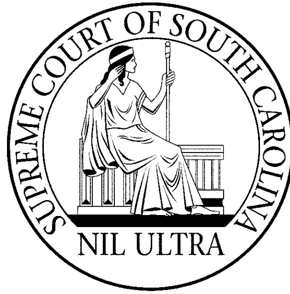

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

May 27, 2003

ADVANCE SHEET NO. 20

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

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Quentin Anderson, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Orangeburg County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 25656
Submitted April 23, 2003 - Filed May 27, 2003

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, and Assistant Attorney General William Bryan Dukes, all of Columbia, for Petitioner.

John Stafford Bryant, of Bryant, Fanning and Shuler, of Orangeburg, for Respondent.

JUSTICE BURNETT: We granted a writ of certiorari to review the decision of the Post-Conviction Relief ("PCR") judge granting Quentin Anderson ("Anderson") relief. We reverse.

FACTS

Anderson was indicted and convicted of assault and battery with intent to kill and received a twenty-year sentence. Janice Jenkins Glover ("Glover"), Anderson's former girlfriend, testified at trial Anderson had threatened to kill her or the other man if he saw her with another man. Glover testified she was at a club on the night of the crime talking to the victim. Anderson entered the club, and Glover walked away from the victim to the bar.

Glover testified Anderson approached her and slapped her, knocking her to the floor. As she left the club she heard a gunshot. When she heard a second gunshot, she saw Anderson outside the club with a gun. Three witnesses corroborated Glover's testimony, including the victim who positively identified Anderson as the man who shot him.

The Court of Appeals affirmed his conviction. State v. Anderson, Op. No. 98-UP-510 (Ct. App. Filed November 23, 1998). A petition for a writ of certiorari was not filed with this Court.

Anderson subsequently filed a petition for PCR alleging appellate counsel provided ineffective assistance by failing to petition for a writ of certiorari from this Court. The PCR court agreed noting that he would have prevailed on an appeal to this Court under State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (1998), a decision released subsequent to the Court of Appeals decision in Anderson's case.

ISSUE

Did the PCR court err in concluding appellate counsel provided ineffective assistance by not petitioning for a writ of certiorari to

this Court to determine if Anderson's threat to and assault of Glover were properly admitted at trial?

DISCUSSION

A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990).[1] An applicant must prove ineffective assistance by showing counsel's performance deficient, and the deficient performance prejudiced the applicant. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Strickland, supra; Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). That is, Anderson must prove prejudice by showing he would have prevailed on appeal had a writ been filed by counsel and granted by this Court. See Butler, supra.

Assuming, arguendo, appellate counsel was deficient in not seeking certiorari from this Court, Anderson has failed to prove he was prejudiced by counsel's inaction. Anderson asserts he would have prevailed on appeal because his threatening statement to Glover and testimony of his slapping her at the bar were inadmissible prior bad acts. See Rule 404, SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). We disagree.

Rule 404, SCRE, the modern expression of the Lyle rule, excludes "evidence of other crimes, wrongs, or acts" offered to "prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. The rule creates an exception when the testimony is offered to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Id.

[1] We do not decide whether Anderson was entitled to effective assistance of counsel on a discretionary appeal.

Anderson's threatening statement to Glover is not a prior bad act. See State v. Beck, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000); see also State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001). As such the bar against admitting prior bad acts is not applicable.

Further, Lyle is inapplicable to the testimony of Anderson's slapping Glover. A defendant's prior bad act is admissible if it forms part of the res gestae of the crime. See State v. Bolden, 303 S.C. 41, 43, 398 S.E.2d 494, 495, n. 1 (1990); see also State v. Smith, 309 S.C. 442, 451, 424 S.E.2d 496, 501 (1992) (Toal, J., dissenting).

Evidence of other crimes is admissible under the res gestae theory when the other actions are so intimately connected with the crime charged that their admission is necessary for a full presentation of the case. State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996). The evidence of Anderson's slapping Glover is part of the res gestae of the crime. The assault, which took place moments before the shooting, provides the context of the shooting, along with Anderson's earlier threatening statement. A full presentation of the crime necessarily includes Anderson's threat, testimony Anderson saw Glover talking to a man, Anderson's assaulting Glover, and culminating in the shooting of the victim.

Neither Anderson's threat nor his assault upon Glover are prior bad acts barred by Rule 404. Anderson, unable to prove the inadmissibility of the evidence, would not have prevailed on appeal to this Court. He is, therefore, unable to prove prejudice.

REVERSED.

MOORE, A.C.J., WALLER and PLEICONES, JJ., concur. TOAL, C.J., not participating.

The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Pay License Fees or Comply with Continuing Legal Education Requirements

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ORDER

By order dated September 6, 2000, this Court adopted Rule 419, SCACR. This rule provides a comprehensive procedure for suspending lawyers who fail to pay license fees to the South Carolina Bar or to comply with Continuing Legal Education (CLE) requirements. This rule provides that a lawyer who is not reinstated within three years of being suspended by this Court will have his or her membership in the South Carolina Bar terminated and will have to comply with all of the requirements of Rule 402, SCACR, to be readmitted to the practice of law in this state.

Prior to the adoption of Rule 419, this Court held hearings and suspended lawyers for failing to pay license fees or to comply with CLE requirements. Although our order adopting Rule 419 did not deal with its

application to lawyers suspended prior to its adoption, we find that this rule should be applied to those lawyers.

However, to insure they have an adequate opportunity to apply for reinstatement prior to having their membership terminated, lawyers who were suspended for failure to pay bar dues or comply with CLE requirements before Rule 419 became effective, have until June 1, 2004, to seek reinstatement under the procedures provided by Rule 419. If they fail to do so, their membership in the South Carolina Bar will be terminated, and they will have to comply with all requirements of Rule 402 to be readmitted to practice law in this state.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
May 16, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richard Eugene Hartley, Betty Ann Hartley Hilton, L. C. Rabon, Larry T. Savage, William J. Hartley, Jr., Jacquelyne T. Parham, James D. Parham, Jean A. Thomas, and Jennie Mae Lemacks, **Respondents,**

v.

John Wesley United Methodist Church of Johns Island, **Appellant.**

Appeal From Charleston County
Roger M. Young, Master-In-Equity

Opinion No. 3642
Heard April 9, 2003 – Filed May 27, 2003

AFFIRMED

W. Andrew Gowder, Jr., of Charleston, for Appellant.

Joseph W. Ginn, III, of Charleston, for Respondents.

