that's unsafe and try to make it safe." He further described his track duties as including the following: tightening and replacing track bolts, replacing broken joints and joint bars, and replacing anything else that might be broken or defective on the track. In addition, he was responsible for reporting anything "out of the ordinary that would … allow a piece of track to be unsafe."

According to respondent, about a month before his injury, Crook reassigned him from working primarily on the A-line to working **solely** on the S-line:

> Mr. Crook came up to me and Mr. Crook made a verbal agreement with me and he says that a – that S Line was in bad shape and that he knew it and I knew it and he came up to me and he made a verbal agreement with me, he says that, "If I were to get you a piece of machinery called a bolt machine and put you out on this track, would you be able to do some work to get that track a little better – in better shape?" And I agreed to, I said, "Look, Mr. Crook, I'll do the best that I can," and that's all I could have done.

A bolt machine is a machine that loosens and tightens track bolts and is used instead of a manual track wrench. Respondent explained that although he was provided with a bolt machine on the first day of his reassignment, the machine was old and it failed. It was neither fixed nor replaced. However,

the other track inspector, Ussery, who had been assigned to the A-line, had been provided with a state-of-the-art Matweld Unit which was a power hydraulic system. Among other things, this unit can run power wrenches and a bolt tightening machine.

Respondent was responsible for the "Andrews Subdivision" of the S-line, approximately 45 to 50 miles of track. In his deposition testimony, respondent stated that although he would have preferred to work on the A-line, he felt as if his job would be in danger if he had not taken the S-line assignment from Crook. Respondent explained about the poor condition of the S-line as follows:

> [The] railroad track … was tore up and run down for many years and you had to be there to see it. It was – it was a bad railroad track. It was a bad piece of track. It was rough, it was rugged, there was a lot of work. I mean a whole lot more work to have been done on that piece of railroad track than it was on the A Line.

Because of the S-line's poor condition, a lot of "slow orders" were placed on the S-line. In addition, respondent stated there was "talk among employees" that the S-line might have to be shut down because the "tracks were in bad shape."

Although he believed that the job assignment required more than just one man, respondent worked without a crew on the S-line. On the day of the accident, respondent went out and was tightening loose bolts and replacing missing bolts. He was supposed to go as far on the line as his workday hours would allow. After about three and a half hours of working, respondent estimated he had tightened 100 to 200 bolts. As respondent was attempting to tighten a particular bolt on a switch with the manual track wrench, the bolt "froze;" after respondent applied "a little more pressure than normal" to the bolt, it gave way which caused respondent to be thrown across the rail and injured on his right side.[2]

[2] As a result of the injuries, Montgomery had neck surgery and knee surgery.

Respondent did not claim there was any defect with the manual track wrench, a tool he had used his entire career at CSX. He did state that the bolt was "bad," i.e., faulty in some way. As to whether he could have gotten help if he had called for it, respondent stated it was "very doubtful" he would have gotten any, especially given the shortage of employees at the rail yard during that time.

Respondent's roadmaster, Reed, testified in deposition that he would expect a track man to tighten up to 24 bolts in a normal day's work. He further stated that if he knew an employee would be tightening as many as 100 bolts in a day, then he would give him a bolt tightening machine for the work.[3] Reed confirmed that respondent had not been charged with any violation of any rule.

Crook, the assistant division engineer, testified that he did not remember a conversation with respondent where Crook asked respondent to get the S-line in better shape with a bolt machine. Crook acknowledged, however, that the S-line "had a lot of problems that … needed to get corrected," such as "a lot of bolts out, … broken bars ..., a good many weak ties and … some surface conditions."

Respondent presented two expert affidavits. Don H. Bowden, Sr., a railroad safety consultant and former roadmaster for CSX, offered his opinions regarding reasonable work assignments and safety practices in the railroad industry. In Bowden's opinion, respondent's assignment on the S-line should not have been done by one worker alone:

> Under common industry practice, this job should not be done by one man alone. [Respondent] was assigned to the monumental task of repairing the track by himself. While it is not uncommon for one man to be assigned a task in inspecting a track, it is unreasonably hazardous to require one man to not only inspect the track, but also perform the actual track maintenance himself. A prudent and reasonable railroad would assign a gang of men to

[3] However, Reed also stated he did not agree that it was inappropriate to put one man on a track to tighten 150 bolts in one day.

> do this type of job. To do otherwise, in my opinion, subjects the employee to an unsafe workplace in the railroad industry because an accident is bound to happen.

Bowden also opined it was unreasonable for CSX to provide respondent with only a manual track wrench:

> The unreasonable hazards to which [respondent] was exposed by working this track by himself were greatly exacerbated and increased by CSX requiring him to replace and/or tighten the track bolts with a manual track wrench. While it is not uncommon for workers to use manual track wrenches to tighten sporadic loose bolts on a stretch of track, this particular track was in such a state of disrepair that the use of a track wrench was not only impracticable, it unreasonably increased the likelihood of injury to [respondent].… In addition to the sheer volume of bolts that [respondent] needed to replace and/or tighten, the condition of the bolts and the track also made the manual track wrench an unsuitable tool for this job. This track had been neglected by CSX for a long period of time. As such, CSX should have known that the bolts were very likely to be "rusted-on," making them very difficult to remove and/or tighten. Requiring Mr. Montgomery to work with a manual wrench in these conditions unreasonably multiplied his risk of injury. Mr. Montgomery's description of the accident shows these hazards were present because he was required to use a tremendous amount of leverage on the wrench to break through the rust. For all of these reasons, a prudent and reasonable railroad would not have supplied just a track wrench to Mr. Montgomery to do this job. A prudent and reasonable railroad would have provided him with another bolt tightening machine when the first one became inoperable or would have fixed the one assigned to him.

Respondent also offered the affidavit of Dr. Tyler A. Kress, a biomechanical engineer, who stated as follows:

It is my opinion that (1) the type of work [respondent] was performing daily and (2) the tools he was given to perform that work created unreasonably dangerous biomechanical risk factors to his body. It is my further opinion that these risk factors are consistent with his fall and the injuries he sustained as a result of his fall.

Apparently, [respondent] was ordered to perform the repetitive motion of tightening and untightening bolts with a manual track wrench. Proper use of the track wrench requires the employee to keep the head of the wrench fixed on the nut that is being tightened or untightened. Keeping the head of the wrench on the nut is even more important when the bolts and nuts are rusted and susceptible to being "stuck." Sporadic use of the track wrench to tighten and untighten nuts and bolts would not normally cause risk to the human body. However, performing repetitive tasks daily – and specifically ones that require push/pull forces of the upper extremity and upper body like the track wrench – are widely associated with increased risk of injury because of the cumulative effects of the repetition and fatigue. In [respondent's] work environment, his use of the track wrench was not spora[d]ic because of the sheer number of bolts that were evidentially [sic] in disrepair on this stretch of track. His fatigue from this manual, repetitive motion was increased by the increased forces needed to free the nuts and bolts from their rusted condition. With each repetitive use of the wrench, it became more physically difficult for [respondent] to control the wrench and its pivot point where the head is fastened to the nut. The probabilities of both (1) the wrench slipping off of the nut and (2) an abrupt motion occurring because of a nut breaking free are increased significantly due to the repetitive and tiring nature of the assigned job. It is understandable that [respondent] may fall if and when one of these events occur. Therefore, it is my opinion that his fall is a natural result of the work environment imposed on him by C.S.X.

The trial court found the expert affidavits unpersuasive because respondent was not under any time pressure by CSX to complete the S-line work. Furthermore, the trial court reasoned that respondent's task of tightening the track bolt was one that could be safely performed by one person; therefore, additional workers would have only meant the job would be finished more quickly. The trial court also found that the failure to provide a bolt tightening machine was not automatically negligent. Significantly, the trial court noted that "[i]f the use of the manual bolt wrench was safe and appropriate for use on one bolt, then it was safe and appropriate for any number of bolts absent unreasonable performance requirements imposed by" CSX. Since the wrench itself was not defective and respondent was "not on any schedule," the trial court found no genuine issue of material fact as to CSX's negligence.

As stated above, the Court of Appeals reversed, with Judge Goolsby dissenting. The majority opinion held that respondent had established genuine issues of material fact as to whether: (1) CSX failed to provide respondent with sufficient help to repair the S-line; and (2) CSX breached its duty to provide respondent with safe and suitable equipment to do his job. The Court of Appeals further held that the railroad employer's conduct must be viewed as a whole, and since CSX's alleged breaches could be combined to create an unreasonably unsafe work environment, then negligence should be determined by a jury. Thus, the Court of Appeals reversed summary judgment and remanded the case for a jury trial. Montgomery v. CSX Transp., Inc., supra.

ISSUES

1. Did the Court of Appeals err in announcing a relaxed standard of negligence for a FELA action?

2. Did the Court of Appeals err in finding the expert affidavits sufficiently created a genuine issue of material fact as to CSX's negligence?

3. Did the Court of Appeals err in holding that, pursuant to Blair v. Baltimore & Ohio R.R., 323 U.S. 600 (1945), the combined effect of respondent's two negligence theories sufficiently raised an inference as to FELA negligence?

DISCUSSION

The ultimate issue in the instant case is whether the Court of Appeals erred in reversing the grant of summary judgment. Because this overall question permeates the three discrete legal issues on certiorari, we begin our discussion with general FELA law, including the legal standards governing summary judgment review in a FELA case.

To prevail on a FELA claim, the plaintiff must prove "the traditional common law elements of negligence (i.e., duty, breach, causation and damages) and that the employer's negligence 'contributed, in whole or in part, to the worker's injury.'" Baggerly v. CSX Transp., Inc., 370 S.C. 362, 369 n.5, 635 S.E.2d 97, 101 n.5 (2006) (quoting Rogers v. Norfolk S. Corp., 356 S.C. 85, 93, 588 S.E.2d 87, 91 (2003)).

In Norton v. Norfolk S. Ry. Co., 350 S.C. 473, 476, 567 S.E.2d 851, 853 (2002), we stated the following regarding FELA claims in state court:

> FELA is a federal statute which provides the framework for handling the injury claims of federal railroad workers. State courts have concurrent jurisdiction to hear FELA claims.… A FELA action brought in state court is controlled by federal substantive law and state procedural law. However, a form of practice may not defeat a federal right…. It is firmly established that questions of sufficiency of evidence for the jury in cases arising under FELA in state courts are to be determined by federal rules.

(Citations omitted).

This Court reviews the grant of a summary judgment motion under the same standard as the trial court, pursuant to 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. E.g., Burriss v. Anderson County Bd. of Educ., 369 S.C. 443, 633 S.E.2d 482 (2006); Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003). When determining if any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. Wilson v. Style Crest Products, Inc., 367 S.C. 653, 656, 627 S.E.2d 733, 735 (2006). Moreover, even if there is no dispute regarding the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Id.

1. Did the Court of Appeals misstate the FELA standard of negligence?

CSX argues the Court of Appeals erred in finding there is a "relaxed" standard for proving FELA negligence, and by applying the relaxed standard it improperly found issues of fact. CSX specifically contends that although there is a relaxed standard for the causation prong, the Court of Appeals erroneously found the relaxed standard also applies to the duty/breach element.[4] We agree with CSX that the Court of Appeals' language regarding the FELA standards is problematic. We do not agree, however, that the misstatements in the opinion led to the wrong result.

Section 1 of FELA provides that:

> Every common carrier by railroad ... shall be liable in damages to any person suffering injury while he is employed by such carrier ... for such injury or death resulting **in whole or in part** from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

[4] The elements of duty and breach in a negligence action are sometimes collectively referred to as the negligence (or fault) prong.

45 U.S.C. § 51 (emphasis added). Courts must construe FELA provisions liberally in favor of injured railroad workers. E.g., Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 542 (1994); Urie v. Thompson, 337 U.S. 163, 182 (1949). Put simply, FELA imposes upon a railroad a non-delegable duty to provide its employees with a reasonably safe place to work. E.g., Brown v. CSX Transp., Inc., 18 F.3d 245, 249 (4th Cir. 1994); Rogers v. Norfolk S. Corp., 356 S.C. 85, 92, 588 S.E.2d 87, 90 (2003), cert. denied, 541 U.S. 1085 (2004).

In Rogers v. Missouri Pacific R. Co., 352 U.S. 500 (1957), the United States Supreme Court (USSC) stated the following regarding causation in a FELA case:

> It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes…. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played **any part at all** in the injury or death.

Id. at 506-07 (emphasis added, footnote omitted).

More recently, the USSC characterized Rogers as having established a "relaxed" causation standard:

> [W]e held in Rogers [] that **a relaxed standard of causation** applies under FELA. We stated that "[u]nder this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, **even the slightest**, in producing the injury or death for which damages are sought." [Rogers, 352 U.S.] at 506.

Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 543 (1994) (emphasis added).

Nonetheless, the Gottshall Court also emphasized that FELA is not a workers' compensation scheme and "'does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.'" Id. (quoting Ellis v. Union Pacific R. Co., 329 U.S. 649, 653 (1947)).

There is a federal circuit split as to whether the relaxed FELA standard applies only to causation, or applies to the fault prong of FELA negligence as well. The Fifth Circuit, for example, expressly uses the lower standard only on the causation element. See, e.g., Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997) (*en banc*). The Gautreaux court stated that the "in whole or in part" language of the FELA statute "modifies only the causation prong of the inquiry. The phrase does not also modify the word 'negligence.'" Id. at 335. The Second Circuit, however, applies the relaxed standard to both the fault and the causation prongs. See, e.g., Williams v. Long Island R.R. Co., 196 F.3d 402, 406 (2nd Cir. 1999) (where the court noted it has "explicitly stated" it construes FELA "as creating a relaxed standard for negligence as well as causation") (citation and internal quotation marks omitted).

The Fourth Circuit has noted that a Jones Act claim, like a FELA claim, is based on negligence where "the elements of duty, breach, and injury draw on common law principles" and only "the element of causation is relaxed." Hernandez v. Trawler Miss Vertie Mae, Inc., 187 F.3d 432, 437 (4th Cir. 1999).[5]

The confusion on this issue was clearly evidenced very recently in Norfolk Southern Ry. Co. v. Sorrell, ___ U.S. ___, 127 S.Ct. 799 (2007). There, the USSC accepted the question of whether the Missouri courts erred in determining that the causation standard for employee **contributory negligence** under FELA differs from the causation standard for railroad **negligence**. The USSC answered this question in the affirmative, and held that under FELA, the same causation standard applies to both a plaintiff's

[5] But see Estate of Larkins v. Farrell Lines, Inc., 806 F.2d 510, 512 (4th Cir. 1986), cert. denied, 481 U.S. 1037 (1987) (where the Fourth Circuit stated that FELA "creates a light burden of proof **on negligence and causation**") (emphasis added).

claim for negligence and a defendant's affirmative defense of contributory negligence.

