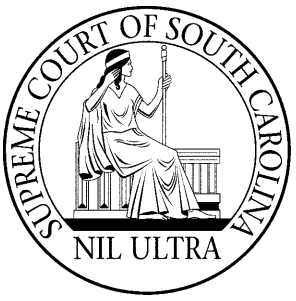

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

June 9, 2003

ADVANCE SHEET NO. 22

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

The State, Respondent,

v.

Florence Robinson Evans, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25661
Heard January 9, 2003 - Filed June 9, 2003

REVERSED

Senior Assistant Appellate Defender Wanda H. Haile, of Columbia, for Petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General S. Creighton Waters, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Florence Evans ("Evans") was granted certiorari from the Court of Appeals' decision reversing trial court's suppression of Evans' statement and remanding this case to the trial court with direction that the trial court make a more definite ruling as to whether the arresting officers violated petitioner's *Miranda*[1] rights. Evans was charged with three counts of murder after her three children died in a mobile home fire.

FACTUAL/PROCEDURAL BACKGROUND

On the morning of March 4, 1994, Evans' mobile home caught fire and burned to the ground, killing her three children. SLED arson agent Terry Alexander ("Alexander") arrived to investigate the cause of the fire and spoke with Evans two separate times that afternoon. A very upset Evans was willing to talk with Alexander but refused to provide a written statement. Alexander returned to the house where Evans was staying ten days later to get a formal written statement from her. Evans was not at the home, so Alexander left a message asking her to come to the Pageland, South Carolina police station.[2]

Evans arrived at the police station later that day with some of her relatives, and Alexander and SLED Lieutenant Doug Ross ("Ross") took her into a back office to take her statement. The SLED agents never read Evans her *Miranda* rights.

During the interview, Evans gave several reasons as to how the fire may have started: a faulty electrical outlet, dogs under the trailer disrupting the electrical wiring, a heating stove that was left on, and the fact that her 21 year-old sister was teaching her son how to light a fire. Ross repeatedly told Evans that he did not believe any of her explanations. Evans remained emotionally unstable during the interview. She sobbed frequently and

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[2] By the time that Alexander returned to get a statement from Evans, he had received results from a forensics test that concluded that an "accelerant" was present in the mobile home fire.

continuously asked the agents "to get her some help." Finally, the agents determined that the interview was bearing fruit, and they stepped out of the room.

The agents met Agent Jennifer Edwards ("Edwards") of the SLED Child Fatality Division outside the room, and they requested that she attempt to talk with Evans who was shaking, sobbing, and very nervous. Edwards tried to sympathize with Evans by discussing religion, saying that her children must be in heaven. They also discussed Evans' dead mother and "female problems" that Evans had experienced with the birth of her three children. Evans kept on asking for help, and Edwards told her she would get her some help.

The two women were in the room together for around 45 minutes to an hour. Evans went to the bathroom two times during this period, and Edwards accompanied her and waited outside the bathroom door.

Eventually, Evans told Edwards, "I dropped a lit piece of paper on the floor. I walked next door and waited until somebody saw the fire." Edwards immediately called Ross and then Alexander into the room, and Evans repeated the statement three times. Alexander wrote down the statement on a "voluntary statement" form, which already contained Evans' original written statement taken earlier in the interview. Evans signed and initialed the document. She testified that she believed that in signing the document that she would get some help. Shortly after making the statement, the agents arrested Evans. The interview had lasted for three hours.

Evans' cousin Inez Robinson, who accompanied Evans to the police station, attempted to go back and see Evans three times, but the officers refused her access to the back room.

The trial judge granted Evans' motion to suppress the inculpatory statement that Evans gave to the SLED agents, finding that the agents had placed Evans in the functional equivalent of a custodial interrogation and should have read Evans her *Miranda* rights.

Initially, the Court of Appeals upheld the trial judge's determination, finding that Evans was not free to leave the custody of the SLED agents. *State v. Evans*, 341 S.C. 219, 534 S.E.2d 10 (Ct. App. 2000). On rehearing, the Court of Appeals reversed and remanded the action so that the trial judge could make a more definite ruling as to whether Evans was in custody. *State v. Evans*, 343 S.C. 685, 541 S.E.2d 852 (Ct. App. 2001).

This Court granted a Petition for Certiorari to review the Court of Appeals' reversal of the trial judge's grant of the motion to suppress an inculpatory statement. Evans raises the following issue for review:

> Did the Court of Appeals err in reversing the trial court and remanding the issue of whether Evans was in police custody when she gave an inculpatory statement?

STANDARD OF REVIEW

Appellate review of whether a person is in custody is confined to a determination of whether the ruling by the trial judge is supported by the record. *State v. Easler*, 322 S.C. 333, 342, 471 S.E.2d 745, 751 (Ct. App. 1996) *aff'd as modified*, 327 S.C. 121, 489 S.E.2d 617 (1997).

LAW/ANALYSIS

Evans asserts that the Court of Appeals erred in reversing and remanding the trial judge's finding that she was in custody when she made her inculpatory statement and that her statement should be suppressed because the agents failed to *Mirandize* her. We agree.

The purpose of the *Miranda* warnings is to apprise the defendant of her constitutional privilege to not incriminate herself while in the custody of law enforcement. *Miranda*, 384 U.S. at 444, 86 S.Ct. at 1612. Law enforcement must state the *Miranda* warnings "after a person has been taken into custody or otherwise deprived of his freedom of action in any way." *Id*. To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning. *Berkemer v. McCarty*, 468 U.S. 420, 104

S.Ct. 3138, 82 L.Ed.2d 317 (1984); *United States v. Helmel*, 769 F.2d 1306, 1320 (8th Cir. 1985); *Robert Kaupp v. Texas*, ___ S.Ct. ___, 2003 WL 2010974 (May 5, 2003). The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody. *Bradley v. State*, 316 S.C. 255, 257, 449 S.E.2d 492, 493-494 (1994); *State v. Sprouse*, 325 S.C. 275, 282, 478 S.E.2d 871, 875 (Ct. App. 1996).