ANDERSON, J.: John Wesley United Methodist Church of Johns Island appeals the order of the master-in-equity granting a prescriptive easement across church property to the residents of Evans Road. We affirm.

FACTS/ PROCEDURAL BACKGROUND

The Appellant, John Wesley United Methodist Church of Johns Island (church), is an old parish church located adjacent to the west side of River Road on Johns Island, South Carolina. In 1874, the church acquired a one-acre parcel surrounding the sanctuary from Isaac P. Grimball. In 1943, Grimball's widow sold forty-two acres juxtaposed to the east side of River Road directly across from the church to Hawthorne Flying Service (currently Johns Island Airport), and in the same transaction, Hawthorne acquired a triangular 6.8-acre parcel that bounded the church on three sides. In 1980, Hawthorne sold the 6.8-acre parcel to the church.

The Respondents (residents) are title owners of various parcels of property also located west of River Road on Johns Island. All of their properties border Evans Road, a long established road, which bounds the remaining fourth side of the church property. The residents gain sole access to their respective homes and properties from River Road by way of a section of Evans Road, which runs across the 6.8-acre parcel belonging to the church. It is this part of Evans Road that is in controversy.

Some of the residents and their predecessors in title have continuously used Evans Road for roughly sixty years. In fact, Evans Road was named after a predecessor in title and family member of one or more of the current residents. The entire length of the road, including the segment crossing church lands, has been maintained by Charleston County for around twenty-five years.

Approximately two and a half years before the trial, the church planned to construct another building on its property in a location that would cut off the residents' access to Evans Road. Shortly before the residents brought this action, the church, without communicating with any resident, attempted to create another route from the residents' properties to River Road. The

alternate route consists of a scraped dirt path that leads from the existing Evans Road where it first joins the residents' properties, continues southward across the church property, and then merges with an existing driveway that ultimately joins River Road. This "new" access is about 142 feet south of where the existing Evans Road meets River Road. Upon discovering the church's activities, the residents immediately communicated in writing to the church that they objected to any attempts to block their existing access, inquired as to the church's intentions, and asserted their right to continued use of Evans Road. The church did not reply.

Consequently, the residents brought an action in the circuit court seeking a temporary restraining order enjoining the church from closing off access to Evans Road and a declaratory judgment granting a prescriptive easement over Evans Road. The parties stipulated to a temporary injunction until the matter could be adjudicated with finality by the master-in-equity for Charleston County. The master granted the residents a prescriptive easement under claim of right over Evans Road.

ISSUE

Did the master err in granting a prescriptive easement based upon the residents' use under claim of right?

STANDARD OF REVIEW

The determination of the existence of an easement is an action at law. Slear v. Hanna, 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998); Eldridge v. City of Greenwood, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (Ct. App. 1998). Establishing the existence of an easement is a question of fact in a law action. Jowers v. Hornsby, 292 S.C. 549, 551, 357 S.E.2d 710, 711 (1987); Morrow v. Dyches, 328 S.C. 522, 526, 492 S.E.2d 420, 423 (Ct. App. 1997); Revis v. Barrett, 321 S.C. 206, 208, 467 S.E.2d 460, 462 (Ct. App. 1996). The present matter was consensually referred to the master-in-equity for entry of final judgment. Accordingly, our scope of review is limited to correction of errors of law, and we will not disturb the master's factual findings that have some

evidentiary support. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

The church contends the master erred in concluding the residents established a prescriptive easement because the evidence does not support a factual finding that the residents' use was under claim of right. We disagree.

In Morrow v. Dyches, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997), this court affirmed the standard for proving a prescriptive easement, relying upon previous standards set out in Horry County v. Laychur, 315 S.C. 264, 434 S.E.2d 259 (1993) and Revis v. Barrett, 321 S.C. 206, 467 S.E.2d 460 (Ct. App. 1996). There is a distinction between these two cases regarding the first of the three components required to meet the standard.

Revis recited the entire standard, including the first factor, exactly as it appears in Morrow. "To establish a private right of way by prescription, one must show (1) continued use for 20 years; . . . ." Revis, 321 S.C. at 209, 467 S.E.2d at 462. Revis cites both Laychur and Babb v. Harrison, 220 S.C. 20, 66 S.E.2d 457 (1951) in support of the language used in its version of the standard. However in both Laychur and Babb, the first element of the standard consists of not only continued but also "uninterrupted" use for twenty years. "The following prerequisites must be met to establish a right by prescription: (1) There must be continued **and uninterrupted use or enjoyment of the right for a period of 20 years**." Laychur, 315 S.C. at 367, 434 S.E.2d at 261 (emphasis added). "[T]he requirements necessary to establishing a right by prescription are: (1) the continued **and uninterrupted use or enjoyment of the right for the full period of twenty years** . . . ." Babb v. Harrison, 220 S.C. 20, 24-25, 66 S.E.2d 457, 458 (1951) (emphasis added). The remaining two elements in both Laychur and Babb are consistent with those found in the standard set out in Morrow.

Babb and a long litany of South Carolina cases dating back to Lawton v. Rivers, 13 S.C.L. (2 McCord) 445, 449 (1823) call for both continuous and

uninterrupted use to satisfy a grant of a prescriptive easement. Sanitary & Aseptic Package Co. v. Shealy, 205 S.C. 198, 203, 31 S.E.2d 253, 255 (1944); Poole v. Edwards, 197 S.C. 280, 283, 15 S.E.2d 349, 350 (1941); Williamson v. Abbot, 107 S.C. 397, 400, 93 S.E. 15, 15-16 (1917). It remains unclear why Revis and later Morrow deleted the "uninterrupted use or enjoyment" language from part one of the standard. In the instant case, we use the standard set out in Babb as the most current, correct, and complete version of the essentials necessary to prove an easement by prescription.

It has long been recognized that the requisites necessary to establish a right by prescription are: (1) the continued and uninterrupted use or enjoyment of the right for the full period of twenty years, (2) the identity of the thing enjoyed, and (3) the use or enjoyment was adverse or under claim of right. Babb, 220 S.C. at 24-25, 66 S.E.2d at 458; Sanitary & Aseptic Package Co., 205 S.C. at 203, 31 S.E2d at 255; Poole, 197 S.C. at 283, 15 S.E.2d at 349; Williamson, 107 S.C. at 400, 93 S.E. at 15-16; Lawton, 13 S.C.L. (2 McCord) at 449.