Yet, the Sorrell Court did not establish precisely what the FELA standard for causation is. Although the railroad had "attempted to expand the question presented to encompass **what** the standard of causation under FELA should be, not simply whether the standard should be the same for railroad negligence and employee contributory negligence," the Court declined to answer that question. Id. at 803-04 (emphasis in original). The majority opinion therefore did not address this issue of a relaxed standard.

In a concurring opinion, however, Justice Souter offered his own characterization of the 1957 Rogers opinion: "Rogers did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm; the case merely instructed courts how to proceed when there are multiple cognizable causes of an injury." Id. at 809-10 (Souter, J., concurring).

Justice Ginsburg also wrote separately in Sorrell, but she believed the majority opinion "leaves in place precedent solidly establishing that the causation standard in FELA actions is more 'relaxed' than in tort litigation generally." Id. at 812 (Ginsburg, J., concurring in judgment). According to Justice Ginsburg, "Rogers describes the test for proximate causation applicable in FELA suits. That test is whether 'employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" Id. at 813 (quoting Rogers, 352 U.S. at 506).

We turn now to the instant case and how the Court of Appeals set out the FELA standards. The Court of Appeals stated as follows:

> A plaintiff's burden in a FELA action is significantly lighter than it would be in an ordinary South Carolina common law negligence case:
>
> > [FELA's] [history] has been said to reduce the extent of the negligence required, as well as the quantum of

> proof necessary to establish it, to the "vanishing point." **While it is still undoubtedly true that there must be some shreds of proof both of negligence and of causation**, and that "speculation, conjecture and possibilities" will not be enough, there appears to be little doubt that under [FELA] jury verdicts for the plaintiff can be sustained upon evidence which would not be sufficient in the ordinary negligence action.
>
> Norton v. Norfolk S. Ry. Co., 341 S.C. 165, 533 S.E.2d 608 (Ct. App. 2000), rev'd on other grounds, 350 S.C. 473, 567 S.E.2d 851 (2002) (citing W. Page Keeton et al., *Prosser & Keeton on Torts* § 80, at 578 (5th ed. 1984)) (internal quotations omitted).

Montgomery v. CSX Transp., Inc., 362 S.C. at 544-45, 608 S.E.2d at 448 (emphasis added).

However, in **this Court's** opinion which **reversed** the Court of Appeals' Norton case (albeit on other grounds), we noted that the Court of Appeals had "created a relaxed standard of negligence in federal law where there is not one, at least not in the Fourth Circuit." Norton v. Norfolk S. Ry. Co., 350 S.C. at 480 n.5, 567 S.E.2d at 855 n.5.

Likewise, we find here the Court of Appeals inappropriately stated that a relaxed standard applies to the FELA negligence prong. Put simply, federal law has not conclusively established a relaxed standard of negligence (i.e., duty/breach) in FELA cases. See Norton v. Norfolk S. Ry. Co., 350 S.C. at 476, 567 S.E.2d at 853 (a FELA action heard in state court is controlled by federal substantive law). Based on the USSC's statement in Gottshall, there is a relaxed **causation** standard, but the USSC has never expressly stated that anything other than the traditional federal common law standard applies to the other elements of a FELA claim.[6] Therefore, we agree with CSX that the

[6] Although Justice Souter's concurring opinion in Sorrell has now clouded the issue on whether Rogers indeed relaxed the causation standard, the majority opinion did not speak to this precise issue. We therefore agree with Justice Ginsburg's assessment that Sorrell leaves both Rogers and Gottshall intact.

Court of Appeals erred in lowering the burden of proof on the duty/breach elements of a FELA negligence claim.

We reiterate the general standard of proof in a FELA claim: the plaintiff must prove the traditional duty, breach, causation and damages elements of negligence. Baggerly v. CSX Transp., Inc., 370 S.C. at 369 n.5, 635 S.E.2d at101 n.5. We further hold that under federal law, there is a relaxed standard for the causation element. See Gottshall, supra; Rogers, supra. Accordingly, we **modify** the portion of the Court of Appeals' opinion which inaccurately states there is a "significantly lighter" burden of proof on both causation and negligence for a FELA claim. Montgomery v. CSX Transp., Inc., 362 S.C. at 544-45, 608 S.E.2d at 448.

2. Did the Court of Appeals err in finding the expert affidavits created a genuine issue of material fact?

CSX next argues the Court of Appeals erred in finding that the expert affidavits created genuine issues of material fact. Specifically, CSX maintains the affidavits merely contain speculation and conclusory allegations and instead should have been based on specific facts in the record. We disagree.

Rule 56(e), SCRCP, provides that for purposes of summary judgment, "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." This rule further states that "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), SCRCP.

CSX takes issue with the experts' assumptions regarding the following: (1) respondent's difficulty in turning the track bolt was due to the fact that the bolt was "rusted-on;" (2) respondent needed to use a "tremendous amount of leverage on the wrench;" and (3) respondent was fatigued because of the

repetitive nature of his assignment. CSX contends that these averments lack factual support in the record.

Arguably, both experts made a few assumptions that are not explicitly supported by respondent's deposition testimony. For example, respondent never discussed rust on the bolts and did not say he suffered from fatigue. Moreover, his exact words regarding the leverage he used on the wrench – "I tried to tighten it some more, the bolt had froze, which allowed me to apply just a little more pressure than normal, and the whole thing gave which … sent me across the rail" – did not unequivocally indicate he used "tremendous" leverage.

Nonetheless, the evidence must be construed in the light most favorable to respondent. See, e.g., Wilson v. Style Crest Products, Inc., 367 S.C. at 656, 627 S.E.2d at 735. Respondent did testify he had already tightened between 100 and 200 bolts in less than four hours. In our opinion, a reasonable inference is that his job entailed repetitive motions with the large manual track wrench. Similarly, respondent was thrown across the rail when the previously stuck bolt "gave" way. We find a jury could reasonably infer that respondent was applying quite a bit of pressure to the bolt in an attempt to tighten it, which was exactly what his assignment entailed.

This Court has plainly stated that "even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Id. There appears to be no real dispute to the following critical facts: respondent was working alone on the day of the accident, with a manual tool, on a 45-mile stretch of track that was in very poor condition. Respondent's negligence theories are that CSX should have assigned more workers for the task **and/or** should have provided him with a bolt tightening machine. Both respondent's experts confirmed that, in their opinion, CSX should have done both of these things and the failure to do so was causally related to respondent's injury. Thus, there is evidence of duty, breach, causation and injury in respondent's favor. Obviously, the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, but that simply establishes that summary judgment is not appropriate in this case. Id.

A. Is there a jury question on whether CSX was negligent for failing to provide sufficient help to respondent for the S-line repair?

FELA negligence may be predicated on the railroad's failure to furnish sufficient help if, but for that failure, the injury would not have occurred. E.g., Yawn v. Southern Ry. Co., 591 F.2d 312, 315 (5th Cir.), cert. denied, 442 U.S. 934 (1979); Deere v. Southern Pac. Co., 123 F.2d 438, 441 (9th Cir. 1941), cert. denied, 315 U.S. 819 (1942); Lis v. Pennsylvania R.R. Co., 12 Misc.2d 868, 869 (N.Y. City Ct. 1958).

CSX argues that providing more workers on the S-line would not have prevented respondent's injury because tightening a bolt is generally a one-man task. CSX relies heavily on McKennon v. CSX Transp., Inc., 897 F.Supp. 1024 (M.D. Tenn.), aff'd, 56 F.3d 64 (6th Cir. 1995), in support of its argument that summary judgment is warranted in this case.

In McKennon, the plaintiff raised insufficient help as one of his negligence theories; the district court granted summary judgment for CSX. The plaintiff, a foreman, was repairing a railroad switch after a derailment. This was a two-man job where the plaintiff's partner would insert a tie under the tie plate and position the plate on top of the tie; the plaintiff would then secure the plate by driving a spike through it and into the tie. To drive the spikes, the plaintiff used a "spike maul," a nine-pound tool similar to a sledgehammer, which he had been using for approximately 20 years. While swinging the spike maul, the plaintiff injured his left shoulder. Id. at 1025-26.

As to the plaintiff's theory that he should have had more workers on the job, the district court stated the following:

> [T]he fact that Plaintiff's job would have been easier if there had been more workers does not constitute negligence on the part of Defendant, nor does it create an unreasonably unsafe work environment. Assuming *arguendo* that Defendant's failure to

> supply more workers was a breach of its duty, Plaintiff still has not shown how the absence of additional workers caused his injury.

Id. at 1027.

Admittedly, the facts of McKennon are very similar to those of the instant case, and it certainly is questionable whether CSX's failure to provide more workers on the S-line proximately caused respondent's injury. Respondent argues, however, the instant case is distinguishable from McKennon. Viewing the facts in a light most favorable to respondent and taking into account the relaxed standard of causation in a FELA case, we agree a jury question has been presented. Here, there are two experts who offered detailed affidavits as to CSX's duty, breach, and causation which was absent in McKennon.[7] Although the evidence on causation is not conclusive, the circumstances of this case require that the claim be submitted to a jury.

B. Is there a jury question on whether CSX was negligent for failing to provide respondent with a bolt-tightening machine?

As to the theory regarding the bolt-tightening machine, CSX argues it was not required to provide respondent with an automated machine. We find, however, that respondent presented a jury question on this issue as well.

The proper inquiry in a FELA case is whether the work method prescribed by the employer was reasonably safe, not whether the employer

[7] The plaintiff in McKennon submitted an affidavit from his surgeon who concluded it was foreseeable that the plaintiff's shoulder would be injured from the task he was performing, and the plaintiff's assignment constituted an "unsafe work practice." The district court noted that "[t]his information constitute[d] the entire substance of the physician's affidavit" and was the only evidence in the record which supported the plaintiff's complaint. The district court concluded that affidavit did not create a genuine issue of material fact. McKennon, 897 F.Supp. at 1028 n.2. The qualifications of the two experts in the instant case, and the more substantial content of their affidavits, contribute to making this case one in which there are genuine issues of material fact on the insufficient help negligence theory.

could have used a safer alternative method for performing the task. Stillman v. Norfolk & W. Ry., 811 F.2d 834, 838 (4th Cir. 1987). Thus, the fact that there may have been an automated or safer method of work does not automatically render the chosen method negligent for purposes of FELA. Chicago R.I. & Pac. R.R. v. Lint, 217 F.2d 279, 282-83 (8th Cir. 1954); see also Soto v. Southern Pac. Transp., 644 F.2d 1147, 1148 (5th Cir.), cert. denied, 454 U.S. 969 (1981) ("That there are other, arguably more advanced, methods in use by the defendant … is of no significance where the method in use by [the employee] was not an inherently unsafe one."); McKennon, 897 F.Supp. at 1027.

The plaintiff in McKennon argued that CSX was negligent for failing to provide an automated tool to drive in the spikes, but the district court decided, as a matter of law, there was no negligence:

> Plaintiff admits that he has used the spike maul safely for twenty years. Plaintiff concedes that the maul he used was not defective in any way. He further concedes that the spike maul is a safe and appropriate way to drive spikes.… That easier, automated means were available is irrelevant to the issue in this case. Based on the Plaintiff's own testimony, this Court finds that Defendant's failure to allow the use of the machine did not constitute negligence or create an unreasonably unsafe working condition.

McKennon, 897 F.Supp. at 1027.

Once again, although the McKennon facts are similar to those of the instant case, we find McKennon distinguishable. In this case, respondent testified that when he was assigned to the S-line by Crook, he was, in essence, offered a bolt-tightening machine. That respondent's supervisor allegedly offered him an automated method to fix a track which was "in bad shape," is evidence that arguably CSX believed this was the appropriate way for respondent to handle the assignment. Thus, the facts that (1) the machine failed, (2) it was not fixed or replaced, and (3) respondent was required to use the manual wrench, all weigh in favor of an inference that the manual method was not reasonably safe. Stillman, supra. This inference is supported by

Reed's own testimony that he would expect a track man to tighten only up to 24 bolts in a normal day's work, and if he knew an employee would be tightening as many as 100 bolts in a day, he would give him a bolt tightening machine. Furthermore, respondent's experts both opined that a manual track wrench was fine for sporadic tightening, but was, in Bowden's words, "an unsuitable tool for this job."

Given this factual record, respondent has established there was a genuine issue of material fact as to whether CSX negligently failed to provide him a bolt-tightening machine. Thus, as the Court of Appeals found, a jury should decide the ultimate issue of whether the work method prescribed by CSX was reasonably safe. See Stillman, supra.

3. Did the Court of Appeals err in its application of Blair v. Baltimore & Ohio R.R., 323 U.S. 600 (1945)?

CSX argues that the Court of Appeals misinterpreted the USSC's decision in Blair v. Baltimore & Ohio R.R., 323 U.S. 600 (1945). More specifically, CSX argues that because neither of respondent's negligence theories should, on its own, reach the jury, Blair may not be relied upon to send the case to the jury under a combined negligence theory. We disagree for two reasons.

First, as discussed above, it is our opinion respondent established there are jury questions presented as to his two theories of negligence even if considered independently. Second, we find no error in the Court of Appeals' application of Blair.

In Blair, the USSC stated that "[t]he duty of the employer becomes more imperative as the risk increases." Id. at 604 (citations and internal quotation marks omitted). Therefore, "[t]he negligence of the employer may be determined by viewing its conduct **as a whole**." Id. (emphasis added). The USSC found this principle "especially … true" under the facts of Blair "where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others." Id. In addition, the USSC noted that "in close or

doubtful" FELA cases, it was improper to deprive railroad workers of the benefit of a jury trial. Id. at 602.

The Blair Court then applied these rules to the facts:

> The nature of the duty which the petitioner was commanded to undertake, the dangers of moving a greased, 1000 pound steel tube, 30 feet in length, on a 5 foot truck, the area over which that truck was compelled to be moved, the suitableness of the tools used in an extraordinary manner to accomplish a novel purpose, the number of men assigned to assist him, their experience in such work and their ability to perform the duties and the manner in which they performed those duties – **all of these raised questions appropriate for a jury to appraise in considering whether or not the injury was the result of negligence as alleged in the complaint**. We cannot say as a matter of law that the railroad complied with its duties in a reasonably careful manner under the circumstances here, nor that the conduct which the jury might have found to be negligent did not contribute to petitioner's injury 'in whole or in part.' Consequently we think the jury, and not the court should finally determine these issues.

Id. at 604-05 (emphasis added).

In the instant case, the Court of Appeals found that pursuant to Blair, respondent was entitled to a jury trial:

> The Blair case is controlling here. To make [respondent] not only work on the entire Andrews Subdivision of the S-line by himself all day, every day, until completed, but also limiting his ability to make the numerous repairs by only providing him with a manual track wrench is *prima facie* evidence of negligence, if not negligence as a matter of law.