In his oral order, the trial judge used the correct objective standard in analyzing whether Evans was in custody. In addition, he stated, "[y]ou also have to take into account that she was at the time in her mid-20s, mildly retarded, no evidence of any record so, therefore, no real evidence of exposure." The Court of Appeals reversed and remanded the trial judge's determination because it found that the judge might have tainted the objective custody analysis with this subjective comment. *State v. Evans*, 343 S.C. at 692, 541 S.E.2d at 855.

We believe that the trial judge's order provides abundant justification for his determination that Evans was in police custody. First, he found Evans was not *free to leave*. When Evans went to the restroom, Agent Edwards accompanied her at all times and waited outside the restroom. Also, the officers would not permit Evans' cousin to go back to the interview room. Second, the *place* where the agents interviewed Evans also concerned the judge in that it was in a back office in the police station. Third, the judge noted that the interview was *lengthy*, as it lasted three hours. Finally, the judge was most concerned with the agent's *purpose*. He said:

> What really turns it for me was that when … That her story was challenged and once that was challenged, that changes from just a routine inquiry to name, rank and serial number. They (Alexander and Ross), in fact, put it to her that they did not believe her. As soon as that occurred, then the switch over to the female officer (Edwards) occurred.

We hold that the trial judge's order, *in toto*, reflects that he objectively examined the totality of the circumstances and concluded that the agents placed Evans in a custodial interrogation setting, which warranted a recitation

of her *Miranda* rights. Accordingly, the trial judge was justified in granting Evans' motion to suppress her inculpatory statement.

CONCLUSION

We **REVERSE** the Court of Appeals and find that the trial judge did not err in granting Evans' motion to suppress an inculpatory statement. We believe that after considering the totality of the circumstances, the judge did not abuse his discretion in concluding that Evans was in police custody when she made the inculpatory statement.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sherry Brown, Employee, Petitioner,

v.

Bi-Lo, Inc., Employer and Self-Insurer, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
Thomas J. Ervin, Circuit Court Judge

Opinion No. 25662
Heard October 9, 2002 - Filed June 9, 2003

REVERSED

Donald R. Moorhead, of Donald R. Moorhead, PA, of Greenville, for petitioner.

Jeffrey Scott Jones, of Wilson & Jones, LLC, of Greenville, for respondent.

Alford Haselden, of Haselden, Owen, & Boloyan, of Clover; and Desa A. Ballard, of Desa A. Ballard, PA, of West Columbia, for Amicus Curiae South Carolina Trial Lawyers' Association.

Samuel Painter, of Nexsen, Pruet, Jacobs and Pollard, of Columbia, for Amicus Curiae South Carolina Self-Insurers' Association.

Jeffrey Ezell and Michelle DeLuca O'Connor, Gallivan, White & Boyd, PA, of Greenville, for Amicus Curiae South Carolina Defense Trial Attorneys' Association, Inc.

JUSTICE BURNETT: We granted a writ of certiorari to review the Court of Appeals' decision in Brown v. Bi-Lo, Inc., 341 S.C. 611, 535 S.E.2d 445 (Ct. App. 2000). We reverse.

FACTS

Petitioner Sherry Brown (Employee) sustained a compensable injury while working for Respondent Bi-Lo, Inc., (Employer). After Employee's surgery, Employer agreed to continue to provide medical treatment. Several years later, a question arose whether medical treatment sought by Employee for subsequent falls was related to the work injury and, thus, whether Employer was required to pay for the medical treatment. Employee filed a Form 50 requesting a hearing to obtain medical treatment.

Employer hired a rehabilitation nurse to contact Employee's treating physicians regarding the nature of her condition and cause of her falls. Employee's attorney wrote a letter to the nurse warning her not to discuss Employee's condition with Employee's treating physicians and threatening legal action if she did not comply. Employee's attorney wrote similar letters to Employee's treating physicians, advising them not to engage in *ex parte* communications with Employer or Employer's workers' compensation carrier.

Employer complained to the Workers' Compensation Commission (Commission). The Commission ordered Employee's attorney to "cease and desist from obstructing contact, including contact involving *ex*

parte communications, meetings, correspondence, and/or answering questions in written and oral form, between the treating physician and the defendant's representatives."

ISSUE

Did the Court of Appeals err by affirming the Commission's order requiring Employee's counsel to cease and desist from seeking to limit contact between Employer's representatives and Employee's health care providers?

DISCUSSION

The South Carolina Workers' Compensation Act (the Act)[1] requires physicians provide employers and/or their representatives with pertinent information regarding the treatment of a compensation claimant.[2] South Carolina Code Ann. § 42-15-95 (Supp. 2002) specifically provides:

> All *existing information* compiled by a health care facility, as defined in Section 44-7-130, or a health care provider licensed pursuant to Title 40 pertaining directly to a workers' compensation claim must be provided to the insurance carrier, the employer, the employee, their attorneys or the South Carolina Workers' Compensation Commission, within fourteen days after receipt of *written request*. A health care facility and a health care provider may charge a fee for the search and duplication of a *medical record*, . . .The facility or provider may charge a patient or the patient's representative no more than the actual cost of reproducing an *X-ray*. . . *If a treatment facility or physician fails to send the requested information within forty-five days after receipt of the request*, the person or entity making the request may apply to the

[1] S.C. Code Ann. § 42-1-10 et. seq. (1985).

[2] The Act specifies that facts communicated to or otherwise learned by a physician during the course of treatment are not privileged. S.C. Code Ann. § 42-15-80.

commission for an appropriate penalty payable to the commission, not to exceed two hundred dollars.

(emphasis added); see 25A S.C. Ann. Reg. 67-1301(A)(Supp. 2002) ("[a] medical practitioner or treatment facility shall furnish upon request all medical information relevant to the employee's complaint of injury to the claimant, the employer, the employer's representative, or the Commission….").