It is uncontested that the residents and/or their predecessors in title have enjoyed continued and uninterrupted use of the clearly marked and well-known Evans Road in excess of twenty years. Thus, we devote our analysis to the remaining third factor of the prescriptive easement standard.

The church challenges the master's findings, arguing the residents' belief that they have a right to use Evans Road "is based solely on the fact that they are accustomed to using it and prefer it." The church further suggests that all of the residents' testimonies regarding their claim of right may be summarized into the single declaration that "the [residents] had always used [Evans Road]" and this claim of perpetual use is also "the sole basis of [the residents'] claim of right." Finally, the church interprets our court's holdings in Revis and Morrow to support its position that the residents have not met the burden of proving a prescriptive easement under claim of right. The church cites Revis and Morrow for the proposition that a party cannot assert a claim of right solely on the ground that it thought it had the right.

In support of the theory that the residents' claim of right is based on perpetual and preferred use alone, the church presented testimony that neither it nor Hawthorne Flying Service ever told the residents that their use was by right or would be permanent.

However, at least one of the residents stated that when he purchased his property on Evans Road, both the seller and the next-door neighbor to the property told him that Evans Road could not ever be legally closed off "[a]nd [access to Evans Road] was part of the consideration for [his] purchase of the property." A long-time parishioner and lay leader of the church, who claimed active attendance since childhood, attested that at the time the church bought the property in which the disputed portion of the road runs, the church was aware that Evans Road was on the property and had been in use for forty years. Moreover, the witness admitted the church had built the rectory on a site across the road from the church to avoid blocking Evans Road in 1986. Regardless of whether or not the church verbally assured the residents of a permanent right to use the road, its selection of a building site for the rectory in 1986 indicated its willingness to preserve access to Evans Road.

Curiously, the church also presents the residents' testimonies that they did not believe they **owned** the path and had no intention of **owning** it to the exclusion of the church as proof the claim of right rested on their use alone.

The residents do not argue that any one of them individually or collectively holds actual title to the road, nor do the residents bring an action to settle title in themselves. The law granting a prescriptive easement under claim of right does not mandate a party to believe that he holds actual title or that he intends to acquire it. Rather, our courts have held in order for a party to earn a prescriptive easement under claim of right he must demonstrate a substantial belief that he had the right to **use** the parcel or road based upon the totality of circumstances surrounding his use. See Revis v. Barrett, 321 S.C. 206, 209, 467 S.E.2d 460, 462 (Ct. App. 1996) (holding a party's belief about her right to use a road flowed from a claim of right where she knew use of the road had originated with her parents, the road was formerly a state road, she knew and participated in a lawsuit against a party seeking to deny her use, and she had used the road for a substantial period of time); see also

Morrow v. Dyches, 328 S.C. 522, 528, 492 S.E.2d 420, 424 (Ct. App. 1997) (noting a party's belief that he had a right-of-way may be sufficient for a prescriptive easement pursuant to a claim of right).

The church maintains that the residents have "attempt[ed] to cobble together a 'claim of right,'" while conceding in its brief that "they used the road for a long time, that their parents or other relatives had used the road, that the County had occasionally scraped [Evans Road]." The church does not address these arguments directly. Instead the church dismisses them by insisting that a claim of right, by definition, requires the claiming party have "some legal right to use the road" and "[Evans Road] is simply the residents' preferred way to get to River Road." The church does not give these attendant facts sufficient importance and misinterprets their significance in supporting a claim of right.

Many of the residents testified they have used Evans Road since childhood and claimed their right flowed from their own continuous use of the road and use by prior generations of their families. Resident Jacquelyn T. Parham declared that she has used Evans Road as the sole access to her family home since she was a little girl. Indeed, Evans Road was named for Parham's grandparents. Parham opined that she felt the residents had the right to use the road "because [her] grandparents used it. [Evans Road] was there when they purchased the property [and] it's just handed down, a community road." Resident Richard Hartley professed that he had lived on Evans Road and used Evans Road as sole access his whole life of 56.5 years to reach his family home, which was acquired by his parents prior to 1945. Resident William J. Hartley, Jr. declared that he was sixty years old and had lived on Evans Road and used Evans Road as sole access to his family home all his life. Hartley was given his property by his father. Resident Jennie Mae Lemacks established that she was seventy-three years old, lived on Evans Road since she was 13.5 years old (almost sixty years), and had used Evans Road as the sole access to her property the entire time. Lemacks alleged that her home had been family property since 1942. It is clear from the record that the residents and/or their predecessors in title carried on a tradition of use for several decades. Further, testimony shows the residents

relied upon the use by their predecessors in title to gird their belief that they held a claim of right to use Evans Road.

It is acknowledged that Charleston County has maintained Evans Road for many years. Resident Parham avowed that the county has brought in dirt and rocks to refurbish the roadbed and routinely scraped Evans Road at least once a month for about twenty years. Resident Richard Hartley also said that the county maintained Evans Road with truckloads of dirt and grading equipment about once a month for over twenty-five years. Resident William Hartley testified that the county had maintained the road for twenty years or more. The church never objected to the county's care and upkeep of the road. Our supreme court has held that such an extended duration of public maintenance fortifies the public character of a road and supports a finding that those who use the road may acquire an easement. See Darlington County v. Perkins, 269 S.C. 572, 575, 239 S.E.2d 69, 70-71 (1977) ("We are of the view, however, that the continuous and widespread public usage of the road for at least 50 years, without charge or interference from previous owners and these Landowners, clearly establishes the public character of the road. This conclusion is fortified by the extent and duration of the maintenance which the county has performed on the road.").

The master relied upon this court's decision in Revis v. Barrett, 321 S.C. 206, 467 S.E.2d 460 (Ct. App. 1996). In Revis, similar to the facts in this case, the party seeking an easement had been using the road at issue to access her property and she was aware that her parents had used this roadway to access this property. In Revis, this court affirmed the trial court's grant of a prescriptive easement under claim of right holding:

> Clearly, Revis was under the impression that she had a continuing right to use the road, originating with her parents' use of the roadway. There was certainly ample evidence to support the master's finding Revis' belief about her right to use the road flowed from a "claim of right," . . . .