Montgomery v. CSX Transp., Inc., 362 S.C. at 549, 608 S.E.2d at 451.[8]

We find the Court of Appeals correctly held that Blair supports the reversal of summary judgment.[9] The Blair Court expressly instructed that in a FELA case, the railroad's conduct should be judged "as a whole," especially when the circumstances "from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others." 323 U.S. at 604. Clearly, this language should not be interpreted as meaning that each theory of negligence must also stand on its own. Such an interpretation would negate the idea of looking at the employer's conduct as a whole and as forming a pattern.

We are mindful of Blair's admonition that "[t]o deprive railroad workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." Id. at 602 (citation and internal quotation marks omitted). We believe this is such a close case where negligence may be inferred from various circumstances in combination, i.e., by evaluating CSX's conduct "as a whole." Accordingly, the Blair decision was appropriately relied upon to justify reversing summary judgment.

CONCLUSION

In sum, we affirm as modified the Court of Appeals' opinion. We affirm the Court of Appeals' overall holding that the trial court erred in granting summary judgment for CSX. Accordingly, the case shall be remanded for trial. We hold, however, that in a FELA case, there is a relaxed standard of proof only on the causation element.

[8] Judge Goolsby disagreed with the majority's reading of Blair. In his opinion, "the [USSC in Blair] had already accepted the premise that the railroad employer was negligent in several respects, any one of which would have been actionable in its own right." Id. at 556, 608 S.E.2d at 454 (Goolsby, J., dissenting).

[9] However, we do not agree with the Court of Appeals' statement that the facts of this case establish CSX's "negligence as a matter of law."

AFFIRMED AS MODIFIED.

TOAL, C.J., MOORE, J. and Acting Justice J. Michael Baxley, concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jerry Danny Hall, Employee, Respondent,

v.

Desert Aire, Inc., Employer and Travelers Casualty & Surety Co., Carrier, Appellants.

Appeal From Charleston County
Mikell R. Scarborough, Special Circuit Court Judge

Opinion No. 4324
Heard December 13, 2007 – Filed December 20, 2007

AFFIRMED

F. Reid Warder, Jr., of Charleston, for Employer/Carrier/ Appellants.

Malcolm M. Crosland, Jr., of Charleston, for Respondent,

ANDERSON, J.: Claimant Jerry Danny Hall (Hall) sustained injuries as a result of a motor vehicle accident that occurred while he was traveling on a business trip. The Appellate Panel awarded workers' compensation

benefits, and the circuit court affirmed. Employer and insurance carrier (collectively "Desert Aire") appeal on the ground Hall's injury did not arise out of and in the course of his employment. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Hall began working for Desert Aire in 1997 as regional sales manager and was national sales manager at the time of his injury. Desert Aire manufactures and sells industrial and commercial dehumidification equipment. The corporation markets its product through independent sales companies that represent Desert Aire's equipment to prospective buyers. In addition, Desert Aire promotes sales by encouraging the engineers who design large facilities to include Desert Aire equipment in their specifications.

As the national sales manager for Desert Aire, Hall was responsible for training Desert Aire's regional sales staff and independent sales representatives. He routinely interacted with sales agents and engineers to facilitate the sale and specification of Desert Aire units. Because the sales and engineering firms are located throughout the country, Hall's employment necessitated an average of four days of business travel every week.

Hall's duties included entertaining potential customers and engineers who might recommend the company's product. In addition, he regularly conducted training for sales agents during business luncheons and dinners. Alcohol was frequently served at these functions, which were organized, sponsored, and paid for by Desert Aire. Hall had an entertainment budget designed specifically for entertaining prospective sales contacts and training sales agents. He confirmed that serving alcohol at these business events was common practice, "part of the culture of the business, in general." Hall testified: "The HVAC industry, the architectural products when you are getting the products specified has almost always used entertainment, dinners, and a lot of people drink alcohol socially and lightens up an [sic] you talk more freely."

In July of 2004 Hall flew to Little Rock, Arkansas, to meet with agents of Air Tech, Inc., one of the independent sales companies that sold Desert

Aire products. The purpose of his trip was to work with the sales representatives, to visit with key engineers, and to plan a strategy for securing the Walmart account. From Arkansas, Hall intended to continue his business travel to Omaha, Nebraska and Des Moines, Iowa. He envisioned the excursion would last a little over a week. Hall averred every aspect of his journey was for Desert Aire sales-related business; no part of his trip was for a personal purpose.

In Arkansas, Hall worked closely with Charlie Brunner, a sales agent for Air Tech. On July 16, 2004, Hall and his business associates scheduled a dinner meeting at the Brunner home. In attendance, in addition to Hall and Brunner, were John Oliver, Air Tech owner, Charlotte Brunner, Air Tech sales associate, and Edward Osterman, Desert Aire regional sales manager. Hall maintains the discussion throughout the evening focused on Desert Aire sales, including long-term plans and strategies for obtaining the Walmart account. Hall and Brunner both consumed alcohol before and during the dinner meeting.

Hall asserts the business discussion persisted after the meal ended. He and Brunner walked outside and around Brunner's yard, "still discussing things." Eventually, they decided to change venue and continue talking while riding around the block in Brunner's jeep. Brunner drove and Hall occupied the front passenger seat. Approximately 300 yards from Brunner's home, the jeep overturned and Hall sustained multiple injuries that required extended hospitalization and medical treatment. Brunner suffered fatal injuries.

Hall sought workers' compensation benefits and Desert Aire denied his claim, alleging Hall's injuries did not arise out of and in the course of his employment. The single commissioner found Hall's claim compensable, deciding Hall had not deviated from the course and scope of his employment at the time of his accident. The single commissioner added: "[e]ven if Hall's departure from the Brunner home on the evening of the accident were a deviation from his employment (which I find specifically was not the case) such a deviation was minimal and did not remove Hall from continuing to act within the course and scope of his employment at the time of the accident."

The Appellate Panel unanimously affirmed the single commissioner's findings of fact and conclusions of law, adopting the order in its entirety and incorporating it by reference. The circuit court affirmed the decision of the Appellate Panel, with one exception. The finding by the Appellate Panel that Hall suffered an injury to his neck and left leg as a result of the compensable accident was reversed.[1]

ISSUE

Does substantial evidence support the factual finding that Hall's injury arose out of and in the course of his employment, concomitantly satisfying the legal standard for compensability under section 42-1-160 of the South Carolina Code of Laws?

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1981); Gray v. Club Group, Ltd., 339 S.C. 173, 182, 528 S.E.2d 435, 440 (Ct. App. 2000) (cert denied); Hargrove v. Titan Textile Co., 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004); Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 516, 526 S.E.2d 725, 728 (Ct. App. 2000). As provided by the APA, a reviewing court

> may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by other error of law; [or] are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

[1] The record indicates Hall conceded no compensable injuries were sustained to his neck or left leg.

S.C. Code Ann. § 1-23-380(A)(5)(d)(e)(Supp. 2006); see also Hall v. United Rentals, Inc., 371 S.C. 69, 77, 636 S.E.2d 876, 881 (Ct. App. 2006); Bass v. Kenco Group, 366 S.C. 450, 456, 622 S.E.2d 577, 580 (Ct. App. 2005); Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 619, 611 S.E.2d 297, 300 (Ct. App. 2005) cert. denied, July 2007.

Pursuant to the APA, this court's review is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by some error of law. Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); Gibson, 338 S.C. at 516, 526 S.E.2d at 728. "Any review of the Appellate Panel's factual findings is governed by the substantial evidence standard." Lockridge v. Santens of Am., Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001). The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record. Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005) (citing Sharpe v. Case Produce, Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999)). It is not within the reviewing court's province to reverse findings of the Appellate Panel which are supported by substantial evidence. Frame v. Resort Servs., Inc., 357 S.C. 520, 528, 593 S.E.2d 491, 495 (Ct. App. 2004); Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999). The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Kenco Group, 366 S.C. at 458, 622 S.E.2d at 581; Frame, 357 S.C. at 528, 593 S.E.2d at 495; Broughton, 336 S.C. at 496, 520 S.E.2d at 637.

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004); Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003). Substantial evidence is something less than the weight of the evidence. Office of Regulatory Staff v. S.C. Pub. Serv. Comm'n, 374 S.C. 46, 647 S.E.2d 223 (2007). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharpe, 336 S.C. at 160, 519 S.E.2d at 105; Smith v. NCCI Inc., 369 S.C. 236, 247, 631 S.E.2d 268, 274 (Ct. App.

2006); DuRant v. S.C. Dep't of Health & Envtl. Control, 361 S.C. 416, 420, 604 S.E.2d 704, 707 (Ct. App. 2004).

The Appellate Panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the single commissioner's findings of fact. Bass v. Isochem, 365 S.C. 454, 468, 617 S.E.2d 369, 376 (Ct. App. 2005); Frame, 357 S.C. at 528, 593 S.E.2d at 495; Muir v. C.R. Bard, Inc., 336 S.C. 266, 281, 519 S.E.2d 583, 591 (Ct. App. 1999). The final determination of witness credibility and the weight assigned to the evidence is reserved to the Appellate Panel. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000); Frame, 357 S.C. at 528, 593 S.E.2d at 495. Where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive. Brown v. Greenwood Mills, Inc., 366 S.C. 379, 393, 622 S.E.2d 546, 554 (Ct. App. 2005); Etheredge v. Monsanto Co., 349 S.C. 451, 455, 562 S.E.2d 679, 681 (Ct. App. 2002); see also Mullinax v. Winn Dixie Stores, Inc., 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995) ("Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive.").

LAW/ANALYSIS

Desert Aire contends Hall's injury did not arise out of and in the course of his employment. We disagree.

To be compensable, an injury by accident must be one "arising out of and in the course of employment." S.C. Code Ann. § 42-1-160 (Supp. 2006); Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 871 (2007); Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 638 (Ct. App. 1999).

The phrase "arising out of" refers to the injury's origin and cause; whereas, "in the course of" refers to the time, place, and circumstances under which the injury occurred. Baggott v. Southern Music, Inc., 330 S.C. 1, 4, 496 S.E.2d 852, 854 (1998); Owings v. Anderson County Sheriff's Dep't, 315 S.C. 297, 300, 433 S.E.2d 869, 871 (1993); Loges v. Mack Truck, Inc., 308 S.C. 134, 138, 417 S.E.2d 538, 541 (1992). Although the requirements are somewhat overlapping, they are not synonymous and both must exist

simultaneously to allow the claimant to recover workers' compensation benefits. Osteen v. Greenville County School Dist., 333 S.C. 43, 49, 508 S.E.2d 21, 24 (1998); Broughton, 336 S.C. at 496, 520 S.E.2d at 638.

While an injury must both arise out of and in the course of employment for an employee to recover for an injury, "there are circumstances when injuries arising out of acts outside the scope of the employee's regular duties may be compensable. These circumstances have been applied to: (1) acts benefiting co-employees; (2) acts benefiting customers or strangers; (3) acts benefiting the claimant; and (4) acts benefiting the employer privately." Grant, 372 S.C. 196, 202, 641 S.E.2d at 872.

Whether an accident arises out of and is in the course and scope of employment is largely a question of fact for the Appellate Panel. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004); Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 518, 526 S.E.2d 725, 729 (Ct. App. 2000). The claimant has the burden of proving facts sufficient to allow recovery under the Act. West v. Alliance Capital, 368 S.C. 246, 252, 628 S.E.2d 279, 282 (Ct. App. 2006). However, when the facts are undisputed, whether an accident is compensable is a question of law. Shuler v. Gregory Elec., 366 S.C. 435, 622 S.E.2d 569 (Ct. App. 2005); Gibson, 338 S.C. at 518, 526 S.E.2d at 729.

In determining if an accident arose out of and in the course of employment, each case must be decided with reference to its own attendant circumstances. Lanford v. Clinton Cotton Mills, 204 S.C. 423, 425, 30 S.E.2d 36, 41 (1944). The general policy in South Carolina is to construe the Workers' Compensation Act in favor of coverage, and any reasonable doubts as to construction should be resolved in favor of the claimant. Davis v. S.C. Dep't of Corr., 289 S.C. 123, 125, 345 S.E2d 245, 246 (1986).

A. Raison d'etre mandated under section 42-1-160 for compensability.

Desert Aire contends Hall's employment did not proximately cause his injuries because the accident occurred during the jeep ride, while both

Brunner and Hall were intoxicated and incapable of meaningful business discussions. We disagree.

An accident arises out of employment when the employment is a contributing proximate cause of the accident. Simmons v. City of Charleston, 349 S.C. 64, 72, 562 S.E.2d 476, 480 (Ct. App. 2002). It must be apparent to the rational mind, considering all the circumstances, that a causal relationship exists between the conditions under which the work is performed and the resulting injury. Smith v. NCCI, Inc., 369 S.C. 236, 253, 631 S.E.2d 268, 277 (Ct. App. 2006); Broughton v. South of the Border, 336 S.C. 488, 497, 520 S.E.2d 634, 638 (Ct. App. 1999).

"[I]f the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment." Gray v. Club Group, Ltd., 339 S.C. 173, 187, 528 S.E.2d 435, 442 (Ct. App. 2000) (quoting Douglas v. Spartan Mills, Startex Div., 245 S.C. 265, 269, 140 S.E.2d 173, 175 (1965)). The injury must be fairly traced to the employment as a contributing proximate cause and cannot be the result of conditions to which the worker would be equally exposed outside of the employment. Id.

> The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

Id.

In Gray, 339 S.C. at 173, 528 S.E.2d at 435, this court upheld the award of benefits to an employee's widow. Gray died as a result of injuries he sustained in a motor vehicle accident while traveling from his home to pick up items for delivery. He was employed by Club Group to work at Harbour Town in Hilton Head. Id. at 179, 528 S.E.2d at 438. Gray's duties

included greeting guests, delivering documents, courier work, running errands, and transporting guests. Id. He was paid an hourly wage and normally worked Monday through Thursday, with Friday off. Id. at 185, 528 S.E.2d at 441.

A co-owner of Club Group engaged Gray to transport payroll materials between Henderson and Harbor Town on his day off, using his own vehicle, for a $35 fee that included mileage. Id. at 179, 528 S.E.2d at 438. The mileage was calculated from Gray's home in Savannah to Henderson, then to Harbour Town, back to Henderson, and then to Gray's home. Id.

The automobile accident occurred as Gray drove from his home in Savannah to Henderson to pick up payroll materials for his Friday job. Club Group alleged his injury did not arise out of Gray's employment. We concluded:

> There is substantial evidence in the record to support a finding that Gray was required to pick up his deliveries in the morning, and but for his employment he would not have been traveling to Henderson. Instead, he would have been traveling to Hilton Head to pick up his paycheck, as was his custom prior to his employment on Fridays.

Id. at 187, 528 S.E.2d at 443 (emphasis supplied). The essential function of Gray's Friday employment was travel. Clearly, he could not accomplish his responsibilities but for his traveling. Gray's employer specifically compensated him for his travel, based on round-trip mileage from Gray's home. Gray's employment was, therefore, the contributing proximate cause of his death.