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993). If a statute's language is plain, unambiguous, and conveys a clear meaning "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

Section 42-15-95 contemplates the disclosure of existing written records and documentary materials. The statute refers to the exchange of "existing information," "medical record[s]," and "X-ray[s]" after receipt of a written request. Moreover, it provides a penalty if the facility or physician fails to "send" information as requested. This language indicates the General Assembly's clear intent to require health care providers and facilities to forward existing written records and documents. The statute does not authorize other "*ex parte*"[3] methods of communication between an insurance carrier, employer, or their representatives and the claimant's health care provider. Of course, insurance carriers and employers may obtain additional information through approved methods of discovery. See § 42-3-160

[3] We use the term "*ex parte* communication" because that was the term used by the Commission. However, the exchange of information sought here by Employer is not an "*ex parte* communication." Black's Law Dictionary 597 (7th ed. 1999) (*ex parte* communication is defined as "prohibited communication between counsel and the court when opposing counsel is not present.").

(providing for taking of depositions in workers' compensation actions). Likewise, employer representatives may speak with the claimant's health care provider provided they obtain the claimant's permission.[4]

We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Brown v. South Carolina Dep't of Health and Envtl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002). Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation. Id.; Richland County School Dist. Two v. South Carolina Dept. of Educ., 335 S.C. 491, 517 S.E.2d 444 (Ct. App.1999).

We agree with the Court of Appeals that permitting employers and their representatives to speak and/or communicate directly with physicians may, in some instances, promote "swift and sure compensation," which is one goal of the Act.[5] Nevertheless, workers' compensation is a creature of statute. As such, we are bound to strictly construe the terms of the statute and to rely on the General Assembly to amend the statute where

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[4] Our analysis is supported by similar decisions in North Carolina holding that policy considerations of patient privacy, physician-patient confidences, and the adequacy of formal discovery methods render *ex parte* communications between an employee's treating physician and employer representatives improper. Burchette v. East Coast Millwork Dist., Inc., 562 S.E.2d 459 (N.C. Ct. App. 2002); Salaam v. North Carolina Dep't of Transp., 468 S.E.2d 536 (N.C. Ct. App. 1996), cert. dismissed as improvidently granted 480 S.E.2d 51 (N.C. 1997). Other jurisdictions hold similarly. Hydraulics, Inc. v. Industrial Comm'n, 768 N.E.2d 760 (Ill. App. Ct. 2002); Linton v. City of Grant Falls, 749 P.2d 55 (Mont. 1988) rev'd on other grds. Anderson v. Hammer, 826 P.2d 931 (1992); Travelers Ins. Co. v. Woodard, 461 S.W.2d 493 (Tex. Civ. App. 1970).

[5] See Parker v. Williams and Madjanik, Inc., 275 S.C. 65, 70, 267 S.E.2d 524, 526 (1980).

necessary. See Wigfall v. Tideland Utilities, Inc., Op. No. 25628 (S.C. Sup. Ct. filed April 14, 2003) (Shearouse Adv. Sh. No. 14 at pg.10) (because Act provides compensatory system in derogation of common law rights, Court must strictly construe the statute and leave it to the General Assembly to amend and define any ambiguities).

For these reasons, we reverse the decision of the Court of Appeals. S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2002) (court may reverse decision if substantial rights of appellant have been prejudiced because agency conclusions are affected by error of law).

REVERSED.

TOAL, C.J., MOORE and WALLER, JJ., concur.
PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully disagree with the majority's conclusion and would affirm the Court of Appeals.

Workers' compensation laws were enacted so that the "employee receives the right to swift and sure compensation; the employer receives immunity from tort actions by the employee. This quid pro quo approach to workers' compensation has worked to the advantage of society as well as the employee and employer." Parker v. Williams and Madjanik, Inc., 275 S.C. 65, 70, 267 S.E.2d 524, 526 (1980). The purpose of workers' compensation is to settle claims quickly and efficiently. Id. One of the ways the legislature sought to insure this result was by enacting statutes that require the exchange of medical information so that claims can be evaluated and settled in a timely manner.

Both the employer's representatives and the claimant's representatives must comply with the statutes and regulation compelling disclosure of relevant medical information. S.C. Code Ann. § 42-15-95 (1976) provides:

> All *existing information* compiled by a health care facility, as defined in Section 44-7-130, or a health care provider licensed pursuant to Title 40 *pertaining directly* to a workers' compensation claim must be provided to the insurance carrier, the employer, the employee, their attorneys or the South Carolina Workers' Compensation Commission, within fourteen days after receipt of written request….
> (emphasis supplied).

25A S.C. Code Ann. Reg. § 67-1301(A) (Supp. 2001) provides "[a] medical practitioner or treatment facility *shall furnish upon request all medical information relevant to the employee's complaint of injury to* the claimant, *the employer, the employer's representative*, or the Commission…." (emphasis supplied). The claimant's health care providers and treatment facilities are thus compelled by the statute, and by the regulation, to disclose information relevant to the claimant's injury to all parties and their representatives.

The question before us is whether the Commission properly interpreted its regulation to allow Employer and its representatives to contact the health care providers "*ex parte*"[1] whether face to face, through written correspondence, or through oral communications. The decision of an agency interpreting its own regulation is given great deference. Goodman v. City of Columbia, 318 S.C. 488, 458 S.E.2d 531 (1995). I would find that such an interpretation of the regulation[2] was not an abuse of discretion.[3]

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[1] I agree with the majority that the phrase "*ex parte* communication" is not the appropriate term. The exchange of information sought by Employer is not an "*ex parte* communication." An *ex parte* communication is defined as "prohibited communication between counsel and the court when opposing counsel is not present." Black's Law Dictionary 597 (Bryan A. Garner ed., 7th ed., West 1999). The phrase "*ex parte* communication" implies that the communication was with the court. Here, the communication was between the employer's representative and a witness. Further, the phrase implies the communication was done without notice to the other party. In this case, the claimant was on notice that the Employer's representatives could communicate with the physician because she initiated the workers' compensation claim.

[2] There is no challenge to the regulation as exceeding the agency's authority.