Id. at 210, 467 S.E.2d at 462.

In this case the residents, their families, and/or their predecessors in title had used Evans Road for approximately sixty years because they thought they had the right to use it. The Charleston County government has extensively maintained the road for a period in excess of twenty years. The residents immediately reasserted their claim of right on the first occasion that the church attempted to interfere with their use.

There was ample evidence from which the master could have concluded that the residents earned a prescriptive easement under claim of right over Evans Road.

CONCLUSION

For the forgoing reasons, the order of the master granting a prescriptive easement under claim of right is

AFFIRMED.[1]

CONNOR and HUFF, JJ., concur.

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[1] Because we affirm the trial court, it is not necessary to address the residents' adverse possession claim.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Marshall Eaddy, Respondent,

v.

Smurfit-Stone Container Corporation, Self-Insured Employer, Appellant.

Appeal From Florence County
L. Casey Manning, Circuit Court Judge

Opinion No. 3643
Submitted April 7, 2003 – Filed May 27, 2003

AFFIRMED

Grady L. Beard and Marcy J. Lamar, of Columbia, for Appellant.

Steve Wukela, Jr., of Florence, for Respondent.

HUFF, J.: In this workers' compensation action, Smurfit-Stone Container Corporation (Smurfit-Stone) appeals the trial court's order

affirming the order of the South Carolina Workers' Compensation Commission (Commission) awarding medical expenses and workers' compensation benefits to Marshall Eaddy. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Eaddy began working at Smurfit-Stone in the mid-1960s. He primarily worked as a general mechanic, which involved strenuous physical labor at times. Prior to joining Smurfit-Stone, Eaddy spent one year as a student at Clemson University followed by one year of service in the Air Force and one year as a bank teller.

Eaddy testified that while working a 7:00 p.m. to 7:00 a.m. shift at Smurfit-Stone on July 19 to 20, 1999, he was working on a wood chipper when he felt sharp pains. He stated the incident occurred about 12:00 or 1:00 in the morning while he was using a twenty-five to thirty pound impact wrench, helping to change out the segment on the chipper. Eaddy initially attributed the pain to gas and told his co-worker he was going to First Aid. There, a nurse gave Eaddy Alka-Seltzers, which Eaddy took. He sat down for awhile, but subsequently returned to work. Through the course of his shift, Eaddy's pain worsened and he complained to another co-worker. Around 7:00 a.m., Eaddy reported to his maintenance foreman that he was in pain stating, "I believe my guts is coming out." His supervisor told him to report to the First Aid office again and fill out a report. After doing so, Eaddy returned to his home.

Once Eaddy arrived home, he took some old pain medication and slept until the following morning. When he awoke he was still experiencing pain, so he contacted the nurse at Smufit-Stone, who thereafter instructed him to go to the emergency room at Carolinas Hospital System in Florence. At the hospital, Eaddy complained of abdominal pain, abdominal distention, nausea, and vomiting. Dr. David Anderson saw Eaddy on July 21, 1999, and determined Eaddy had a bowel obstruction secondary to a recurrent ventral hernia.

During the course of his employment at Smurfit-Stone and prior to the present incident, Eaddy underwent four hernia operations, all performed by Dr. Reginald S. Bolick. The first operation occurred on October 26, 1987, to treat an umbilical hernia. Surgery for a second umbilical hernia took place on November 21, 1988. Dr. Bolick saw Eaddy again in December 1992 for treatment of a ventral hernia in a different location that was in his midline section above his umbilicus. He performed surgery on Eaddy on January 4, 1993 to repair this hernia, and operated on him again on January 12, 1993 when he developed a recurrence of this hernia after an episode of severe post-operative coughing.

Dr. Bolick testified, although he referred to Eaddy's third hernia as a "recurrent hernia" in his December 1992 notes, he considered this a misnomer, noting that this hernia was actually above the location of the previous umbilical hernia repair. Additionally, Dr. Bolick testified that there is some degree of inherent weakness of the tissue after one has a hernia, and given Eaddy's susceptibility to hernias, the natural progression of his condition would be to develop another one. However, he did not consider Eaddy disabled and Eaddy had no permanent impairment at that time. Dr. Bolick further stated, when he last saw Eaddy in May 1993, his repair was sound, and he discharged Eaddy from his office, releasing him to full activity. Eaddy received treatment, as well as temporary total workers' compensation benefits, for each of these hernias.

Dr. Anderson testified that he documented in his initial consultation on July 21, 1999 that Eaddy reported he was working at Smurfit-Stone the day before when "he went to lift something, he felt a pull in his abdomen and afterwards felt abdominal pain." On July 22, 1999, Dr. Anderson operated on Eaddy to repair the ventral hernia and resect a portion of incarcerated bowel. When discussing his initial assessment of Eaddy's condition as a "recurrent ventral hernia," Dr. Anderson stated, "Well, it means that he's had more than one and that it has returned" and because it was his fifth repair, it was a recurrent hernia. However, he further testified that the repairs were not always in the same location.

According to Dr. Anderson, he could not state how long the hernia had existed prior to the surgery, but "the intestines had been out in the hernia sac for at least twenty-four hours" at the time of surgery, and his intestines most likely became incarcerated and trapped when Eaddy lifted the object at work, leading to the onset of pain. Concerning the impact of Eaddy's job on his health, Dr. Anderson testified that it had been "a big problem, in that . . . he does a tremendous amount of physical work and in doing that, he's putting a tremendous amount of stress on the incisions and that this, in part, has led to why he's had to have so many hernia repairs." He further opined that if Eaddy continued to go about his work activities, "he's going to develop a recurrent hernia, and each time that we do this it's almost like playing Russian Roulette." He testified Eaddy could, at most, do "sedentary type work," but that any kind of physical work at all, including a "simple task in the yard," would mean Eaddy was "taking his health into severe risks."

Eaddy's co-worker, Russell Suggs, confirmed that Eaddy complained to him that he was sick and needed to go to First Aid on the night in question. He stated Eaddy was "feeling his stomach" and that "it seemed like that's where he was hurting." Eaddy's maintenance superintendent, Jimmy Burroughs, testified that on the date of Eaddy's alleged accident, Eaddy came to the office and told him and the foreman "that he had pulled something loose or pulled the hernia loose again."