In West v. Alliance Capital, Alliance challenged the award of benefits to an injured worker who performed repairs on his own truck during working hours. 368 S.C. 246, 628 S.E.2d 279 (Ct. App. 2006). Alliance asserted the worker's activities were permissive rather than work-related. Id. Alliance employed West and leased his services to Meylan Enterprises. Id. at 249, 628 S.E.2d at 281. The custom and practice existed at Meylan's shops of allowing employees, during working hours, to work on their own vehicles in

the shop, using shop equipment. Id. at 250, 628 S.E.2d at 281. Because Meylan lacked a sufficient number of usable vehicles, West volunteered the use of his truck after it was restored to operable condition. Id. at 252, 628 S.E.2d at 283.

West was engaged in activities related to his employment when he sustained his injury. Meylan intended to use West's truck following its repairs to address its shortage of available vehicles. Id. Meylan authorized West to travel on company time and at company expense to retrieve the truck and permitted the truck to be kept at the shop. Id. at 253, 628 S.E.2d at 283. Moreover, Meylan understood repairs were necessary to make the truck operational. Id. Affirming the award of benefits, we reasoned that "West's injury arose out of the employment because the truck was being repaired for Meylan's benefit, using company resources, with Meylan's consent. We conclude the record establishes the requisite causal connection between the working conditions and the injury." Id.

Our supreme court recently reversed the denial of workers' compensation benefits in Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007). Grant was vice-president of a family-owned business, Grant Textiles. Id. at 198, 641 S.E.2d at 870. After making a business delivery, Grant drove, in a company-owned truck, to Clinton House and Meeting Plantation, a corporate hunting preserve where Grant Textiles frequently entertained clients. Id. at 198-99, 641 S.E.2d at 870. Grant intended to meet his father, the CEO of Grant Textiles, and customers who were interested in purchasing equipment from the company. Id.

As Grant neared the entrance to the reserve, he swerved onto the shoulder to avoid hitting an object in the highway. Id. He parked at the entrance to Clinton House and walked back to the highway to remove the debris he believed was a hazard to his potential customers and the general public. Id. A moving vehicle hit Grant and injured him. Id.

The single commissioner awarded benefits and the Appellate Panel reversed, concluding "(1) the accident did not arise out of Claimant's employment because the causative element of his accident had no connection with his employment; and (2) that Claimant's job duties were in no way

related to road maintenance." Id. at 200, 641 S.E.2d at 871. The circuit court reversed, declaring the Appellate Panel erred in its application of the law. Id. The Court of Appeals reversed and reinstated the decision of the Appellate Panel, holding Grant's injuries did not arise out of his employment with Grant Textiles because the cause of the accident had no relation to his regular employment duties. Id.

The supreme court held the Appellate Panel erred in finding no causal connection between Grant's accident and his employment. The accident would not have happened but for Grant's business trip to the Clinton House to meet his father and his employer's customers. Id. at 202, 641 S.E.2d at 872 (emphasis supplied). Grant's business trip and the duties incidental to it were an integral part of his responsibility as an employee of Grant Textiles.

Contrastively, this court reversed the award of benefits to an employee who was injured when she left work to check on a sick co-worker. Broughton, 336 S.C. at 488, 520 S.E.2d at 634. Upon reporting for her shift as a Kardex clerk, Broughton read an unaddressed note left by a co-worker indicating she was sick and wanted someone to check on her. Id. at 493, 520 S.E.2d at 636. Broughton's supervisors were absent, and Broughton did not exercise a supervisory role over any other employees. Id. Moreover, her duties never required her to leave her employer's premises. Id.

Without clocking out, Broughton decided to leave the workplace and check on the sick co-worker, where she fell and sustained an injury. Id. at 494, 520 S.E.2d at 637. We held:

> There is simply no causal connection between Broughton's employment and her injury. Her employment as a Kardex clerk in no way required her to check on sick employees. The accident was not related to the performance of any duties as an employee by Broughton. Checking on sick co-workers is not a job requirement of Kardex clerks.

Id. at 497-98, 520 S.E.2d at 638; see also Osteen v. Greenville County Sch. Dist., 333 S.C. 43, 50, 508 S.E.2d 21, 25 (1998) (holding no causal connection existed between an attendance clerk's employment and her injury;

"her employment in no way required her to be placing a chest full of ice, for use over the weekend, into the trunk of her vehicle").

In the instant case, the Appellate Panel found Hall's credible testimony indicated the evening's activities were consistent with and logically related to Hall's employment responsibilities. Like the claimants in Gray and Grant, Hall's purpose in traveling was wholly and exclusively in pursuit of his duties as national sales manager for Desert Aire. Nothing in the evidentiary record suggests he engaged in any activities of a personal nature that might break the causal link between his employment and his injuries. Only business associates attended the gathering at the Brunner home and their conversation focused on plans and strategies to promote the sale of Desert Aire equipment. Although the business dinner ended at approximately 9:00 p.m., Hall and Brunner continued discussing their marketing plans for Desert Aire as they walked around the yard and eventually decided to take a drive in Brunner's jeep.

The custom and practice of Desert Aire employees was to frequently conduct the company's business in the context of entertaining. Desert Aire provided Hall with an expense account specifically for that purpose, understanding a portion of the funds would be spent on alcohol. As part of the culture of Hall's company and "business in general," alcohol was served and consumed before and during the dinner meeting on the night of the accident. Desert Aire, like Meylan in West, benefited from the business customs and practices endorsed by the employer. Here, the custom and practice of conducting business in an entertaining environment fostered good working relationships, facilitated planning, and furthered Desert Aire's interests.

Desert Aire's assertion that alcohol rendered Hall incapable of discussing business is without substantial evidentiary support. Hall's blood alcohol level several hours following the accident was .121 percent and Brunner's was .234 percent. Desert Aire's expert, Dr. Roger A. Russell, opined that Brunner and Hall could not have had meaningful business conversation at the time of the accident due, in part, to intoxication. Hall's expert, Dr. Robert Bennett, reported that meaningful business conversation requires only cognitive functioning and does not require motor skills.

Bennett submitted empirical data indicating that 50% of individuals are not grossly intoxicated at a blood alcohol level of .15. In addition, he indicated that alcohol may, in fact, result in a beneficial effect on cognitive function.

In deciding whether substantial evidence exists, it is appropriate to consider both lay and expert evidence. Hargrove v. Titan Textile Co., 360 S.C. 276, 296, 599 S.E.2d 604, 614 (Ct. App. 2004) (citing Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999)). Adopting the single commissioner's finding, the Appellate Panel placed greater weight on Dr. Bennett's opinion and report and Hall's credible testimony regarding the content of the discussions with Brunner at the time of the accident.

> One of the bases of Dr. Russell's opinions with regard to the level of intoxication of Hall assumed Hall was of the same height and weight as Mr. Charles Brunner. Hall's testimony clearly established that Mr. Brunner was significantly taller and over 50 pounds heavier than Hall. Dr. Russell's opinions also assume Hall consumed as much alcohol as Mr. Brunner; however, there is no evidence supporting this assumption.

The Appellate Panel concluded Hall did not consume sufficient alcohol to render him unable to engage in business discussions with Brunner immediately prior to the accident. Furthermore, Desert Aire's contention that Brunner's alleged intoxication proximately caused the accident is speculative. The record is devoid of any evidence establishing why Brunner's jeep overturned.

Hall was engaged in ongoing discussions with business associates involving the marketing and sale of Desert Aire equipment at the time of the accident. But for these employment activities, Hall would not have traveled to Little Rock, attended the business dinner at the Brunner home, or continued his business conversation with Brunner on into the evening. At all times during the day and evening Hall was executing his duties and responsibilities as national sales manager for Desert Aire. Moreover, consuming alcohol at employer-sponsored functions was part of the custom and practice of the business culture, and Hall's job exposed him to the hazards incidental to that custom and practice. The Appellate Panel's finding

that Hall's injuries arose out of his employment is not clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The record contains substantial evidence from which reasonable minds could conclude that Hall's employment was a contributing proximate cause of his accident and his resulting injuries arose out of his employment with Desert Aire.

B. The course of employment prong of section 42-1-160.

An injury occurs "in the course of" employment when it occurs within the period of employment at a place where the employee reasonably may be in the performance of his duties and while fulfilling those duties or engaged in something incidental thereto. Baggott v. Southern Music, Inc., 330 S.C. 1, 5, 496 S.E.2d 852, 854 (1998) (citing Beam v. State Workmen's Compensation Fund, 261 S.C. 327, 331, 200 S.E.2d 83, 85 (1973); Gibson v. Spartanburg School Dist. No. 3, 338 S.C. 510, 519, 526 S.E.2d 725, 729-30 (Ct. App. 2000); Broughton v. South of the Border, 336 S.C. 488, 499, 520 S.E.2d 634, 639 (Ct. App. 1999). An employee need not be in the actual performance of the duties for which he was expressly employed in order for his injury to be "in the course of" employment. Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 871 (2007); Skipper v. Southern Bell Tel. & Tel. Co., 271 S.C. 152, 156, 246 S.E.2d 94, 96 (1978) (citing Beam, 261 S.C. at 331, 200 S.E.2d at 85). "It is sufficient if the employee is engaged in a pursuit or undertaking consistent with his contract of hire and which in some logical manner pertains to or is incidental to his employment." Skipper, 271 S.C. at 156, 246 S.E.2d at 96 (quoting Kohlmayer v. Keller, 263 N.E.2d 231, 233 (Ohio 1970)). "An act outside an employee's regular duties which is undertaken in good faith to advance the employer's interest, whether or not the employee's own assigned work is thereby furthered, is within the course of employment." Grant, 372 S.C. at 202, 641 S.E.2d at 871-72 (citing Howell v. Kash & Karry, 264 S.C. 298, 301, 214 S.E.2d 821, 822 (1975)).

It is well settled that "traveling employees are generally within the course of their employment from the time they leave home on a business trip until they return, for the self-evident reason that the traveling itself is a large part of the job." Arthur Larson, Larson's Worker' Compensation Law, § 14.01 (Lexis-Nexis 2004). However, this general rule is subject to challenge

when an injury occurs while the employee has deviated from his business route or purpose. See Meritt v. Smith, 269 S.C. 301, 307, 237 S.E.2d 366, 369 (1977) (noting "the trip to and from an eating establishment, as well as the taking of meals themselves, while on out-of-town business are within the course and scope of employment unless the circumstances attending the taking of the meal constitutes [sic] a deviation"). Resolving this type of compensability issue usually hinges on whether the injury occurred during a "slight" or "substantial" deviation.

Desert Aire's characterization of Hall and Brunner's drive as a "drunken joy ride" implies Hall substantially deviated from his business purpose of promoting Desert Aire sales. In support of this contention, Desert Aire relies on Brownlee v. Wetterau Food Servs., 288 S.C. 82, 329 S.E.2d 694 (Ct. App. 1986); Boykin v. Prioleau, 255 S.C. 437, 179 S.E.2d 599 (1971); and Grice v. National Cash Register Co., 250 S.C. 1, 156 S.E.2d 321 (1967).

In Brownlee, an employee died of injuries received while out of state at a training seminar. 288 S.C. at 83, 329 S.E.2d at 695. This court affirmed the Appellate Panel's finding that the employee was not in the course of his employment at time of death. Id. The training seminar began each day at 7:00 in the morning and ended at approximately 10:00 in the evening. Id. at 84, 329 S.E.2d at 695. Employees attending the seminar stayed at the motel where it was presented. Id. The fatal accident occurred at 1:55 a.m., several hours after the last scheduled seminar event and at some distance from the motel where the attendees stayed. Id. The evidence indicated the employee, along with three other seminar attendees, had planned to see a movie after the seminar events. Id.

In affirming the denial of benefits, we determined the record lacked any evidence the employee died while attending either a job-related function or employer-sponsored event. Id. at 85, 329 S.E.2d at 695. Instead, substantial evidence showed he "died while engaged in an outing that occurred after work, away from the premises of his employer, and at a time when his employer exercised no control over his activities." Id.

Similarly, in Grice, the Appellate Panel denied benefits when an employee, who was out of town for training, was killed while returning from a July fourth holiday picnic with other employees. 250 S.C. 1, 156 S.E.2d 321. The evidence failed to demonstrate the employee sustained his injury in the course of his employment. Id. Co-employees, without the knowledge or endorsement of the employer, organized the picnic. Id. at 4, 156 S.E.2d at 323. Moreover, it was not held during regular work hours. Id. In affirming the denial of benefits, our supreme court summarized:

> There is a total absence of any testimony tending to show that the accident from which deceased sustained the fatal injuries had its origin in a risk created by the necessity of being away from home. The picnic was not arranged, sponsored, or suggested by the employer. It was solely an outing planned by the deceased and his co-employees, taking place after work hours, off the premises of the employer, and during hours when the employer exercised no control over the employee's activities. Insofar as the record discloses, the employer had no knowledge of the picnic. The attendance of the deceased was purely voluntary on his part.

Id. at 5, 156 S.E.2d at 323.

Boykin v. Prioleau involved a wrongful death action against a deceased defendant whose duties required transporting younger co-employees, including Boykin, to their homes after work. 255 S.C. 437, 179 S.E.2d 599 (1971). On the evening of the fatal accident, the defendant departed from his usual route and took the co-employees on a three-hour "joy ride" that included several stops and consumption of intoxicants. All but one of the employees died in the accident. The issue at trial was whether the accident occurred during a substantial deviation from the route delivering the employees home, or whether the defendant had resumed the scope and course of his employment at the time of the fatal accident. If the defendant had returned to the course of his employment, workers' compensation was the exclusive remedy and the wrongful death action was barred. The supreme court held this question was one for the jury and reversed the trial court's directed verdict in the defendant's favor.

Tangentially, the court noted the workers' compensation hearing commissioner awarded death benefits to Boykin's survivors. The claim was settled without admission of liability before appeal to the Appellate Panel was heard. However, the court did opine that a substantial deviation occurred during the drive to the employees' homes:

> The only reasonable inference from the facts which have been stated is that almost immediately upon driving away from his employer's place of business, [defendant] forsook the task assigned to him and embarked upon the pursuit of his own ends. It is abundantly clear that while thus engaged [defendant] was not conducting his employer's business within the meaning of the statute. Whether upon leaving the restaurant, several miles from the point of deviation, and starting back toward Columbia [defendant] resumed the scope and course of his employment was, at best from defendant's standpoint, a jury issue. We decide only that the court erred in resolving this issue in defendant's favor as a matter of law.