[3] I agree with the majority that decisions of North Carolina courts construing that state's workers' compensation statutes are entitled to great weight. Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E.2d 110 (2002). However, I respectfully disagree that North Carolina's precedent is entitled to great weight in the case at bar. North Carolina recognizes a physician-patient privilege, Crist v. Moffatt, 389 S.E.2d 41 (N.C. 1990), while South Carolina does not. McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997). North Carolina's Supreme Court first held that *ex parte* communications were inappropriate in a medical malpractice case in Crist v. Moffatt, supra. The North Carolina Court of Appeals then held that *ex parte* communications, therefore, were also banned in workers' compensation cases, but stated were they "writing on a clean slate" the defendant's arguments for *ex parte* communications "would carry great force…we

Both the statute and the regulation compel the claimant's health care provider to furnish the employer's representatives medical information pertaining to the worker's claim.[4] The providers are limited to furnishing information that is relevant to the patient's claim. So long as the information is relevant to the claim, the provider is not limited as to the manner of its communication. While "existing information" will most often take the form of written records nothing precludes the provider from communicating verbally or in writing with anyone authorized to receive such information. I would hold that neither the claimant nor his attorney is permitted, in the workers' compensation setting, to limit the communication between the employer's representatives and the claimant's medical provider as to matters relevant to the claim.

Petitioner expresses concern that the doctor may exceed the scope of relevant medical information when responding to such an inquiry. Physicians must be guided by their code of medical ethics.[5] In my opinion, since the responses are compelled by law, the physician who respects the line between information relevant to the claim, and that which is irrelevant, would not be exposed to liability for improper disclosure.[6]

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nonetheless are bound by Crist." Salaam v. N.C.D.O.T., 468 S.E.2d 536, 539 (N.C. Ct. App. 1996). We are writing on a "clean slate."

[4] S.C. Code Ann. §42-15-95 (1976); 25A S.C. Code Ann. Reg. §67-1301(A)(Supp. 2001).

[5] A physician is governed by the ethical guidelines adopted and published by the Board of Medical Examiners. S.C. Code Ann. § 40-47-200 (1976). The relevant provision reads, "A physician shall respect the rights of patients, of colleagues, and of other health professionals, and shall safeguard patient confidences within the constraints of the law." 26 S.C. Code Ann. Reg. § 81-60(D) (Supp. 1995).

[6] See South Carolina State Bd. of Med. Exam. v. Hedgepath, 325 S.C. 166, 480 S.E.2d 724 (1997) (Court held ""[a] physician acts ethically when she maintains patient confidences, and when she provides confidential

I respectfully disagree with the majority and would find that the Commission did not err in ordering Petitioner's attorney to cease and desist from seeking to limit contact between the Employer's representatives and Petitioner's health care provider. Therefore, I would affirm the decision of the Court of Appeals.

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information to others *as required by law* or as authorized by the patient"); McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (1997) (Court allowed that under certain circumstances, a physician might be required to reveal confidences when public interest dictates disclosure, and that even though the breach of confidentiality tort exists, "the right is not absolute and must give way *when disclosure is compelled by law* or is in the best interest of the patient or others").

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Coastal Conservation League and Sierra Club, Respondents,

v.

South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, Port Royal Plantation, and the Town of Hilton Head Island, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Beaufort County
Thomas Kemmerlin, Master-in-Equity

Opinion No. 25663
Heard May 14, 2003 - Filed June 9, 2003

REVERSED

Curtis L. Coltrane, of Coltrane, Alford & Wilkins, of Hilton Head Island, and Leslie West Stidham, Chief Counsel of S.C. Department of Health and Environmental Control – Office of Ocean and Coastal Resource Management, of Charleston, for Petitioners.

James S. Chandler, Jr., of Pawleys Island, for Respondents.

JUSTICE PLEICONES: We granted certiorari to consider a decision of the Court of Appeals holding that the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (OCRM) was prohibited by the Beachfront Management Act[1] (BMA) from issuing permits allowing existing groins[2] to be repaired or new groins to be constructed. South Carolina Coastal Conserv. League v. South Carolina Dep't of Health and Envtl. Control, 345 S.C. 525, 548 S.E.2d 887 (Ct. App. 2001). We reverse.

FACTS

OCRM issued a permit to petitioner Port Royal Plantation allowing petitioner to construct four new groins and to refurbish 17 existing groins. Respondents filed a request for a contested case hearing, seeking to overturn the permit. The administrative law judge (ALJ) granted petitioners'[3] motion for summary judgment, and respondents appealed to the Coastal Zone

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[1] S.C. Code Ann. §§48-39-10 et seq. (Supp. 2002).

[2] A groin is defined as "a structure designed to retard erosion of a beach by trapping littoral drift. Groins are usually perpendicular to the shore and extend from the shoreline into the water far enough to accomplish their purpose. Groins are narrow and vary in length from less than one hundred feet to several hundred feet…." 23A S.C. Code Ann. Reg. 30-1(24) (Supp. 2002).

[3] Petitioners are OCRM, Port Royal Plantation, and the Town of Hilton Head Island.

Management Appellate Panel, which affirmed the ALJ's decision. On appeal, the circuit court upheld the issuance of the permit.

Respondents then appealed to the Court of Appeals, which reversed. South Carolina Coastal Conserv. League v. South Carolina Dep't of Health and Envtl. Control, *supra*. The Court of Appeals held that the BMA prohibited the OCRM from issuing a permit for the construction of new groins or the reconstruction of existing groins. Id. This certiorari followed.

ISSUE

Whether the Court of Appeals erred in holding that the legislature intended to prohibit permits for the rehabilitation or construction of groins?

ANALYSIS

We begin our analysis by outlining the points upon which the parties and the Court of Appeals agree. There is no question that groins are not "erosion control structures or devices" as defined by S.C. Code Ann. § 48-39-270(1) (Supp. 2002). Accordingly, all agree that the specific prohibition on the construction of new erosion control devices in § 48-39-290(2)(a) and the restrictions on repairs to such devices in § 48-39-290(2)(b) do not apply to groins.