Eaddy testified that from 1993, when he had his fourth hernia surgery, up until July 20, 1999, he had not felt any tearing feelings nor had any trouble with pain in his abdomen. His co-worker Harold Clay verified that from 1993 to 1999, Eaddy never complained to him about having any problems with his stomach.

Although Eaddy agreed that he had not made any attempts to return to employment, he testified he did not know of any kind of work for which he was qualified that he was capable of performing. Eaddy was fifty-eight years old at the time of the hearing before the single commissioner in May 2000.

In October 1999, Eaddy sought permanent disability workers' compensation benefits for his hernia. Smurfit-Stone denied his claim. In an

August 2000 order, the single commissioner found (1) Eaddy sustained an injury resulting in a hernia or rupture on July 20, 1999; (2) the hernia or rupture appeared suddenly; (3) the hernia or rupture was accompanied by pain; (4) the hernia or rupture immediately followed an accident; (5) the hernia or rupture did not exist prior to the accident for which compensation is claimed; (6) Eaddy sustained an accident arising out of and in the course of his employment at Smurfit-Stone; (7) Eaddy is entitled to all medical, surgical, hospital, and other required treatments for the hernia; (8) Eaddy is totally and permanently disabled, and entitled to a permanent award of workers' compensation; and (9) because of Eaddy's total and permanent disability, he is entitled to have all resulting and necessary nursing services, medicines, prosthetic devices, sick travel, medical, hospital and other treatment or care be paid during Eaddy's life, without any regard to any limitation in the Act, including the maximum compensation limit.

Smurfit-Stone appealed to the full commission, which affirmed the single commissioner's findings. It then appealed to the circuit court, which affirmed the full commission. This appeal follows.

ISSUES

I. Did the circuit court err in finding Eaddy sustained a compensable injury?

II. Did the circuit court err in finding Eaddy was totally and permanently disabled?

III. Did the circuit court err in failing to find Smurfit-Stone was entitled to a credit for accident and sickness benefits, as well as previous workers' compensation payments?

IV. Did the circuit court err in affirming the full commission's order because the order was made in violation of the South Carolina Administrative Procedures Act (APA)?

STANDARD OF REVIEW

The APA establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981); Adkins v. Georgia-Pacific Corp., 350 S.C. 34, 36-37, 564 S.E.2d 339, 340 (Ct. App. 2002). An appellate court may reverse or modify a decision if the findings or conclusions of the commission are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2002); Adams v. Texfi Indus., 341 S.C. 401, 404, 535 S.E.2d 124, 125 (2000). Substantial evidence is evidence that, considering the entire record, allows reasonable minds to reach the same conclusion reached by the full commission. Miller v. State Roofing Co., 312 S.C. 452, 454, 441 S.E.2d 323, 324-25 (1994).

LAW/ANALYSIS

I. Compensable Injury

Smurfit-Stone first argues the circuit court erred in affirming the full commission's finding that Eaddy sustained a compensable hernia injury. It contends Eaddy failed to prove the necessary statutory elements under S.C. Code Ann. § 42-9-40, and further failed to prove an injury by accident arising out of and in the course of his employment pursuant to S.C. Code Ann. §42-1-160. We disagree.

In order to be entitled to compensation for an injury under the South Carolina Workers' Compensation Act, a claimant must show he suffered an "injury by accident arising out of and in the course of employment." S.C. Code Ann. § 42-1-160 (Supp. 2002). The term "arising out of" refers to the origin of the cause of the accident. Dukes v. Rural Metro Corp., 346 S.C. 369, 373, 552 S.E.2d 39, 41 (Ct. App. 2001). An accidental injury is considered to arise out of one's employment when there is a causal connection between the conditions under which the work is required to be

performed and the resulting injury. Id. An injury occurs within 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. Broughton v. South of the Border, 336 S.C. 488, 498, 520 S.E.2d 634, 639 (Ct.App.1999). There is substantial evidence from both Eaddy and Dr. Anderson that Eaddy sustained the hernia injury as a result of his working on a piece of equipment during the course of his employment.

Additionally, a person seeking workers' compensation benefits for a hernia or rupture must prove to the Commission's satisfaction:

(1) That there was an injury resulting in hernia or rupture;
(2) That the hernia or rupture appeared suddenly;
(3) That it was accompanied by pain;
(4) That the hernia or rupture immediately followed an accident; and
(5) That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

S.C. Code Ann. § 42-9-40 (1985).

Here, Dr. Anderson's testimony indicates that Eaddy suffered an injury resulting in a hernia. Additionally, Eaddy testified that he was working with a twenty-five to thirty pound instrument when he felt a sharp pain. His co-worker verified that Eaddy complained at the time, and indicated he was going to First Aid. Other employees confirmed, that as the shift advanced, Eaddy continued to complain until he ultimately told one of his superiors that he had "pulled the hernia loose again." Further, Dr. Anderson documented that Eaddy told him he was injured when he lifted something at work and that he felt a pull in his abdomen and subsequent pain. Thus, there is substantial evidence of record that Eaddy suffered an injury resulting in a hernia, the hernia appeared suddenly, it was accompanied by pain, and it immediately followed an accident when Eaddy attempted to lift a heavy piece of machinery at work.

Smurfit-Stone contends that the evidence does not substantially support a finding that Eaddy satisfied the final element of S.C. Code Ann. § 42-1-160, which requires that the hernia did not exist prior to the accident for which compensation is claimed. In support of its position, Smurfit-Stone relies on Eaddy's four previous hernia operations and the characterization of Eaddy's condition as a "recurring hernia." We find this argument unavailing.

Testimony from Dr. Bolick indicates, although he used the term "recurring hernia" in his report, it was really a misnomer. He noted that his repair to Eaddy's last hernia, prior to the 1999 occurrence, was sound, and he discharged Eaddy, releasing him to full activity. Further, Dr. Anderson indicated when he referred to Eaddy's hernia as recurrent, he simply meant that Eaddy had previous hernias, but noted that the repairs of Eaddy's hernias were not always in the same location. Finally, Eaddy testified that from 1993, when he had his fourth hernia surgery, until July 20, 1999, he had not had any tearing feelings or any trouble with pain in his abdomen. Thus, we find there is substantial evidence of record that Eaddy's hernia did not exist prior to the accident for which compensation is claimed.

Based on our review of the record, we find substantial evidence supporting the Commission's finding that Eaddy suffered a compensable hernia injury.