Hall cites Beam v. State Workmen's Compensation Fund, 261 S.C. 327, 200 S.E.2d 83 (1973) in support of his contention that his injury occurred in the course of employment. In Beam, two teachers were killed in an automobile accident en route from Gaffney to Columbia to attend a South Carolina Education Association meeting. Beam, 261 S.C. at 330, 200 S.E.2d at 85. The Appellate Panel awarded workers' compensation benefits, finding the teachers' deaths arose out of and in the course of their employment. Id. Our supreme court affirmed, adopting the principle established by the Ohio Supreme Court that in order for injury or death to be in the 'course of employment' "it is sufficient if the employee is engaged in a pursuit or undertaking consistent with his contract of hire and which in some logical manner pertains to or is incidental to his employment." Id. at 332, 200 S.E.2d at 86 (quoting Kohlmayer v. Keller, 24 263 N.E.2d 231, 233 (Ohio 1970)). The evidence indicated the teachers' attendance at the association meeting, while not compulsory, was encouraged, and expected as part of their contractual obligation to participate in and attend the meetings of professional organizations, including those of the South Carolina Education

Association. Id. at 331, 200 S.E.2d at 85. Concluding the teachers died in the course of their employment, the court observed "they were not exercising a personal privilege wholly apart from their employment or their employer's interest, but were about the performance of an act, incidental to and recognized as of value by their superintendent in connection with their duties as high school teachers." Id. at 333, 200 S.E.2d at 86.

We deem Brownlee, Boykin, and Grice factually and legally distinguishable from the instant case. Though the claimants in Brownlee and Grice were out of town on business travel, their injuries did not result from risks created by the necessity of being away from home. The events that led to each of the fatal accidents originated independently of any employee's effort to further the interests of his employer. Grice's attendance at a holiday picnic, Brownlee's assumed movie excursion, and the "joy ride" that led to Boykin's demise, were not within periods of employment. Nor did these claimants' activities take place at locations where they might reasonably perform their duties, at a time during which they fulfilled those duties, or while engaged in something incidental thereto.

In contraposition, the Appellate Panel found Hall's exclusive purpose for his trip to Little Rock was to represent and advance Desert Aire's interests. The nature of Hall's employment required extensive travel. His duties were necessarily performed in a variety of settings and during the course of an entire day, rather than at a time and in a location designated by his employer. Desert Aire financially supported the custom and practice of entertaining sales agents, engineers, and potential customers to promote sales of Desert Aire equipment.

Pellucidly, the evidentiary record exuberates that Hall was engaged in ongoing discussions regarding planning for sales activities on behalf of Desert Aire at the time of the accident. The accident occurred within the period of employment, at a place where Hall was reasonably in the performance of his duties and was fulfilling those duties or engaged in activities incidental to that employment. Like the claimants in Beam, Hall was not exercising a personal privilege wholly apart from Desert Aire's interests. Rather, Hall's ongoing business discussion with Brunner was an

act, incidental to and recognized as beneficial by Desert Aire in connection with Hall's duties as national sales manager.

CONCLUSION

We hold substantial evidence supports the factual finding that Hall's injury arose out of and in the course of employment with Desert Aire, illatively satisfying the legal standard for compensability under section 42-1-160 of the South Carolina Code of Laws.

Accordingly, the decision of the circuit court is

AFFIRMED.

SHORT and WILLIAMS, JJ. concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dixie Bell, Inc., a South Carolina Corporation, **Respondent,**

v.

Larry C. Redd, Larry Clifton Redd, Bruce A. Green, and Triple Crown Land Development, LLC, **Appellants.**

Appeal from Greenwood County
Wyatt T. Saunders, Jr., Circuit Court Judge

Opinion No. 4325
Heard December 13, 2007 – Filed December 20, 2007

REVERSED

C. Rauch Wise, of Greenwood, for Appellants.

Harold P. Threlkeld, of Anderson, for Respondent.

ANDERSON, J.: Dixie Belle, Inc., (Dixie Belle) sued Larry C. Redd, Larry Clifton Redd, Bruce A. Green (collectively Triple Crown's principals), and Triple Crown Land Development, LLC (Triple Crown). The jury awarded Dixie Belle $100,000, and the trial court granted Dixie Belle's post-

trial motion for pre-judgment interest. We reverse the award of pre-judgment interest.

FACTUAL/PROCEDURAL BACKGROUND

In June 1999, Larry C. Redd and Larry Clifton Redd organized Triple Crown Land Development, LLC to buy and develop a tract of land in Aiken County, South Carolina. Dixie Belle became an investor in Triple Crown, contributing $950,000 ($400,000 cash and a $550,000 loan from Grand South Bank, secured by Dixie Belle's assets).

Dixie Belle sent Triple Crown and its principals a letter in September 2001 to commence negotiations to sell its interest in Triple Crown for $1,407,041.47. Triple Crown and its principals did not respond to the letter until June 2002, when Larry C. Redd sought out James Forrest (Forrest), Dixie Belle's sole shareholder, to discuss purchasing Dixie Belle's interest in Triple Crown.

Forrest testified he offered to sell Dixie Belle's interest for $1,412,000, the price in the initial letter plus interest from September to June. During his cross-examination, Forrest explained how he reached the figure: "You take all those four things, Grand South, my money, the interest on my money, the interest on the Grand South note and you add ten percent to that and that's all I wanted."

Larry C. Redd, on direct examination, asserted he and Forrest never formed an agreement in June 2002. When asked if Forrest ever stated a price, Larry C. Redd answered:

> No, he didn't. He said let him think over it, let him get back with us and he would get back and let us know something. We didn't go back down there, my accountant what was with me, we didn't got back down there for a month or so. He said, "I will fax you all something tomorrow," but he did not do that, he did not do what he said he would do.

On August 1, 2002, Triple Crown refinanced its property with Pacific Coast Investments (Pacific), borrowing $5,720,000. Forrest was not present at the closing. A portion of the Pacific loan was used to satisfy Dixie Belle's debt with Grand South Bank in the amount of $630,559.67. Both parties concede part of the purchase price for Dixie Belle's interest in Triple Crown would be the balance of the Grand South Bank loan. On August 12, 2002, Dixie Belle's attorney was given a $527,653 check for what Triple Crown and its principals believed to be the remainder of Dixie Belle's interest in Triple Crown.

Dixie Belle declares the balance of the amount due was $782,093.33, which was $254,440.33 more than Triple Crown and its principals tendered. When a resolution could not be reached, Dixie Belle sued Triple Crown and its principals on March 17, 2003, alleging four causes of action: (1) declaratory judgment to determine if Dixie Belle had a superior lien to Pacific Coast Investment Company; (2) an order to allow Dixie Belle to negotiate the check for $527,653.00 without prejudice to the claim the check did not represent full satisfaction of the purchase price; (3) conversion; and (4) violation of South Carolina Uniform Securities Act.

The parties agreed to dismiss all original causes of action, and the trial court submitted the dispute over the purchase price to the jury based on breach of contract and breach of contract with fraudulent intent claims. The jury returned a $100,000 verdict for Dixie Belle. In a post-trial motion, Dixie Belle moved for pre-judgment interest on September 20, 2005, arguing:

> Defendants agreed, as a matter of law, to pay Plaintiff One hundred thousand dollars ($100,000.00) on August 1, 2002 and because the obligation to pay the One hundred thousand dollars ($100,000.00) was by agreement demandable and the sum was certain or capable of being reduced to certainty, Plaintiff is entitled to pre-judgment interest through September 15, 2005.

On March 6, 2006, the trial judge granted Dixie Belle $27,352 in pre-judgment interest, stating: "The court finds and concludes that the obligation on which the judgment was based was fixed by conditions existing at the time the claim arose."

ISSUES

1. Did the trial court err in awarding pre-judgment interest to Dixie Belle?

2. Did Dixie Bell establish the parties agreed to a sum certain, entitling it to pre-judgment interest?

LAW/ANALYSIS

1. Historic Development of Pre-Judgment Interest

An excellent academic analysis of the historic development of the law involving the concept and principle of pre-judgment interest is found in Vaughn Development, Inc. v. Westvaco Development Corp., 372 S.C. 576, 642 S.E.2d 757 (Ct. App. 2007), which articulates:

> Historically, the recovery of prejudgment interest was severely limited. Michael S. Knoll, A Primer on Prejudgment Interest 75 Tex. L.Rev. 293, 294-98 (1996). "The roots of prejudgment interest law are based on centuries-old moral and religious proscriptions against interest and loans. Both the ancient Israelites and Greeks viewed the taking of any interest as usurious." Martin Oyos, Comment, Prejudgment Interest in South Dakota, 33 S.D. L.Rev. 484, 485-86 (1988). With the shift from agrarian economies in the common law European countries, and the emphasis in this country from the beginning on the mercantile influence, prejudgment interest has become more favored and the courts now allow prejudgment interest on liquidated amounts. James L. Bernard, Note, Prejudgment Interest and the Copyright Act of 1976 5 Fordham Intell. Prop. Media & Ent. L.J. 427, 433 (1995). There has been, however, "growing dissatisfaction with the distinction between liquidated and unliquidated damages. As a result, many jurisdictions abandoned it…. With the breakdown and rejection of the distinction between liquidated and unliquidated damages, courts established more liberal rules for awarding

> prejudgment interest. Some courts looked to whether the claim was 'ascertainable.'" Id. at 434-436. This liberalization of prejudgment law has even led to recovery of prejudgment interest for personal injury damages, usually calculable from the time of a settlement offer or demand. See generally Diane M. Allen, Annotation, Validity and Construction of State Statute or Rule Allowing or Changing Rate of Prejudgment Interest in Tort Actions 40 A.L.R.4th 147 (1985) (cases and statutes cited therein).
>
> Turning to South Carolina, we find an initial similar trend. In the early part of the last century in South Carolina, the law regarding prejudgment interest was strict. The failure of the party owing money to acknowledge a sum owed prevented a plaintiff from recovering prejudgment interest; the amount due had to be acknowledged and liquidated. Wakefield v. Spoon, 100 S.C. 100, 106, 84 S.E. 418, 420 (1915). However, even under this specific rule, the law surrounding prejudgment interest was muddled. Goddard v. Bulow 10 S.C.L. (1 Nott & McC.) 45, 56 (1818) ("It is not a little extraordinary that a question of every day's occurrence, should have remained to this time unsettled…."). Also similar to the trend in the United States, South Carolina liberalized the rules for awarding prejudgment interest. The governing statute looks to whether the claim is ascertainable. See S.C. Code Ann. § 34-31-20(A) (Supp. 2006) ("In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law…"). "In South Carolina, interest may also be awarded in equity cases, conversion cases, and property cases." 11 S.C. Juris. Damages § 8 (1992).

Id. at 578-579, 642 S.E.2d at 758-759.

2. Request for Pre-Judgment Interest Must Be Pled

Triple Crown and its principals claim the trial court erred in awarding Dixie Belle pre-judgment interest on the $100,000 jury verdict because Dixie Belle did not request pre-judgment interest in its pleadings. We agree.

In Town of Bennettsville v. Bledsoe, 226 S.C. 214, 219, 84 S.E.2d 554, 556 (1954), our Supreme Court held pre-judgment interest should not be included in the judgment because it was not pled in the complaint or prayer. Id. Town of Bennettsville involved a claim against a contractor to recover overpayments made by the Town of Bennettsville on a construction contract. The Supreme Court reversed the trial court, holding: "The last contention of error is that interest should not have been included in the judgment which was rendered against [Bledsoe]. With this we agree because interest was not demanded in the complaint or prayer." Id. (citing Rawls v. American Central Ins, Co., 97 S.C. 189, 204-205, 81 S.E. 505, 510 (1914)); accord Calhoun v. Calhoun, 339 S.C. 96, 102, 529 S.E.2d 14, 18 (2000) (finding pre-judgment interest must be pled absent an agreement to pay a sum certain); Hopkins v. Hopkins, 343 S.C. 301, 307, 540 S.E.2d 454, 458 (2000); Chan v. Thompson, 302 S.C. 285, 293, 395 S.E.2d 731, 736 (Ct. App. 1990) ("The Thompsons seek prejudgment interest…in their petition for rehearing. The Thompsons neither sought nor were awarded prejudgment interest in the lower court. They may not now raise this issue.").

In Goodson v. Carolina Container Corp., Inc., 283 S.C. 575, 324 S.E.2d 67 (1984) pre-judgment interest was denied when the claim demanding pre-judgment interest was stricken from the record: "Inasmuch as it has agreed that Goodson's attorney consented to strike any reference to a claim for interest, the same should not have been sought at the trial level." Id. at 577, 324 S.E.2d 68. The portion of the trial judge's order granting pre-judgment interest was reversed, because Goodson waived any claim to receive pre-judgment interest by not pleading it. Id.

An amendment to a complaint is sufficient to place the demand for pre-judgment interest before the trial judge. Charleston County School Dist. v. Charleston County, 297 S.C. 300, 303, 376 S.E.2d 778, 780 (1989). The motion to amend, nevertheless, must be clear and specific to include a claim

for pre-judgment interest. McMillan v. South Carolina Dep't of Agric., 364 S.C. 60, 611 S.E.2d 323 (Ct. App. 2005) cert. granted (Feb. 14, 2007). In McMillan, counsel moved to conform the pleadings to any evidence not originally pled. Id. at 75, 611 S.E.2d at 331. On appeal, this Court ruled the motion to amend the pleadings was not sufficient to raise a pre-judgment interest claim: "We do not find the motion made by Respondents was sufficient to properly amend the complaint to include a claim for pre-judgment interest, which must be specifically pled in order to be recovered." Id.

In Tilley v. Pacesetter Corp., 355 S.C. 361, 375-376, 585 S.E.2d 292, 299 (2003), a class action lawsuit for violation of the Consumer Protection Code, our Supreme Court elucidated:

> Buyers argue they are entitled to prejudgment interest from October 27, 1995, the date the action was filed, to April 3, 1997, the date of entry of summary judgment. We disagree.
>
> This Court requires parties to plead for pre-judgment interest in order for it to be recovered. Hopkins v. Hopkins, 343 S.C. 301, 540 S.E.2d 454 (2000); Calhoun v. Calhoun, 339 S.C. 96, 529 S.E.2d 14 (2000). If no request for pre-judgment interest is made in the pleadings, it cannot be recovered on appeal. Id. If pre-judgment interest is pled for in the complaint, it "is allowed on obligations to pay money from the time the payment is demandable, either by agreement of the parties or by operation of law, if the sum is certain or capable of being reduced to certainty." Future Group, II v. Nationsbank, 324 S.C. 89, 101, 478 S.E.2d 45, 50 (1996).
>
> In this case, the Buyers did not plead for pre-judgment interest in their original complaint of October 27, 1995, or in their amended complaint of January 23, 1996. Under the rule established in Calhoun and Hopkins, Buyers cannot now recover pre-judgment interest.

See Durlach v. Durlach, 596 S.C. 64, 75, 596 S.E.2d 908, 914 (2004).

Dixie Belle prayed for pre-judgment interest in its original complaint. Yet, Dixie Belle **voluntarily dismissed** all claims initially asserted and submitted its claim to the jury on a breach of contract and breach of contract with fraudulent intent claim, without seeking pre-judgment interest. Dixie Belle did not place the demand for pre-judgment interest on the claims submitted to the jury before the trial judge and cannot recover pre-judgment interest because it has not been specifically pled.