Further, there is no dispute that the policy of this State, expressed in the BMA, is to "protect, preserve, restore, and enhance the State's beach/dune system," and to use beach renourishment where appropriate. § 48-39-260 (Supp. 2002). The BMA authorized OCRM to "develop and institute a comprehensive beach erosion control policy," S.C. Code Ann. § 48-39-120(B) (Supp. 2002). Further, the BMA granted OCRM the discretion to determine whether to permit or deny alterations or utilization within the 'critical areas.' S.C. Code Ann. § 48-39-210 (Supp. 2002). Groins, by definition, must be located in 'critical areas'[4] on the 'active beach.'[5]

[4] The 'critical area' includes beaches. S.C. Code Ann. § 48-39-10(J)(3) (Supp. 2002).

Pursuant to this grant of authority, OCRM adopted regulations. One regulation specifically authorizes the use of groins where necessary "to enhance the design life of an ongoing renourishment effort … ." 23A S.C. Code Ann. Reg. 30-13(N) (Supp. 2002). The permit at issue in this case was issued pursuant to Reg. 30-13(N) and the BMA.

The Court of Appeals found the permit issue controlled exclusively by S.C. Code Ann. § 48-39-290. Section (A) of this statute generally prohibits new construction in the area seaward of the baseline (which includes the area where groins are located, the 'active beach'), subject to several exceptions. Groins are not among these exceptions. Therefore, the Court of Appeals held that OCRM lacked authority to issue groin permits.

Further, the Court of Appeals concluded that, because groins are not mentioned at all in the version of the BMA in effect at the time this permitting decision took place, [6] and because they must, of necessity, be constructed on the 'active beach,' 'special permits' to construct groins could not be issued pursuant to § 48-39-290(D)(1).[7] The Court of Appeals held that

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[5] The term 'active beach' is defined as "that area seaward of the escarpment or the first line of stable natural vegetation, whichever first occurs, measured from the ocean." S.C. Code Ann. § 48-39-270(13) (Supp. 2002).

[6] In March 2002, § 48-39-290(A) was amended to explicitly authorize the issuance of permits to construct and/or reconstruct groins. See 2002 S.C. Act No. 198. We agree with petitioners that this amendment does not moot this suit, since the effect of our decision today reversing the Court of Appeals is to reinstate their permit and all other groin permits issued under the pre-March 2002 version of the BMA.

[7] This subsection provides:
(D) Special permits:
(1) If an applicant requests a permit to build or rebuild a structure other than an erosion control structure or device seaward of the baseline that is not allowed otherwise pursuant to Sections 48-39-250 through 48-39-360, the

its construction of § 48-39-290, absolutely barring any construction or repair of groins, "fully comports with the purpose and policy of the [BMA]." We disagree.

Unlike the Court of Appeals, we do not find that the question of groin permits can be answered by examining § 48-39-290 in isolation. As we read § 48-39-290(A), it generally prohibits construction of recreational structures, just as § 48-39-290(B) generally prohibits construction of habitable structures. Further, to find groin permits are prohibited by § 48-39-290(D)(1) undermines the OCRM's statutory mandate to administer a "comprehensive beach erosion control policy," § 48-39-120(A), and frustrates the legislature's instruction that the State should "encourage the use of erosion-inhibiting techniques which do not adversely impact the long-term well-being of the beach/dune system" and "promote carefully planned renourishment as a means of beach preservation and restoration where economically feasible," § 48-39-260(4) and (5), since groins are defined in the regulations as erosion-retardation devices. See fn. 2, *supra*; see e.g., Great Games, Inc. v. South Carolina Dep't of Rev., 339 S.C. 79, 529 S.E.2d 6 (2000) (statutes which are part of the same legislative scheme should be read together to ascertain legislative intent).

CONCLUSION

We hold that the BMA authorized OCRM to issue groin permits in furtherance of the State's policy of encouraging certain types of erosion-inhibiting techniques and promoting beach renourishment where appropriate.

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department may issue a special permit to the applicant authorizing the construction or reconstruction if the structure is not constructed or reconstructed on a primary oceanfront sand dune or on the active beach and, if the beach erodes to the extent the permitted structure becomes situated on the active beach, the permittee agrees to remove the structure from the active beach if the department orders the removal. However, the use of the property authorized under this provision, in the determination of the department, must not be detrimental to the public health, safety, or welfare.

Our conclusion that the General Assembly did not intend to ban groins is reinforced by its enactment, after the adoption of the BMA, of "The Beach Restoration and Improvement Trust Act,"[8] creating a beach renourishment program to be implemented by OCRM. This Act specifically authorizes groin construction and maintenanS. C. Code Ann. § 48-40-20(3). See e.g., Denene, Inc. v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002) ('Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something").

The decision of the Court of Appeals is

REVERSED.

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

[8] S.C. Code Ann. §§ 48-40-10 through –70 (Supp. 2002).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gloria Cole and George DeWalt, Jr., in their capacities as Personal Representatives of the Estate of George Ernest Cole, deceased, Appellants,

v.

South Carolina Electric and Gas, Inc., Respondent.

Appeal from Richland County
Alison Renee Lee, Circuit Court Judge
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 3650
Heard October 9, 2002 – Filed June 9, 2003

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

F. Xavier Starkes and William T. Toal, both of Columbia, for Appellants.

Robert A. McKenzie and Gary H. Johnson, II, both of Columbia, for Respondent.

CONNOR, J.: Gloria Cole and George DeWalt, Jr., (Cole) brought suit in their capacities as Personal Representatives of the Estate of George Ernest Cole, deceased, against South Carolina Electric and Gas (SCE&G) for causes of action arising out of the drowning of George Cole at a Lake Murray recreation site owned by SCE&G. Cole filed this appeal challenging the trial court's pretrial order finding the parking fee charged by SCE&G was not a charge as defined under the Recreational Use Statute (RUS).[1] Cole also challenges various rulings made during the trial of the case. We affirm in part, reverse in part and remand.