II. Total and Permanent Disability

Smurfit-Stone next argues the circuit court erred in affirming the full commission's finding that Eaddy is totally and permanently disabled. We disagree.

Total disability does not require complete helplessness; rather the inability to perform common labor is considered total disability for one who is not qualified by training or experience for any other employment. Wynn v. Peoples Natural Gas Co. of S.C., 238 S.C. 1, 11, 118 S.E.2d 812, 817 (1961). On the other hand, if an employee is capable of performing other work that is continuously available to him, he will not be deemed totally disabled simply because he is unable to resume the duties of the particular occupation in

which he is engaged at the time of his injury. Id. at 11, 118 S.E.2d at 817-18. In order to be entitled to total and permanent disability workers' compensation benefits for a work injury, the claimant must be unable to perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist. Id. at 12, 118 S.E.2d at 818; Colvin v. E. I. DuPont de Nemours Co., 227 S.C. 465, 474, 88 S.E.2d 581, 585 (1955). See also Stephenson v. Rice Servs., Inc., 323 S.C. 113, 118, 473 S.E.2d 699, 702 (1996) ("Employees who because of a work-related injury can perform only limited tasks for which no reasonably stable market exists are considered totally disabled notwithstanding their nominal earning capacity.")

Here, both physicians attributed Eaddy's predisposition to hernias to the strenuous physical nature of his work. Each testified that, should he continue his work, he would likely sustain future hernias. In particular, Dr. Anderson, who performed surgery to treat the hernia upon which the claim in the present action is based, testified about the life-threatening nature inherent in the pursuit of any physical labor, even light yard work, by Eaddy. Dr. Anderson suggested that, at most, Eaddy would be capable of "sedentary type work." Although he served as a bank teller, he worked in that position over three decades ago and did so for only one year. Further, the work skills he developed over his thirty-five year career with Smurfit-Stone depended heavily on strenuous physical labor, which he can no longer safely perform. Given Eaddy's age and the evidence of record that he has no current skills needed to perform any sedentary work, we find there is substantial evidence he has no skills for which a reasonably stable market exists. Accordingly, we find the record supports the Commission's finding that Eaddy is totally and permanently disabled.

III. Credit for Total and Permanent Disability

Smurfit-Stone further contends, assuming Eaddy is totally and permanently disabled, the circuit court erred in failing to find it is entitled to a credit offsetting its obligation by the amounts of (1) all accident and sickness benefits paid to Eaddy related to the present hernia, and (2) all workers'

compensation benefits Eaddy received in the past while working for Smurfit-Stone for prior workers' compensation injuries.[1] We disagree.

Smurfit-Stone summarily asserts it is entitled to a credit for thirty-three weeks of accident and sickness benefits, which the claimant testified he received following the incident. It cites no law in support of this assertion, but merely claims an entitlement to the credit. This court has noted that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review. Glasscock, Inc. v. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). See also R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (where no authority is cited and argument in brief is conclusory, issue is deemed abandoned); First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (appellant was deemed to have abandoned issue where he failed to provide any argument or supporting authority). At any rate, even if this argument were properly presented to this court, we agree with the circuit court that, pursuant to Muir v. C.R. Bard, Inc., 336 S.C. 266, 297-98, 519 S.E.2d 583, 599-600 (Ct. App. 1999), Smurfit-Stone is not entitled to a credit for the payments because there is no evidence of record that the accident and sickness benefits were made with reference to liability under the provisions of the Workers' Compensation Act.

In like summary fashion, Smurfit-Stone further asserts it is entitled to a credit for all benefits Eaddy received from past workers' compensation injuries because he is only entitled to "compensation for the degree of disability which would have resulted had he not suffered from prior hernias pursuant to S.C. Code Ann. §§ 42-9-150, 42-9-160, and 42-9-170." Assuming arguendo that Smurfit-Stone has not abandoned this issue based on its conclusory argument, we find no merit to its position.

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[1] Although it is questionable whether Smurfit-Stone raised this issue to the single commissioner, it is clear it was raised before both the full commission and the circuit court, and was addressed by the circuit court in its order.

South Carolina Code Ann. § 42-9-150 provides:

> If an employee **has a permanent disability or** has sustained a **permanent injury** in service in the Army or Navy of the United States or in another employment **other than that in which he receives a subsequent permanent injury** by accident, such as specified in § 42-9-30 or the second paragraph of § 42-9-10 he shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed, except that such employee may receive further benefits as provided by §§ 42-7-310, 42-9-400 and 42-9-410 Title (sic) if his subsequent injury qualifies for additional benefits provided therein.

S.C. Code Ann. § 42-9-150 (1985) (emphasis added). As noted by the circuit court, pursuant to this statute, an employer would only be entitled to credit for previous awards of workers' compensation benefits involving permanent disability. There is no evidence of record, however, that Eaddy ever sustained a previous permanent injury or received any permanent benefits for such an injury. The only evidence of any prior workers' compensation benefits received by Eaddy were temporary total benefits paid by Smurfit-Stone. Neither is there evidence that Eaddy sustained a previous injury in service in the Army or Navy or in another employment besides that of Smurfit-Stone. Accordingly, this statute is inapplicable to the present situation.

South Carolina Code Ann. § 42-9-160 provides:

> If an employee receives an injury for which compensation is payable **while he is still receiving or entitled to compensation for a previous injury** in the same employment, he shall not at the same time be entitled to compensation for both injuries, **unless the later injury be a permanent injury** such as specified in § 42-9-30 or the second paragraph of § 42-9-10, but he shall be entitled to compensation for that injury and from the time of

> that injury which will cover the longest period and the largest amount payable under this Title.

S.C. Code Ann. § 42-9-160 (1985) (emphasis added). We first note this statute is inapplicable as there is no evidence Eaddy was "still receiving or entitled to compensation" for his previous hernias. Further, Eaddy would fall under the exception of the provision since his latter hernia has been determined to be a permanent injury.

Finally, South Carolina Code Ann. § 42-9-170 provides in pertinent part:

> **If an employee receives a permanent injury** as specified in § 42-9-30 or the second paragraph of § 42-9-10 **after having sustained another permanent injury in the same employment**, he shall be entitled to compensation for both injuries, but the total compensation shall be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding five hundred weeks.

S.C. Code Ann. § 42-9-170 (1985) (emphasis added). Again, because Eaddy did not suffer a permanent injury from the previous hernias, this statute is immaterial.