3. Pre-Judgment Interest Awarded on a Sum Certain

Triple Crown and its principals aver Dixie Belle did not establish its claim was a sum certain and is not entitled to pre-judgment interest by statute. We agree.

Section 34-31-20(A) of the South Carolina Code (Supp. 2006), provides statutory authority for pre-judgment interest: "In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum." See Jacobs v. American Mut. Fire Ins. Co. of Charleston, 287 S.C. 541, 545, 340 S.E.2d 142, 144 (1986).

Our Supreme Court, in Llewelyn v. Dobson Bros., 274 S.C. 177, 262 S.E.2d 726 (1980), recognized "[i]n the absence of agreement or statute, interest is not recoverable on an unliquidated demand." Id. at 178, 262 S.E.2d at 727 (citing Robert E. Lee & Co., Inc. v. Comm. of Public Works of the City of Greenville, 248 S.C. 92, 100, 149 S.E.2d 59, 63 (1966); Ancrum v. Slone, 29 S.C.L. (2 Speers) 594, 596 (1844); 47 C.J.S. Interest § 19(a) (1946)); Builders Transport, Inc. v. South Carolina Property & Cas. Ins. Guar. Ass'n, 307 S.C. 398, 406, 415 S.E.2d 419, 424 (Ct. App. 1992). "A claim is liquidated if the sum claimed is certain or capable of being reduced to a certainty." Dibble v. Sumter Ice & Fuel Co., 283 S.C. 278, 287, 322 S.E.2d 674, 679 (Ct. App. 1984) (citing Columbia Lumber & Mfg. Co. v. Globe Indemnity Co., 166 S.C. 408, 415, 164 S.E.2d 916, 918 (1932); Ancrum, 29 S.C.L. (2 Speers) 594, 596; 22 Am. Jur. 2d Damages § 180 (1965)); Weeks v. McMillan, 291 S.C. 287, 294, 353 S.E.2d 289, 293 (Ct.

App. 1987); Republic Textile Equipment Co. of South Carolina, Inc. v. Aetna Ins. Co., 293 S.C. 381, 390, 360 S.E.2d 540, 545 (Ct. App. 1987).

Not long ago, our Supreme Court explicated the sum certain requirement for pre-judgment interest in Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 631 S.E.2d 252 (2006):

> Stated another way, prejudgment interest is allowed on a claim of liquidated damages; i.e., the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties. Prejudgment interest is not allowed on an unliquidated claim in the absence of an agreement or statute.

Id. at 133, 631 S.E.2d at 258-259. Finding Butler Contracting, Inc.'s claim was liquidated and a sum certain, the denial of pre-judgment interest was reversed. Id. at 134, 631 S.E.2d at 259. See Future Group, II v. Nationsbank, 324 S.C. 89, 101, 478 S.E.2d 45, 50 (1996); BB & T of South Carolina v. Kidwell, 350 S.C. 382, 391, 565 S.E.2d 316, 320 (Ct. App. 2002); Lee v. Thermal Engineering Corp., 352 S.C. 81, 88-89, 572 S.E.2d 298, 302 (Ct. App. 2002); Brooklyn Bridge, Inc. v. South Carolina Ins. Co., 309 S.C. 141, 145, 420 S.E.2d 511, 513 (Ct. App. 1992); Robbins v. First Federal Sav. Bank, 294 S.C. 219, 225, 363 S.E.2d 418, 421 (Ct. App. 1987); Anderson v. Citizens Bank, 294 S.C. 387, 398, 365 S.E.2d 26, 32 (Ct. App. 1987) overruled on other grounds by Ward v. Dick Dyer & Associates, Inc., 304 S.C. 152, 157, 403 S.E.2d 310, 313 (1991); Southern Welding Works, Inc. v. K & S Const. Co., 286 S.C. 158, 164, 332 S.E.2d 102, 106 (Ct. App. 1985) (citing Ancrum, 29 S.C.L. (2 Speers) 594, 596).

The South Carolina Court of Appeals differentiated liquidated and unliquidated damages in Beckman Concrete Contractors, Inc. v. United Fire and Cas. Co., 360 S.C. 127, 131-132, 600 S.E.2d 76, 78-79 (Ct. App. 2004):

> In Lewis v. Congress of Racial Equality, 275 S.C. 556, 274 S.E.2d 287 (1981), our Supreme Court declared: "In liquidated-damages cases, the amount is usually a sum certain, or at least the amount is capable of ascertainment by

> computation." Id. at 560, 274 S.E.2d at 289. Black's Law Dictionary defines liquidated damages as "[a]n amount contractually stipulated" in contrast to unliquidated damages which are "[d]amages that … cannot be determined by a fixed formula, so they are left to the discretion of the judge or jury." Black's Law Dictionary 395-97 (7th ed. 1999). Liquidated damages "are damages the amount of which has been made certain and fixed either by the act and agreement of the parties or by operation of law to a sum which cannot be changed by the proof." 22 Am. Jur. 2d Damages § 489 (2003). "They are also defined as damages the amount of which has been ascertained by judgment or by the specific agreement of the parties or which are susceptible of being made certain by mathematical calculation from known factors." Id. "In general, damages are unliquidated where they are an uncertain quantity, depending on no fixed standard, referred to the wise discretion of a jury, and can never be made certain except by accord or verdict." Id.

In Southern Welding Works, Inc., the trial court's denial of pre-judgment interest was affirmed. 286 S.C. at 165, 332 S.E.2d at 106. The South Carolina Court of Appeals stated, "Prejudgment interest is allowed on liabilities to pay money from the time when, either by agreement of the parties or operation of law, the payment was demandable, if the sum is certain or capable of being reduced to certainty." Id. In finding an award of pre-judgment interest was inappropriate, the Court explained:

> Southern proved the account was actually stated. However, in its answer K & S specifically denied the parties ever agreed it was a true account. Consequently, the burden was on Southern to prove agreement to the account as stated. In the record before us there is no evidence that K & S expressly or impliedly agreed there was at any specified time due to Southern the sum of money specified in the account. Likewise, we find no evidence that the parties agreed to a contract price for the repairs before they were performed.

Id. at 165-166, 332 S.E.2d at 106. Southern Welding Works, Inc. illustrates the necessity for an agreement between the parties when there is no operation of law to make the sum demandable. Because Southern could not prove an agreement with K & S that the sum was actually due, or demandable, pre-judgment interest was correctly denied. Id.

In Wayne Smith Const. Co., Inc. v. Woman, Duberstein, & Thompson, 294 S.C. 140, 143, 363 S.E.2d 115, 117 (Ct. App. 1987), the Court of Appeals affirmed a pre-judgment award after finding a sum certain, noting:

> Prejudgment interest, however, is allowed on an obligation to pay money "from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty." Anderson v. Citizens Bank, 365 S.E.2d 26, 32 (S.C. Ct. App. 1987); Robert E. Lee & Co. v. Commission of Public Works of City of Greenville, 248 S.C. 92, 149 S.E.2d 59 (1966).
>
> Here, the sum owed Smith Construction under each contract could be readily determined. Under each contract, the partnership was required to pay Smith Construction reimbursable costs, plus 10 per cent thereof as a contractor's fee upon the presentation by Smith Construction to the partnership of a waiver of liens and a certificate of occupancy. The mere fact that the partnership disagreed with Smith Construction regarding the amount of the reimbursable costs did not preclude an award of prejudgment interest. Holmes & Son Construction Co., Inc. v. Bolo Corp., 22 Ariz. App. 303, 526 P.2d 1258 (1974); see Tappan & Noble Harwood, 2 Speers (29 S.C.L.) 536 (1844) (wherein the court held in an action involving a contract to build two houses that, while the discount claimed by the defendant might reduce the amount due, it did not impair the claim for interest on the balance when adjusted by the jury's verdict).

Id. at 146-147, 363 S.E.2d at 119. This case emphasized the principle that an amount may be both a sum certain and disputed, and being contested does not necessarily preclude a pre-judgment interest award. Id.

Our Supreme Court clarified the analysis for pre-judgment interest in Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (1993), when it held: "The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." Id. at 353, 426 S.E.2d 791 (citing 47 C.J.S. Interest & Usury § 49 at 124-125 (1982)); Keane v. Lowcountry Pediatrics, P.A., 372 S.C. 136, 147-148, 641 S.E.2d 53, 60 (Ct. App. 2007); QHG of Lake City, Inc. v. McCutcheon, 360 S.C. 196, 205, 600 S.E.2d 105, 109 (Ct. App. 2004). Babb personally paid an obligation owed by a corporation in which he was a shareholder, without notifying Schild, another shareholder. Babb, at 352, 426 S.E.2d 791. Babb did not request contribution or notify Schild until he brought suit. Id. The Court determined Babb was entitled to pre-judgment interest, but only from the date he filed suit, that being the date the claim arose: "Babb did not inform Schild that he had personally paid this obligation until he filed this suit three years after the payment was made. We hold under these facts that Babb is entitled to prejudgment interest only from the date the complaint was filed." Id.

More recently, in Smith-Hunter Constr. Co., Inc. v. Hopson, 365 S.C. 125, 128-129, 616 S.E.2d 419, 421 (2005), our Supreme Court upheld an award of pre-judgment interest on a breach of contract claim. The Court determined the sum demanded was ascertainable and established through the contractor's invoices. Id. The homeowners disputed the amount due, but the Court annunciated: "The mere fact that Homeowners disagreed with Builder regarding the amounts, which were stated in the invoices, representing completed work did not preclude an award of prejudgment interest." Id. at 129, 616 S.E.2d at 421. The trial court was affirmed "because the measure of recovery was fixed by conditions existing at the time the claim arose." Id.

T.W. Morton Builders, Inc., v. von Buedingen, 316 S.C. 388, 450 S.E.2d 87 (Ct. App. 1994) advanced the principle that pre-judgment interest is not automatically applied to judgments. Id. at 399, 450 S.E.2d at 93. This

Court acknowledged the well-settled rule that pre-judgment interest is appropriate where there is a sum certain, where parties agree, or where the law provides the payment is demandable. Id. In T.W. Morton Builders, Inc., a home improvement contractor sued to foreclose on a mechanic's lien, and the special master found poor business practices on the part of both parties. Id. The Court concluded:

> T.W. Morton's success in proving the additional amount due for the renovations does not automatically translate into entitlement to prejudgment interest on the unpaid balance. To establish its right to prejudgment interest, T.W. Morton had the burden of establishing a stated account and the parties' agreement, express or implied, that the account is a true statement due at a specific point. The master's implicit finding of no stated account is supported by the testimony of Dr. von Buedingen, who vigorously disputed the amount due T.W. Morton for cost overruns. We accordingly affirm the denial of pre-judgment interest.

Id. (internal citations omitted).

In the case sub judice, the action arose when the parties failed to reach an agreement on the purchase price of Dixie Belle's interest in Triple Crown. Dixie Belle's damages, however, were unliquidated, not entitling Dixie Belle to pre-judgment interest. The claim was unliquidated because: (1) there was no agreement between the parties as to a sum certain, (2) it could not be reduced to a sum certain by computation or formula, (3) the purchase price was not contractually stipulated, (4) it is not reduced to a sum certain by operation of law or a controlling statute, and (5) it could only be reduced to certainty by a jury determination. Furthermore, the conditions existing at the time the claim arose did not fix the measure of recovery. Accordingly, Dixie Belle's claim does not meet the statutory specifications of a sum certain, and Dixie Belle is not permitted pre-judgment interest.

CONCLUSION

Dixie Belle did not plead for pre-judgment interest, nor did its damages qualify under the statute as liquidated or a sum certain. The pre-judgment interest awarded to Dixie Belle in the amount of $27,352 on the $100,000 jury verdict was in error. Therefore, we

REVERSED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jodi Howard,	**Respondent,**
v.	
Calvin Roberson and Troy Lawhorn,	**Defendants,**
of whom Calvin Roberson is	**Appellant.**

Appeal From Lexington County
Larry R. Patterson, Circuit Court Judge

Opinion No. 4326
Heard December 13, 2007 – Filed December 20, 2007

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

William Bailey Woods, of Lexington, for Appellant.

Gary Walton Popwell, Jr., of Columbia, for Respondent.

Robert A. McKenzie and Gary H. Johnson, II, of Columbia, Amicus Curiae for Troy Lawhorn.

ANDERSON, J. : This civil action involves Jodi Howard's claim for damages for injuries sustained in an automobile accident against defendants Calvin Roberson and Troy Lawhorn. The trial court directed a verdict in Howard's favor on liability. A jury found Roberson liable and awarded Howard damages for medical expenses and lost wages only. Howard moved for new trial nisi additur and the trial court granted a new trial on the issue of damages alone against Roberson based on the thirteenth juror doctrine. We affirm in part, reverse in part, and remand.

FACTUAL/PROCEDURAL BACKGROUND

On the night of August 23, 2003, Roberson and Lawhorn were driving in the same traffic lane on Highway 70. Lawhorn's pickup truck was in front of a van driven by an unknown driver, and Roberson followed behind the van. Roberson attempted to pass the van in front of his vehicle. At the same time, Lawhorn slowed and began to make a left turn onto a public road. The vehicles driven by Roberson and Lawhorn collided, injuring Howard, a passenger in Lawhorn's truck. Howard initiated this action against Roberson and Lawhorn to recover damages for his injuries.

At the close of the defendants' case, Howard moved for a directed verdict on the issue of negligence against Roberson for violation of section 56-5-1880 of the South Carolina Code (2006). Section 56-5-1880(a)(2) prohibits vehicles from driving on the left side of a roadway "[w]hen approaching within one hundred feet of or traversing any intersection." The trial court granted Howard's motion for directed verdict but not against Roberson alone. Instead, the trial court granted the motion finding, "There is evidence of negligence on both or one of the defendants." The trial court later instructed the jury, "[Y]ou may find against the Defendant, Mr. Roberson, or you may find against the Defendant, Mr. Lawhorn, or you can find against both of them. You can find against one of the two or you can find against both."

During deliberation, the jury asked the trial court if they could apportion seventy-five percent of the fault to Roberson and twenty-five

percent to Lawhorn. The trial court explained the jury could not assign fault in that manner. Neither party raised this issue on appeal. The jury found only Roberson negligent and awarded Howard $7,672.47 in actual damages for medical expenses and lost wages. The award did not reflect inclusion of pain and suffering. Howard moved for a new trial nisi additur, stating the jury apparently ignored the law as it related to pain and suffering. The trial court took the matter under advisement and, in a form order, granted Howard a new trial solely on the issue of damages based on the thirteenth juror doctrine. In its subsequent written order the trial court ruled the jury's findings regarding pain and suffering were "contrary to the fair preponderance of the evidence [and] . . . [t]he Plaintiff suffered obvious injuries which obviously had to be painful."