FACTS/PROCEDURAL HISTORY

George Cole and three other individuals visited a recreational beach area located at Lake Murray on land owned by SCE&G. At the entrance to the area, automobiles wishing to park are required to pay three dollars. The driver of the car in which George was a passenger paid the fee.

The recreational site is fenced-in and is patrolled by a security guard. There are no lifeguards on duty at the lakefront nor is safety equipment present at the site. The swimming area is roped off with buoy lines. Warning signs on the property indicate there are no lifeguards on duty and that individuals swim at their own risk. After paying for parking, a similar written notice is handed to the patrons.

George entered the water, swam to the buoy line, and drowned while attempting to return to shore. Other swimmers and paramedics, who were called to the scene, attempted to revive him but were unsuccessful.

The complaint alleged causes of action for negligence, nuisance, and unreasonably dangerous activity. SCE&G answered and asserted as defenses, among other things, the RUS, assumption of risk, accident, and

[1] S.C. Code Ann. §§ 27-3-10 to -70 (1991).

comparative negligence. Following amendments to the pleadings, SCE&G moved for summary judgment.

The trial court granted SCE&G's motion for summary judgment on Cole's causes of action for nuisance and unreasonably dangerous activity and denied summary judgment on the negligence cause of action. In a subsequent order, the court clarified its initial ruling. The court found the parking fee was not a "charge" as contemplated under the RUS. Thus, the court granted partial summary judgment for SCE&G on the negligence cause of action. This ruling required Cole to demonstrate gross negligence in order to find SCE&G liable.

At trial, Cole's expert witness testified George would not have died had a lifeguard been present at the site. The expert also testified the buoy line was located too far from shore and at an improper depth. Cole elicited testimony concerning whether SCE&G was subject to Department of Health and Environmental Control (DHEC) Regulation 61-50, requiring a lifeguard to be present at a public swimming area. Cole contended the regulation was applicable to the case and a violation of the regulation could be used as evidence of gross negligence.

The jury found in favor of SCE&G. Cole moved for judgment notwithstanding the verdict and, in the alternative, for a new trial. The trial court denied the motions and this appeal follows.

LAW/ANALYSIS

I. Recreational Use Statute

Cole first contends the trial court erred in granting partial summary judgment to SCE&G based on the RUS. The trial court ruled that SCE&G could still be found liable for gross negligence under section 27-3-60(a). However, given the court found as a matter of law that the parking fee was not a "charge," it ruled Cole was barred from pursuing judgment against SCE&G for simple negligence under section 27-3-60(b). Cole argues the

three dollar parking fee was a "charge" as contemplated in section 27-3-60(b), and, therefore, SCE&G was not entitled to protection from liability for negligence under the RUS.

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Roof v. Swanson, 344 S.C. 315, 543 S.E.2d 278 (Ct. App. 2001). "In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the non-moving party." Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." Lanham v. Blue Cross & Blue Shield of South Carolina, Inc., 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002).

The following facts are undisputed. Every vehicle entering SCE&G's recreation site is required to pay a per-vehicle parking fee.[2] The fee is not assessed on each person in an automobile. Rather, the fee covers every person riding in the vehicle. The driver of George Cole's party paid the parking fee upon entering the site. Access to the site is free to individuals who walk, swim, or ride a bike to the site. Drive-through traffic is prohibited and vehicles leaving the site are assessed an additional, identical fee upon re-entry.

The RUS "encourage[s] owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." S.C. Code Ann. § 27-3-10 (1991). "Landowners owe 'no duty of care to keep the premises safe' for recreational users and need not 'give any warning of a dangerous condition, use, structure or activity' on the property." Brooks v. Northwood

[2] The fee is assessed depending on the type of vehicle. Cars are assessed three dollars, motorcycles two dollars, and buses five dollars, to park at the site.

Little League, Inc., 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997) (quoting S.C. Code Ann. § 27-3-30 (1991)).

Furthermore, an owner who permits a person to use property for recreational purposes without charge does not: "(a) Extend any assurance that the premises are safe for any purpose[;] [or] (b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed." S.C. Code Ann. § 27-3-40 (1991). A "charge" is defined as "the admission price or fee asked in return for invitation or permission to enter or go upon the land." S.C. Code Ann. § 27-3-20(d) (1991). The only caveats, found in section 27-3-60, provide:

> Nothing in this chapter limits in any way any liability which otherwise exists:
>
> (a) For grossly negligent, willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.
>
> (b) For injury suffered in any case where the owner of land *charges* persons who enter or go on the land for the recreational use thereof, except that in the case of land leased to the State or a subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section.

S.C. Code Ann. § 27-3-60 (1991) (emphasis added).

South Carolina has not had the opportunity to determine whether a parking fee is a charge under section 27-3-60(b). The Supreme Court of Georgia considered this issue in relation to Georgia's Recreational Property Act in Stone Mountain Mem'l Ass'n v. Herrington, 171 S.E.2d 521 (Ga. 1969). The Georgia court found that a two dollar parking fee at Stone

Mountain Park was not a "charge"[3] or admission fee removing the Memorial Association from the protection of Georgia's Recreational Property Act. Id. at 522-23. In affirming the trial court's grant of summary judgment to the defendant, the court found persuasive the following uncontroverted facts: (1) "[p]ersons on foot are not charged any fee, nor is a fee charged for a number of people in any one vehicle"; and (2) "[t]he fee is strictly a parking fee for the automobile to enter." Id. at 523.

The Georgia Court of Appeals has also examined this issue. In Majeske v. Jekyll Island State Park Auth., 433 S.E.2d 304 (Ga. Ct. App. 1993), the court held that a per-vehicle fee, not based on the number of occupants, and not charged to individuals entering by means other than motorized vehicle, was not a "charge" sufficient to remove the Authority from the protection of Georgia's Recreational Property Act. The court also determined that a re-entry fee did not transform what was strictly a parking fee into a "charge" for admission. Id. at 305-06; cf. Hogue v. Stone Mountain Mem'l Ass'n, 358 S.E.2d 852 (Ga. Ct. App. 1987) (holding an initial four dollar fee allowing re-entry during the course of the patron's stay permitted the use of a vehicle in the park and did not constitute a charge for the recreational use of the park).