Accordingly, we find no error in the circuit court's refusal to find Smurfit-Stone was entitled to any credit for accident and sickness benefits[2] or previous workers' compensation benefits.

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[2]As in Muir, 336 S.C. 266, 298 n.1, 519 S.E.2d 583, 600 n.1, we express no position on Smurfit-Stone's subrogation rights for the accident and sickness benefits.

IV. Commission's Order

Smurfit-Stone next contends that the circuit court erred in affirming the Commission's order, alleging the order violated the South Carolina Administrative Procedures Act (Act). We disagree.

The Act provides, in pertinent part:

> A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

S.C. Code Ann. § 1-23-350 (1986). Here, Smurfit-Stone contends that the Commission's order, which generally affirmed the single commissioner, lacked separately stated findings of fact and conclusions of law. It also contends the order lacked an explicit statement of the underlying facts supporting the Commission's findings, as well as separately stated conclusions of law. We find this argument unavailing.

The Commission incorporated the single commissioner's order by reference as if set forth verbatim within the Commission's order. The Commission's order stated, in part:

> [W]e, the appellate panel have reviewed the Award and weighed the evidence as presented at the initial hearing. We have also considered all issues raised [in Eaddy's and Smurfit-Stone's briefs].
>
> After careful review in the instant case, the appellate panel of the [Commission] has determined that all of the Hearing Commissioner's Findings of Fact and Rulings of Law are correct as stated. We find that such Findings of Fact and Conclusions of Law are hereby **included** in this Order by ***reference,*** and by such

> ***reference***, the requirements of Baldwin v. James River Corporation, 304 SC 485, 405 SE2d4, (sic) as well as Sections 42-17-40 and 1-23-350 of the South Carolina Code of Laws have been met.

The opinion also contained a footnote that stated:

> It should be noted that the findings of fact and conclusions of law as contained in the single commissioner's order are specifically referenced and included in toto in the "order" portion of this decision so as to comply with the requirements of Baldwin v. James River Corp., 304 SC 485, 405 SE2d4,[3] as well as [the APA]. In the interest of brevity they have not been repeated in the body of this order.

We find the Commission's incorporation of the single commissioner's findings of fact and conclusions of law by reference provided the circuit court with sufficiently definite and detailed findings to allow the circuit court to ascertain whether the findings by the Commission were supported by the evidence and whether the law was correctly applied. Accordingly we find the Commission's order complied with the pertinent provisions of the APA.

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

AFFIRMED.

CONNOR and ANDERSON, JJ., concur.

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[3] It should be noted the correct citation is Baldwin v. James River Corp., 304 S.C. 485, 405 S.E.2d 421 (Ct. App. 1991). In Baldwin, this court determined the findings of fact in the Commission's order, reversing the single commissioner's finding of compensability, were conclusory, and remanded the case to the Commission to make sufficient findings of fact to afford a reasonable basis for appellate review.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas Trancik, M.D., P.A., Appellant,

v.

USAA Insurance Company &
Rosemary Wiggs, Respondents.

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

Opinion No. 3644
Heard February 13, 2003 – Filed May 27, 2003

AFFIRMED

Robert W. Buffington, of Columbia, for Appellant.

Paul C. Ballou, of Columbia, for Respondent.

HOWARD, J.: Thomas Trancik, M.D., P.A. ("Trancik")[1] brought this action for breach of contract and violation of the Unfair Trade Practices Act ("UTPA"), alleging USAA Insurance Company ("USAA") failed to honor an assignment of settlement proceeds executed by his patient, Rosemary Wiggs, in connection with medical treatment she received following a motor-vehicle collision with USAA's insured. The trial court dismissed the suit, ruling Trancik failed to state a claim for relief because no contractual privity with USAA existed. We affirm.

FACTS

Trancik performed surgery on Wiggs for injuries she received in an automobile accident. Prior to surgery, Wiggs executed an assignment, which states in relevant part:

> I Rose Mary Wiggs, hereby guarantee payment of all charges incurred . . . and hereby assign any medical insurance . . . or settlement proceeds due because of liability of a third party by any party, organization or insurance company . . . .
>
> . . .
>
> In the event the undersigned is entitled to physician or physicians benefits of any type whatsoever arising out of any policy of insurance insuring the patient or any party liable to patient, said benefits are hereby assigned to Physician for application on patient's bill, and it is agreed that the Physician may receipt for any such payment and such

[1] Although Thomas Trancik, M.D., P.A. is a separate legal entity, we refer to the Appellant as Trancik in his individual capacity for ease of writing.

> payment shall discharge the said insurance company of any and all obligations under the policy to the extent of such payment, the undersigned and/or patient being responsible for charges not covered by this assignment.

Subsequently, Wiggs sued the at-fault driver, who referred the matter to her insurance carrier, USAA. Trancik sent the assignment to USAA, and USAA acknowledged receipt of it. USAA then settled Wiggs' claim, sending payment directly to her. Wiggs did not pay Trancik.

Trancik brought this suit against USAA, claiming the payment of settlement proceeds directly to Wiggs breached the assignment contract and violated the UTPA. The trial court dismissed both causes of action. Trancik appeals the dismissal of his breach of contract claim, arguing the trial court improperly concluded he lacked contractual privity with USAA. We affirm.

STANDARD OF REVIEW

A trial court must dismiss a claim pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, if the pleadings, when taken in the light most favorable to the plaintiff, fail to allege sufficient facts to constitute a cause of action. See Woodell ex rel. Allen v. Marion Sch. Dist. One, 307 S.C. 297, 298, 414 S.E.2d 794, 794 (Ct. App. 1992). However, the motion cannot be granted if the facts, and their reasonable inferences, demonstrate the plaintiff could prevail on a theory of the case. See Brown v. Leverette, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987).

LAW/ANALYSIS

Trancik argues the trial court erred by granting USAA's motion to dismiss. He contends contractual privity existed between Trancik and USAA by virtue of the assignment contract. We disagree.

According to the complaint, two contracts existed: the insurance contract between USAA and the at-fault driver and an assignment contract between Wiggs and Trancik. Trancik's complaint alleges USAA breached the assignment contract because Wiggs assigned her right to the insurance proceeds to him, USAA had notice of the assignment, and USAA failed to pay the insurance proceeds directly to him.