ISSUES

1. Did the trial court err in directing a verdict in Howard's favor on the issue of liability?

2. Did the trial court err in granting Howard a new trial on damages based on the thirteenth juror doctrine?

STANDARD OF REVIEW

When reviewing a trial court's ruling on a directed verdict, this court will reverse if no evidence supports the trial court's decision or the ruling is controlled by an error of law. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006); McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). The appellate court must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts as liberally construed in his or her favor. Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006); Ericson v. Jones St. Publishers, L.L.C., 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created and the motion should be denied. Proctor v. Dep't of Health and Envtl. Control, 368 S.C. 279, 292, 628 S.E.2d 496, 503 (Ct. App. 2006). A motion for directed verdict goes to the entire case and

may be granted only when the evidence raises no issue for the jury as to liability. The Huffines Co., LLC v. Lockhart, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2005). When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Wright v. Craft, 372 S.C. 1, 19, 640 S.E.2d 486, 496 (Ct. App. 2006) (citing Erickson, 368 S.C. at 463, 629 S.E.2d at 663).

"The grant or denial of new trial motions rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." Chapman v. Upstate RV & Marine, 364 S.C. 82, 88-89 610 S.E.2d 852, 856 (Ct. App. 2005) (citing Vinson v. Hartley, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996); Trivelas v. S.C. Dep't of Transp., 357 S.C. 545, 553, 593 S.E.2d 504, 508 (Ct. App. 2004). An appellate court may only reverse a trial court's decision regarding a new trial nisi if the trial court abused its discretion in deciding a motion for new trial nisi additur to the extent an error of law results. Green v. Fritz, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003).

LAW/ANALYSIS

I. Directed Verdict Motion

Roberson argues the trial court erred in granting Howard a directed verdict motion. Specifically, Roberson contends because Howard made a motion for a directed verdict against Roberson alone, the trial court erred in granting the motion holding either Roberson or Lawhorn or both drivers negligent. We disagree.

When evidence presented at trial yields only one conclusion concerning liability, a trial court may properly grant a motion for directed verdict. See Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 490, 649 S.E.2d 494, 497 (Ct. App. 2007) (citing Carolina Home Builders, Inc. v. Armstrong Furnace Co., 259 S.C. 346, 358, 191 S.E.2d 774, 779 (1972)). See also Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469,

476-77, 514 S.E.2d 126, 130 (1999) ("When the evidence yields only one inference, a directed verdict in favor of the moving party is proper."). In considering a motion for directed verdict, the trial court must view the evidence and inferences that can be drawn from it in the light most favorable to the non-moving party. Doe v. ATC, Inc., 367 S.C. 199, 204, 624 S.E.2d 447, 449 (Ct. App. 2005); (citing Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002)). So long as no more than one inference is created from the evidence presented, a jury issue is not created, and the trial court is proper in directing a verdict. Henson v. Int'l Paper Co., 358 S.C. 133, 147, 594 S.E.2d 499, 506 (Ct. App. 2004) (holding where the evidence is susceptible of more than one reasonable inference, a jury issue is created and the court may not grant a directed verdict).

In the case sub judice, Roberson and Lawhorn each owed a duty to other drivers and passengers like Howard when operating their respective vehicles. Pursuant to section 56-5-2150 of the South Carolina Code (2006), Lawhorn had a duty to turn his vehicle safely and use the appropriate turn signal when making a left turn onto a roadway. Specifically, section 56-5-2150(a) provides, "No person shall turn a vehicle or move right or left upon a roadway unless and until such movement can be made with reasonable safety nor without giving an appropriate signal as provided for in this section." Additionally, section 56-5-2150(b) mandates, "A signal of intention to turn or move right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning." Accordingly, the law compelled Lawhorn to signal and turn safely.

Likewise, Roberson owed a duty pursuant to section 56-5-1880 of the South Carolina Code (2006) not to pass other vehicles within one hundred feet of an intersection. The trial court defined "intersection" as "[t]he junction of an unimproved road publicly maintained with a paved highway." See Carma v. Swindler, 228 S.C. 550, 557, 91 S.E.2d 254, 258 (1956); see also S.C. Code Ann. § 56-5-490 (2006). Furthermore, "The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle." S.C. Code Ann. § 56-5-1840(1) (2006). South Carolina jurisprudence required

Roberson to abide by these statutes as he passed the van on the night of the accident. Finally, both Roberson and Lawhorn were required to drive their automobiles at a safe and reasonable speed under the conditions existing at the time of the accident. S.C. Code Ann. § 56-5-1520 (2006). Whether Lawhorn and Roberson complied with these laws created a question for the jury.

In granting Howard's motion for a directed verdict, the trial court found either Roberson, or Lawhorn, or both, breached at least one duty on the night of the accident. The effect of the court's decision left the issue of who was liable open for determination by the trier of fact. The jury's task was to decide which driver, if not both, was at fault and to calculate damages.

The trial court properly directed a verdict for Howard on the issue of liability. The evidence presented at trial yielded only one conclusion—that the negligence of at least one driver, if not both, resulted in the accident causing Howard's injuries. The trial court did not err in granting a directed verdict on the issue of liability.

II. New Trial on Issue of Damages

A. Thirteenth Juror Doctrine

Roberson contends the trial court erred in granting a new trial solely on the issue of damages pursuant to the thirteenth juror doctrine. We agree.

The following excerpt from Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996) outlines South Carolina jurisprudential history concerning the thirteenth juror doctrine:

> The seminal case stating the "thirteenth juror" doctrine is Worrell v. South Carolina Power Co., 186 S.C. 306, 195 S.E. 638 (1938). Worrell states:
>
> Nor does it follow that because under the law the trial judge is compelled to submit the issues to the jury, he cannot grant a new

trial absolute. As has often been said, the trial judge is the thirteenth juror, possessing the veto power to the Nth degree, and, it must be presumed, recognizes and appreciates his responsibility, and exercises the discretion vested in him with fairness and impartiality. Worrell, 186 S.C. at 313-14, 195 S.E. at 641.

A review of the "thirteenth juror" doctrine was undertaken by the appellate entity in Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990):

> This Court has had an opportunity to reconsider the thirteenth juror doctrine on several occasions. Each time we have refused to abolish the doctrine. We have also refused to require trial judges to explain the reasons for the ruling. The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts. The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror "hangs" the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the "thirteenth juror" vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.
>
> A trial judge's order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. When an order granting a new trial is before this Court, our review is limited to the consideration

> of whether evidence exists to support the trial court's order.

Folkens, 300 S.C. at 254-55, 387 S.E.2d at 267 (citations omitted).

> The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case. Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984). Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed. Todd v. Owen Indus. Prods., Inc., 315 S.C. 34, 431 S.E.2d 596 (Ct. App. 1993). Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion. Johnson v. Parker, 279 S.C. 132, 303 S.E.2d 95 (1983). See also Johnson v. Hoechst Celanese Corp., 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995) (under "thirteenth juror doctrine," trial court may grant new trial if judge believes verdict is unsupported by evidence and, similarly, new trial may be granted if verdict is inconsistent and reflects jury's confusion).

324 S.C. at 402, 477 S.E.2d at 702.

In Norton v. North S. Ry Co., 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002), the South Carolina Supreme Court explained, "the thirteenth juror doctrine is so named because it entitles a trial court to sit, in essence, as the thirteenth juror when [it] finds 'the evidence does not justify the verdict,' and then to grant a new trial based solely 'upon the facts.'" (citing Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990)). The supreme court further held, "[T]he result of the 'thirteenth juror' vote by the judge is a new trial rather than an adjustment to the verdict . . . ." Norton, 350 S.C. at 478, 567 S.E.2d at 854. In essence, the judge, as the thirteenth juror, can hang the jury and start the trial anew.

Our supreme court recently affirmed a court of appeals' decision upholding the grant of a new trial absolute under the thirteenth juror doctrine. Trivelas v. S.C. Dep't of Transp., 357 S.C. 545, 551-52, 593 S.E.2d 504, 508 (2004). The supreme court reasoned the grant was warranted because justice was not served by the jury's verdict, and the evidence did not justify the result. Id. at 552, 593 S.E.2d at 508. The Trivelas court held granting a new trial under the thirteenth juror doctrine has the same effect as if the jury failed to reach a verdict, and the trial court is not required to give reasons for granting a new trial. Id. at 553, 593 S.E.2d at 508 (citing Folkens, 300 S.C. at 254, 387 S.E.2d at 267).

"The 'thirteenth juror' doctrine is not used when the trial judge has found the verdict was inadequate or unduly liberal and, therefore, is not a vehicle to grant a new trial nisi additur." Bailey v. Peacock, 318 S.C. 13, 14-15, 455 S.E.2d 690, 692 (1995); see also Pinckney v. Winn-Dixie Stores, Inc., 311 S.C. 1, 4-5, 426 S.E.2d 327, 329 (Ct. App. 1992).

B. New Trial Absolute and New Trial Nisi Additur

A trial court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. Stevens v. Allen, 336 S.C. 439, 447, 520 S.E.2d 625, 629 (Ct. App. 1999) aff'd by 342 S.C. 47, 536 S.E.2d 663 (2000) (citing Vinson v. Hartley, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996)). Additionally, a new trial is warranted if the verdict is inconsistent. See Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993). The jury's determination of damages, however, is entitled to substantial deference. Id. The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives. See Cock-n-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996); McCourt by and Through McCourt v. Abernathy, 318 S.C. 301, 457 S.E.2d 603 (1995); Allstate Ins. Co. v. Durham, 314 S.C. 529, 431 S.E.2d 557 (1993). The failure of the trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion and on appeal this court will grant a new trial absolute. Stevens, 336 S.C. at 452, 520 S.E.2d at 631.

Alternatively, the trial court may grant a new trial nisi additur or remittitur when it finds the verdict is merely inadequate or excessive. Id. "[T]he trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice or prejudice." Id. (citing Allstate Ins. Co., 314 S.C. at 530, 431 S.E.2d at 558). A new trial nisi is one in which a new trial will be granted unless the party opposing it complies with conditions set by the court. Elliott v. Black River Elec. Coop., 233 S.C. 233, 104 S.E.2d 357, 372 (1958). "A motion for a new trial nisi because of excessiveness of the verdict contemplates not the striking down of the verdict in toto, but remission of part of it and the granting of a new trial in default thereof." Id. The trial court essentially gives the party against whom damages are assessed the option, by way of additur or remittitur, of avoiding a new trial.

The granting of a motion for new trial nisi additur or remittitur rests within the sound discretion of the trial court, but substantial deference must be afforded to the jury's determination of damages. Green v. Fritz, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003). Compelling reasons must be given to justify invading the jury's province in this manner. Chapman v. Upstate RV & Marine, 364 S.C. 82, 89, 610 S.E.2d 852, 856 (Ct. App. 2005) (citing Pelican Bldg. Ctrs. v. Dutton, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993)).

In summary, the court of appeals in Proctor v. Dep't of Health & Envtl. Control, offers an explanation of this process in gargantuan detail:

> A new trial nisi is one in which a new trial will be granted unless the party opposing it complies with a condition set by the court. The grant or denial of new trial motions rests within the discretion of the trial judge, and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. The trial court alone has the power to grant a new trial nisi when he finds the amount of the verdict to be merely inadequate or excessive. However, compelling reasons must be given to

> justify invading the jury's province by granting a new trial nisi [additur or] remittitur. The consideration for a motion for a new trial nisi [additur or]remittitur requires the trial judge to consider the adequacy of the verdict in light of the evidence presented. Great deference is given to the trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial, and who thus possesses a better-informed view of the damages than this Court. When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice. If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute.

368 S.C. 279, 319-21, 628 S.E.2d 496, 518 (Ct. App. 2006) (internal citations and quotation marks omitted).

C. A Procedural Conundrum

We address the equivocality extant in this record. The only motion posited by Howard was a motion for a new trial nisi additur. The record reveals this with certitude:

> On behalf of the Plaintiff, I would make a motion for a new trial nisi additur. Obviously the jury gave a verdict for the exact amount of the medical expenses, chiropractic expenses, and wage loss. They obviously ignored your charge as to pain and suffering. If all the medical expenses and wage loss were justified, then how can the pain and suffering which necessitated the medical expenses not be compensable? They ignored the law as it relates to pain and suffering obviously.

The trial court failed to rule on Howard's motion for a new trial nisi additur. The circuit judge granted a new trial on damages alone based on the thirteenth juror doctrine.

Our precedent firmly establishes the grant of a new trial based on the thirteenth juror doctrine grants a new trial in toto. The thirteenth juror doctrine is not the proper vehicle for ordering a new trial on a singular issue such as damages. Therefore, the trial court erred in granting a new trial solely on damages based on the thirteenth juror doctrine.

Though Howard was entitled to a directed verdict in his favor on the issue of liability, the directed verdict did not specifically hold Roberson liable to Howard. Moreover, Roberson did not appeal the jury's finding that Lawhorn was not liable and Lawhorn was not made a party to this appeal. The determination that Lawhorn was not liable is now the law of the case. First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) ("The unchallenged ruling, right or wrong, is the law of the case and requires affirmance.")

Consequently, we remand this case back to the trial court to rule on Howard's new trial nisi additur motion. Roberson must comply with the trial court's order regarding additur to avoid a new trial as the sole defendant.

CONCLUSION

The trial court properly granted Howard's motion for directed verdict. However, the trial court erred by granting a new trial on the issue of damages alone against Roberson under the thirteenth juror doctrine. Procedurally, the trial court cannot use the doctrine as a vehicle to grant a plaintiff a new trial on the issue of damages alone. Instead, the trial court should have ruled on Howard's motion for new trial nisi additur, and in its discretion, increased damages for pain and suffering. At that juncture, the opposing party must be given the option to comply with the additur or be granted a new trial absolute. If the option utilized by the opposing party in contradistinction to the nisi additur is a new trial absolute, then and in that event only, the new trial

absolute is against Roberson because Lawhorn has been eliminated from this case as a matter of law. Accordingly, the trial court's order is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHORT and WILLIAMS, JJ. concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

James Odom, Appellant.

Appeal From Beaufort County
Perry M. Buckner, III, Circuit Court Judge

Opinion No. 4327
Heard November 7, 2007 – Filed December 20, 2007

AFFIRMED

Jared S. Newman, of Beaufort, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Shawn L. Reeves, all of Columbia; and Solicitor I. McDuffie Stone, III, of Beaufort, for Respondent.

HEARN, C.J.: James Odom appeals the circuit court's determination that police had probable cause to seize him in a traffic stop. He further argues that because the stop was illegal, the marijuana seized during the stop should have been suppressed. We affirm.

FACTS

On September 4, 2002, Odom was pulled over by two officers who witnessed Odom driving a vehicle without wearing a seatbelt. Officer Carter, one of the two officers who witnessed the violation, approached Odom's vehicle to explain to him why he had been pulled over. As Carter drew near to Odom's vehicle, he smelled a strong odor of marijuana and recognized a Swisher-Sweet cigar[1] on the dashboard. Carter asked Odom if he had smoked marijuana, and Odom admitted he had done so earlier that same morning. In addition, Carter noticed a security guard belt with a gun holster in the rear passenger seat, although the holster was empty at the time.