Similarly, in Garreans v. City of Omaha, 345 N.W.2d 309 (Neb. 1984), a park charged patrons fees for the right to park campers and pitch tents, and for the use of camper dumping facilities. However, those generally entering the park paid nothing. The Nebraska statute defined "charge" as "the amount of money asked in return for an invitation to enter or go upon the land." Id. at 313. The court, in holding the fee paid by the plaintiff's grandmother was not a charge for entry upon the land, determined "that in order to constitute a charge, any moneys paid must be paid for the right to enter the facility." Id.

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[3] At all times relevant to this discussion the Georgia Recreational Property Act's definition of "charge" has been identical to South Carolina's definition of the same term.

We find these decisions to be highly persuasive and agree that a parking fee assessed only to those entering by motor vehicle, and on a per-vehicle basis, does not constitute a "charge" under section 27-3-60(b). The undisputed evidence demonstrates only that the fee is purely for the privilege of using a motorized vehicle at the site and is not related to the admission of individuals to the recreation site and is not imposed in return for recreational use of the site. Herrington, 171 S.E.2d at 522-23; Hogue, 358 S.E.2d at 854; see also Jones v. United States, 693 F.2d 1299 (9th Cir. 1982) (applying Washington law and holding a landowner may charge a fee for something other than use of the land, and still enjoy recreational use immunity). Accordingly, the circuit court properly determined as a matter of law that the RUS operated to prevent Cole from recovering from SCE&G based on allegations of simple negligence.

II. Applicability of DHEC Regulation

Cole next contends that 24A S.C. Code Ann. Regs. 61-50 (1992),[4] was applicable to the facts of the case. Regulation 61-50 generally requires the use of lifeguards and safety equipment at natural public swimming areas. Cole argues the trial court's jury instruction was erroneous because it did not mandate application of the regulation, but instead allowed the jury to determine whether the regulation applied to the recreation facility.

The trial court must charge the current and correct law. McCourt v. Abernathy, 318 S.C. 301, 457 S.E.2d 603 (1995). "'In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error.'" Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999) (quoting Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 547, 462 S.E.2d 321, 330 (Ct. App. 1995)); see also Waldrup v. Metro. Life Ins. Co., 274 S.C. 344, 346, 263 S.E.2d 652, 654

[4] Regulation 61-50 was amended in 1999. All references to Regulation 61-50 are to the version in effect at the time of the drowning in 1997.

(1980) (finding appellate court must view the jury charge as a whole before assigning prejudicial error to a discrete portion of the charge).

During arguments on the applicability of Regulation 61-50 to the facts of this case, SCE&G tried to show that an administrative order exempting it from enforcement of the regulation's prior version was also applicable to the regulation in effect at the time of the drowning because DHEC had never attempted to enforce its provisions. The trial court indicated during the charge conference that it would charge the jury that they could consider the exemption order and DHEC's lack of enforcement in determining whether the regulation was applicable to SCE&G's recreation site. Cole objected, stating the court should decide as a matter of law whether the regulation applied.

Notwithstanding its previous indication, the trial court did not address the administrative order during its charge on the regulation. In charging the jury, the trial court began:

> Now in addition to the statutory elements of this negligence case which I have just read to you, I'm also going to instruct you as to other regulations which may or may not apply in this particular case. You and you alone are the judge of the facts and you will determine whether or not these regulations have been violated, and if you determine from the facts that they have been violated, then you will apply the law as I give it to you.

While the trial court begins by saying the regulations may or may not apply, it clearly instructs the jury that its function is to determine if the regulations as explained were violated by SCE&G, and if violated then the jury must apply the law as pronounced. The court then instructs the jury regarding the requirements of Regulation 61-50, including lifeguard requirements, proper warning signage, swimming area barriers, and safety equipment. The trial court never explained how the jury would determine whether the regulation applied.

The trial court concluded with the following instructions:

> Ladies and Gentlemen, violation of any of the provisions of these regulations is negligence that is a matter of law.
>
> This means that proof of such violation is in and of itself proof of negligence. But before you can hold the defendant liable, you must determine not only that the defendant was negligent, but that it was grossly negligent as provided in the statute. While evidence of a statute, evidence of a violation of a statute or regulation constitutes negligence, such violation by itself does not constitute gross negligence or recklessness, wilfulness, or wantonness.
>
> However, it may constitute evidence of these things, and you may consider such violation along with other facts and circumstances surrounding the event to determine whether or not the defendant was grossly negligent, recklessness [sic], wilful or wanton.

Given Regulation 61-50 defines safety and health considerations for natural public swimming areas the trial court should have decided as a matter of law whether Regulation 61-50 applied to the facts of this case. See Steinke v. South Carolina Dep't of Labor, Licensing, & Regulation, 336 S.C. 373, 387-8, 520 S.E.2d 142, 149 (1999) (stating an affirmative legal duty may be created by statute and the court must determine as a matter of law whether the law recognizes a particular duty); Miller v. City of Camden, 317 S.C. 28, 31, 451 S.C. 401, 403 (Ct. App. 1994), aff'd as modified, 329 S.C. 310, 494 S.E.2d 813 (1997) (stating the existence and scope of a duty is a question of law; thereafter, the jury determines whether a breach of the duty has occurred); see also Stewart v. Richland Mem'l Hosp., 350 S.C. 589, 593,

567 S.E.2d 510, 512 (Ct. App. 2002) (stating the applicable standard of care under the Tort Claims Act was a question of law where the pleadings placed the case squarely within the statutory language). However, any error is harmless given the tenor of the overall charge. The entire charge as given leaves it up to the jury to decide whether the regulation was violated, not whether it actually applied to SCE&G. The trial court instructed the jury on the ramifications of its decision if it found a violation to have occurred, requiring the jury to consider the violation as evidence of negligence in determining whether SCE&G was grossly negligent. As such, the trial court's charge on the regulation did not prejudice Cole. See Waldrup, 274 S.C. at 346, 263 S.E.2d at 654 (finding a charge must be construed and considered as a whole before an assignment of prejudicial error will lie for the discrete portion complained of). The trial court did not provide the jury any criteria to establish whether the regulation applied. Rather, the jury was left to determine only whether a violation of the regulation had occurred.