Trancik argues USAA's receipt of the assignment contract was sufficient to create contractual privity with USAA, citing Gray v. State Farm Auto. Ins. Co., 327 S.C. 646, 491 S.E.2d 272 (Ct. App. 1997) to support this contention. We disagree with Trancik's reading of the case.

In Gray, two chiropractors obtained assignments from patients stating any money collected from the patients' insurance carriers was assigned to the chiropractors. The assignments did not include claims against third-party carriers. The chiropractors sent these assignments to third-party-insurance companies, which refused to honor them. As in this case, the patients failed to pay the chiropractors, and the chiropractors sued the third-party-insurance companies, claiming they breached the assignment contract between the chiropractors and their patients.

This Court ruled no contractual privity existed between the chiropractors and the third-party-insurance companies, noting the assignments did not purport to cover the patients' claims against third parties or their carriers. The language of the purported assignments applied only to the patients' insurance carriers, not third-party carriers. Id. at 650, 491 S.E.2d at 274.

Because the Gray court noted the plain language of the assignments did not include claims against third-party insurers, the Court did not consider whether such wording would create an obligation on the part of a third-party insurer. Gray held, as a matter of contract construction, the chiropractors failed to allege a cause of action because third-party carriers were not mentioned in the assignment.

However, Gray does not provide that contractual privity is established merely by including third-party-insurance claims in the assignment. Thus, this case is inapposite.[2] Furthermore, we believe Trancik's position is untenable.

South Carolina contract law carries a presumption that an individual who is not a party to a contract lacks privity to enforce it. See Touchberry v. City of Florence, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988). By the same token, an individual who is not a party to a contract generally cannot be liable for its breach. See Holder v. Haskett, 283 S.C. 247, 251, 321 S.E.2d 192, 194 (Ct. App. 1984).

The only parties to the assignment contract are Trancik and Wiggs. USAA is not a party to it. Thus, unless USAA's insurance policy establishes contractual privity with Wiggs or Trancik, no basis exists upon which USAA can be held liable for breach of the assignment contract. See Holder, 283 S.C. at 251, 321 S.E.2d at 194 (holding an individual who is not a party to a contract cannot be liable for its breach).

Under the common law, "no privity [of contract exists] between an injured person and the tortfeasor's liability insurer, and the injured person has no right of action at law against the insurer." 44 Am. Jur. 2d Insurance § 1445 (1982); see Major v. Nat'l Indem. Co., 267 S.C. 517, 520, 229 S.E.2d 849, 850 (1976) (holding "[a]t common law, no right to maintain suit directly against the insurer existed absent privity of contract between the claimant and the insured"); McPherson v. Michigan Mut. Ins. Co., 306 S.C. 456, 464, 412 S.E.2d 445, 449 (Ct. App. 1991) (holding the insured clients of an insured party were not in contractual privity with insured's reinsurance company because they

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[2] Trancik also argues that the following cases support his position: Dunbar v. Johnston, 170 S.C. 160, 169 S.E. 846 (1933), Thomasson v. Ocean Point Gulf, Inc., 300 S.C. 29, 386 S.E.2d 282 (Ct. App. 1989), and Southern Gen. Factors, Inc. v. Parker Concrete Pile Co., 236 F. Supp. 103 (D.S.C. 1964). However, these cases are equally inapposite because they apply to assignments of first-party benefits.

were not a party to the reinsurance contract), aff'd as modified by, 310 S.C. 316, 426 S.E.2d 770 (1993) (addressing whether the injured party could sue the tortfeasor's insurance company, pursuant to the policy, and not addressing whether the insured party could sue the reinsurance company).

Third-party-liability-insurance contracts are generally indemnity contracts whereby the insurer, or the first party, agrees to pay the insured, or the second party, the amount of any damages the insured may become legally liable to pay a third party. See Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990); see also S.C. Code Ann. § 38-77-140 (2002) ("No automobile insurance policy may be issued . . . unless it contains a provision insuring the persons defined as insured against loss from liability imposed by law for damages arising out of the ownership, maintenance, or use of . . . [motor vehicles]."). Thus, the third party, or the incidental beneficiary, does not have a contractual relationship with the insurer and cannot maintain an action against the insurer for breach of the insurance contract. See Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994) (holding a third person not in contractual privity with the contracting parties has no right to enforce a contract unless the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to that third person); see also Kleckley v. Northwestern Nat'l Cas. Co., 338 S.C. 131, 136, 526 S.E.2d 218, 220 (2000) (holding an injured third party could not assert a bad faith claim against a tortfeasor's insurance company because the injured party was not a party to the contract); Major, 267 S.C. at 520, 229 S.E.2d at 850.

In this case, Trancik does not claim the insurance contract is anything but an indemnity contract.[3] Furthermore, Trancik does not assert that he or Wiggs is a third-party, as opposed to an incidental, beneficiary of the insurance contract. Thus, Trancik has not alleged a basis upon which to assert the existence of contractual privity between

[3] The USAA insurance policy is not included in the record on appeal.

Wiggs and USAA. See 44 Am. Jur. 2d Insurance § 1445 (1982); Major, 267 S.C. at 520, 229 S.E.2d at 850; McPherson, 306 S.C. at 464, 412 S.E.2d at 449.

Because Wiggs had no contractual privity with USAA, Trancik received no greater right from Wiggs through her assignment. See Singletary v. Aetna Cas. & Sur. Co., 316 S.C. 199, 201, 447 S.E.2d 869, 870 (Ct. App. 1994) (holding an "assignee . . . stands in the shoes of its assignor"); Rosemond v. Campbell, 288 S.C. 516, 522, 343 S.E.2d 641, 645 (Ct. App. 1986) ("At common law, an assignee's rights can be no greater than those of his assignor."). Therefore, notwithstanding the obligations incurred by Wiggs pursuant to the assignment contract, mere notification of the assignment was insufficient to contractually bind USAA. Taking Trancik's well-pled allegations as true, USAA was not in privity of contract with Wiggs or Trancik and was not a party to the assignment. Therefore, USAA had no contractual duty to abide by its terms.

CONCLUSION

Based on the foregoing, the decision of the trial court is

AFFIRMED. [4]

HUFF and STILWELL, JJ., concur.

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[4] The trial court also ruled the assignment was unenforceable because, if valid, it would place an undue burden on USAA. Because we agree with the trial court's ruling no contractual privity existed, we need not reach this issue.