Believing that a weapon could be present, Carter asked Odom to exit the vehicle and thereafter conducted a Terry frisk.[2] Carter testified he felt a bundle of leafy material in the breast pocket of Odom's jacket, which he immediately recognized as marijuana because of the extensive training he had received on the Drug Interdicton Force from the United States Department of Homeland Security. After finding the drugs, Carter placed Odom under arrest; continued his search; and located a second larger bag, and two smaller bags of marijuana, totaling 4.361 ounces.

Odom was indicted for possession of marijuana with the intent to distribute. At the start of the trial, Odom's counsel moved to suppress the marijuana as a product of an illegal search and seizure. The court overruled

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[1] Carter testified a Swisher-Sweet cigar is commonly known as a "blunt," which refers to a cigar that has been hollowed and refilled with marijuana. The term "blunt" was originally derived from the preferred brand of cigars for this operation, Phillies Blunts, but can refer to any brand of store-bought cigars. See Urban Dictionary, *available at* http://www.urbandictionary.com.

[2] Terry v. Ohio, 392 U.S. 1 (1968).

this motion. Following presentation of the state's case, the court, sitting non-jury, found Odom guilty and sentenced him to five years' confinement. This appeal followed.

STANDARD OF REVIEW

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

In criminal cases, the appellate court sits to review errors of law only. State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). We are bound by the trial court's factual findings unless they are clearly erroneous. Id. at 388, 577 S.E.2d at 500-01. This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). Our review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding. State v. Bowman, 366 S.C. 485, 501, 623 S.E.2d 378, 386 (2005). An appellate court will reverse only when there is clear error. Id.

LAW/ANALYSIS

I. Existence of Probable Cause for Initial Seizure

Odom first asserts the circuit court erred in finding the officers had probable cause to seize him based on their limited opportunity to view whether he was wearing his seatbelt, the distance between the vehicles, and the dark tint of Odom's windows. We disagree.

Section 56-5-6520 of the South Carolina Code (Supp. 2006) requires drivers or occupants to wear a complying, fastened safety belt when the motor vehicle in which they are riding is being operated on the public streets

and highways of South Carolina. A law enforcement officer may pull over or stop a vehicle when the officer has probable cause of a seatbelt violation based on a clear and unobstructed view of someone within the vehicle who is not wearing a seatbelt. S.C. Code Ann. § 56-5-6540 (Supp. 2006). Odom's counsel used a series of photos during his cross-examination of the arresting officers in order to illustrate it would have been impossible for the officers to recognize a seatbelt violation, during similar circumstances. However, both Officer Carter and his fellow patrolman Officer Dansky, testified to clearly seeing Odom across an intersection from where they were parked, operating a motor vehicle without wearing a safety belt. Because there is testimony in the record upon which the circuit court could base its judgment, we cannot say the court abused its discretion in finding the officers had probable cause to seize Odom due to his seatbelt violation. See Bowman, 366 S.C. at 501, 623 S.E.2d at 386.

II. Legality of Detainment and Patdown

Odom next asserts the circuit court erred in admitting evidence of marijuana found on him during the seizure. Specifically, Odom contends the search violated the safety belt legislation enacted by our legislature. We disagree.

Section 56-5-6540(D) of the South Carolina Code (Supp. 2006) provides: "A vehicle, driver, or occupant in a vehicle must not be searched, nor may consent to search be requested by a law enforcement officer, solely because of a violation of this article." Odom argues the alleged seatbelt violation was the only cause for the subsequent search. We find this argument is misguided. As discussed above, a seatbelt violation can be the sole basis for a police officer to pull over a vehicle. Section 56-5-6540(D) emphasizes this initial seizure cannot be extended to a subsequent search without additional suspicion rising to the level of probable cause. In this case, Officer Carter smelled a strong odor of marijuana as he approached Odom's car and noticed a common indicium of paraphernalia, a Swisher-Sweet cigar, on the dashboard. Additionally, Odom admitted to smoking marijuana earlier in the day, and Officer Carter observed an empty gun holster in the back seat. Having cause to fear for his own safety and

reasonable suspicion of the existence of drugs, Officer Carter asked Odom to exit the vehicle and conducted a Terry search.

In Terry, the United States Supreme Court announced that police may briefly detain and conduct a reasonable search for weapons where the officer has reason to believe the person is armed. Terry, 392 U.S. 1, 27 (1968). Applying this concept, the Supreme Court has also held once a vehicle has been lawfully detained for a traffic violation, police officers may order the driver out of the vehicle and conduct a search for weapons where the officer believes the person is armed and dangerous. Pennsylvania v. Mimms, 434 U.S. 106, 111-12 (1977). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Terry at 27. The existence of the evidence described above gave Carter the reasonable suspicion necessary to perform a patdown for weapons; therefore, Officer Carter's search was not solely based on Odom's seatbelt violation.[3]

[3] Additionally, Odom contends this court should analogize the "solely" language of Section 56-5-6540(D) with the portion of the criminal domestic violence (CDV) statute which limits the admissibility of evidence found pursuant to a CDV complaint. S.C. Code Ann. § 16-25-70(H) (Supp. 2006). We find this argument unavailing. Section 16-25-70(H) sets out criteria which expressly forbids the admissibility of evidence gained as a result of a complaint filed under the CDV statute, unless it falls under the two given exceptions: (1) if [the evidence] is found . . . in plain view . . . [or] pursuant to a search incident to a lawful arrest . . . or (2) if it is evidence of a violation of this article. As decided above, the police officers conducted a lawful Terry frisk and search of Odom for reasons other than the seatbelt violation. See State v. Cannon, 336 S.C. 335, 339, 520 S.E.2d 317, 319 (1999). Furthermore, there is no explicit statutory exclusion language contained in Section 56-5-6540. Therefore, we find this argument is without merit.

III. "Plain-Feel Doctrine"

Finally, Odom contends the circuit court erred in admitting the marijuana because the video in the police squad car allegedly shows a violation of the "plain-feel" rule annunciated in Minnesota v. Dickerson, 508 U.S. 366 (1993). Odom argues even if the initial traffic stop and Carter's decision to patdown Odom were valid, the patdown exceeded the bounds established under Terry and confirmed in Dickerson. We disagree.

Before the start of the trial, Odom's counsel made a motion to suppress the evidence gained from the seizure and subsequent search. In support of this motion, Odom played the in-car video of Officer Carter's stop, which Odom argues provides evidence Carter's frisk exceeded constitutional bounds. In Dickerson, the Supreme Court confronted for the first time the issue of a police officer who conducted a patdown search pursuant to Terry which did not yield a weapon; however, the officer recognized and seized nonthreatening contraband detected during the patdown. Dickerson at 369, 373. Where the seizure remains within the bounds of Terry, the Court reasoned:

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Id. at 375-76. However, the Court in Dickerson found the officer did not immediately recognize the incriminating character of the object in the suspect's pocket. Instead, it only became apparent after "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket – a pocket which the officer already knew contained no weapon." Id. at 378.

We find the case before us is distinguishable from Dickerson, and more closely aligned with our court's decision in State v. Smith, 329 S.C. 550, 495 S.E.2d 798 (Ct. App. 1998) cert. denied. In Smith, police pulled a suspect over for speeding and, pursuant to a reasonable suspicion, asked the suspect to exit the vehicle and thereafter conducted a Terry search. The officer conducting the search testified he immediately recognized a bulge in one of the suspect's pockets as a narcotic despite admitting he "squeezed the outside of [suspect's] jacket" and "squeezed around the package." Smith at 560, 495 S.E.2d at 803. This court distinguished Dickerson, explaining, "[a]lthough there is testimony in the record [the police officer] squeezed the outside of [suspect's] jacket, we do not find this sufficient to invalidate the seizure under Dickerson." Id.

As in Smith, during Odom's pre-trial suppression hearing, Carter testified he recognized immediately the bundle of leafy material in the breast pocket of Odom's jacket as marijuana, testifying: "Once [Odom] steeped [sic] out of the vehicle I smelled a strong odor of marijuana coming from his body, started the search and felt the large bundle in his breast pocket then I knew what it was, it was a bag of marijuana." Accordingly, we find the circuit court did not abuse its discretion in finding Carter's search stayed within the bounds of Terry, as clarified in Smith, and allowing the fruits of that search to be admitted into evidence.

CONCLUSION

Based on the foregoing, we hold the circuit court did not err: (1) in finding probable cause to initially seize Odom due to a seatbelt violation; (2) in admitting the marijuana seized during the search; or (3) in determining the officer's patdown search did not extend past the "plain-feel" rule allowed under Terry. The decision of the circuit court is accordingly

AFFIRMED.

KITTREDGE, J., and THOMAS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tony D. Jones, Appellant,

v.

Harold Arnold's Sentry Buick, Pontiac, Employer and South Carolina Automobile Dealers Association, Carrier, Respondents.

Appeal From Charleston County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 4328
Submitted December 1, 2007 – Filed January 3, 2008

AFFIRMED

Thomas W. Greene, of Charleston, for Appellant.

Vincent C. Northcutt and Jason A. Williams, both of Charleston, for Respondents.

WILLIAMS, J.: This action originated from a workers' compensation claim filed by Tony Jones (Jones) against his employer, Harold Arnold's Sentry Buick, Pontiac, GMC (Employer). Jones argues the Appellate Panel of the Workers' Compensation Commission (Appellate Panel) improperly concluded Employer established the defense of intoxication. We affirm.

FACTS

Jones asserted he suffered compensable injuries to his back and lower extremities as a result of two falls that occurred on May 20 and May 21, 2004. At the time of his alleged injuries, Jones was a car salesman for Employer.

Jones acknowledged an addiction to cocaine. Jones admitted to using cocaine on May 16 and May 17, 2004. However, Jones denied using cocaine on the dates of his falls.

Prior to his alleged injuries, Jones voluntarily began counseling with Kevin Shea, a certified addictions counselor. On May 19, 2004, one day prior to Jones' first fall, Shea and Jones had a one-hour counseling session. According to Shea, Jones did not exhibit any signs of being under the influence of cocaine at this session. However, Shea admitted he did not meet with Jones on the dates of the falls, and therefore, Shea could not determine if Jones was under the influence of cocaine during those days. On the date of Jones' first fall, May 20, 2004, Jones tested positive for cocaine.

In denying a compensable injury had occurred, Employer sought to establish the affirmative defense of intoxication pursuant to S.C. Code Section 42-9-60 (Supp. 2006). The Single Commissioner found Jones was intoxicated at the time of his falls. In so doing, the Single Commissioner specifically concluded Jones' testimony was not credible at either the hearing or at his deposition. The Single Commissioner further found Employer's witnesses' testimony to be more credible than Jones' witnesses' testimony. The Appellate Panel affirmed the Single Commissioner in full as did the circuit court. This appeal follows.

STANDARD OF REVIEW

The Administrative Procedures Act applies to appeals from decisions of the Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). In an appeal from the Commission, neither this Court nor the circuit court may substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but it may reverse when the decision is affected by an error of law. Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002).

"Any review of the [C]ommission's factual findings is governed by the substantial evidence standard." Lockridge v. Santens of Am., Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001). Accordingly, we limit review to deciding whether the Commission's decision is supported by substantial evidence or is controlled by some error of law. Corbin, 351 S.C. at 617, 571 S.E.2d at 95.

"Substantial evidence is evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion that the full commission reached." Lockridge, 344 S.C. at 515, 544 S.E.2d at 844. "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Lee v. Harborside Café, 350 S.C. 74, 78, 564 S.E.2d 354, 356 (Ct. App. 2002) (internal quotations and citations omitted).

LAW/ANALYSIS

Jones argues substantial evidence does not support the conclusion he was intoxicated at the time of his falls. We disagree.

Generally, the fault of an employee in a workers' compensation claim has no bearing on the employee's right to recover. Zeigler v. S.C. Law Enforcement Div., 250 S.C. 326, 329, 157 S.E.2d 598, 599 (1967). Section 42-9-60 makes an exception to this general rule and states, "No compensation shall be payable if the injury . . . was occasioned by the intoxication of the employee . . . ."

Intoxication is a condition that results from the use of a stimulant, which renders an employee impaired in his or her faculties to the extent that the employee is incapable of carrying on the accustomed work without danger to the employee. Reeves v. Carolina Foundry & Mach. Works, 194 S.C. 403, 408, 9 S.E.2d 919, 921 (1940). Intoxication is an affirmative defense which requires the party asserting the defense to carry the burden of proof. Chandler v. Suitt Constr. Co., 288 S.C. 503, 504, 343 S.E.2d 633, 634 (Ct. App. 1986).

The record is replete with testimony that requires this Court to conclude substantial evidence exists to affirm the Appellate Panel. On May 20, 2004, the date of the first fall, Jones tested positive for cocaine. Dr. Demi Garvin, a toxicologist, testified the positive result was consistent with Jones using cocaine on May 20, 2004.

Dr. Garvin further testified that cocaine use can result in red and glassy eyes, slurred speech, and risk-taking behavior. Dr. James Ballenger, a psychiatrist with an expertise in substance abuse, testified that an individual under the influence of cocaine exhibits the following signs: anxiety, memory loss, clumsiness, slurred speech, red puffy eyes, and eyes darting back and forth.

Leslie Wise, a parts manager for Employer, testified she immediately went to Jones after Jones' fall on May 20, 2004. When asked if she noticed anything unusual about Jones' appearance, Wise responded, "Yes. I actually noticed his eyes were, I say, dancing. They were just moving . . . fast . . . just jumping around." Michael Dickey, a general sales manager for Employer, testified Jones slurred his speech on May 20 and May 21, 2004, the dates of Jones' first and second falls. Dickey also stated Jones' eyes were glassy, red, and swollen on May 20 and May 21, 2004.

We are cognizant of the fact that Jones produced witnesses on his behalf. For example, Robert Strong testified on behalf of Jones. The parties were acquainted with each other because both belonged to the same church. On May 19, 2004, one day prior to Jones' first fall, Strong was attempting to

purchase a vehicle from Jones. Strong, along with Jones, took the prospective vehicle for a test drive. During this drive, Jones and Strong decided to have lunch.

When asked whether Strong observed anything unusual about Jones, Strong responded in the negative. Strong further stated Jones did not have red, swollen, or glassy eyes on that day. Strong also noted he had no difficulty in understanding Jones. However, the meeting between Strong and Jones occurred on May 19, 2004, one day prior to Jones' first fall. Thus, it is possible for Jones to have ingested cocaine after his meeting with Strong but prior to his fall. Moreover, the Single Commissioner found Jones' and his witnesses' testimony less credible than Employer's and Employer's witnesses' testimony. See Lee, 350 S.C. at 78, 564 S.E.2d at 356 (Ct. App. 2002) ("The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.") (internal quotations and citations omitted).

CONCLUSION

Accordingly, the circuit court's decision is

AFFIRMED.[1]

ANDERSON AND SHORT, JJ., concur.

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