III. Assumption of Risk Instruction

Cole argues the trial court erred in failing to properly instruct the jury regarding the burden of proof on SCE&G's assumption of risk defense.

During the charge conference the trial court indicated it did not believe assumption of risk was an affirmative defense and therefore the burden would not shift to SCE&G to prove all the elements of this defense. SCE&G's counsel questioned this statement of the law by stating: "it is my understanding assumption of the risk is an affirmative defense." Cole's counsel then inquired whether the trial court planned to charge that Cole had the burden of showing that assumption of risk did not apply and also how the court was going to assign the burden concerning the assumption of risk defense. The court stated it would not place the burden on Cole and decided not "to tell [the jury] anything about a burden."

At the outset of the portion of the jury instruction discussing SCE&G's defenses the trial court stated:

> However, if you are satisfied that the Plaintiff has proven that the Defendant was grossly negligent as described in the Recreational Use Statute and that the Plaintiff was injured or damaged as a proximate result of that negligence, then you must consider the defenses that have been set forth by the Defendant.

The trial court then detailed several of the defenses asserted by SCE&G, including a general denial. The court stated that a general denial places the burden "upon the Plaintiff to prove each and every element of their cause of action." Turning to assumption of risk, the trial court listed the elements of the defense, but never specifically placed the burden of proving this defense upon SCE&G. Instead, the trial court stated:

> A Plaintiff who voluntarily assumes the risk of injury arising from the negligent conduct of the Defendant cannot recover for the injury. . . . If you find from the evidence that the Defendant was grossly negligent as alleged in the complaint but that the Plaintiff could've reasonably foreseen, expected or anticipated such negligence, then the Plaintiff will be held to have assumed the risk and your verdict must be for the Defendant.

After the jury charge, Cole objected to the trial court's failure to charge the burden of proof with regard to the assumption of risk defense.

The trial court must charge the current and correct law. McCourt, 318 S.C. at 306, 457 S.E.2d at 606. "A jury charge is correct if '[w]hen the charge is read as a whole, it contains the correct definition and adequately covers the law.'" Keaton, 334 S.C. at 495-96, 514 S.E.2d at 574 (quoting State v. Johnson, 315 S.C. 485, 487 n.1, 445 S.E.2d 637, 638 n.1 (1994)).

It is well established that a party pleading an affirmative defense has the burden of proving it. Pike v. South Carolina Dep't of Transp., 343

S.C. 224, 540 S.E.2d 87 (2000); Hoffman v. County of Greenville, 242 S.C. 34, 129 S.E.2d 757 (1963). "When a defendant interposes an affirmative defense, he becomes as to that matter the actor in the suit, and the burden of proof rests upon him to establish his affirmative defense by the preponderance of the evidence." Lorick & Lowrance, Inc. v. Julius H. Walker & Co., 153 S.C. 309, 318, 150 S.E. 789, 792 (1929).

"Assumption of risk is an affirmative defense." Howard v. South Carolina Dep't of Highways, 343 S.C. 149, 155, 538 S.E.2d 291, 294 (Ct. App. 2000); see also Wallace v. Owens-Illinois, Inc., 300 S.C. 518, 524, 389 S.E.2d 155, 158 (Ct. App. 1989) (stating "the affirmative defense of assumption of risk ordinarily presents a question of fact for the jury").[5]

The trial court committed reversible error by not placing the burden of proving the affirmative defense of assumption of risk with SCE&G in its jury charge. See Ross v. Paddy, 340 S.C. 428, 532 S.E.2d 612 (Ct. App. 2000) (holding the trial court erred in not charging the jury that a defendant had the burden of proving the affirmative defense of comparative negligence). When viewed as a whole the court's instruction did not convey this burden to the jury. Instructing the jury to "consider" defenses set forth by a defendant is a far cry from stating that a defendant has the burden of proving the defense. Moreover, in light of the trial court's explanation of a general denial, the potential prejudice from failing to explain SCE&G's burden of proof is multiplied.

IV. Limitation on Argument about "Making Money"

After Cole presented her first witness, SCE&G moved to strike any testimony relating to money paid at the site. The trial court did not grant this motion but did state that in light of the court's earlier ruling regarding the

[5] Cole's cause of action accrued prior to the decision in Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 508 S.E.2d 565 (1998). Therefore, the common law form of assumption of risk as it existed prior to Davenport applies to the present case. Id. at 87-8, 508 S.E.2d at 574.

applicability of the RUS it would be inappropriate for Cole to argue SCE&G was making money at the site through the receipt of parking fees. Cole contends she is entitled to a new trial because the trial court erred in refusing to allow her to argue SCE&G was "making money" at the site and did not operate the site "out of the goodness of their hearts."

We decline to consider this argument because Cole's argument is not supported with citations of authority, and it is so conclusory as to be an abandonment of this issue on appeal. First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994); see Glasscock, Inc. v. United States Fid. & Guar. Co., 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001) (stating short, conclusory arguments unsupported by authority are deemed abandoned). In any event, the trial court did not abuse its discretion by limiting questioning and argument on this point. Whether SCE&G made money from the parking fee was not relevant to any issue in the case. Moreover, Cole was able to elicit at least some testimony indicating SCE&G required a fee for parking at the site. Thus, whether SCE&G made money on the parking fees did not go completely unaddressed.

CONCLUSION

Based on the foregoing analysis, the jury verdict in favor of SCE&G is reversed and we remand for a new trial. We affirm the trial court's grant of partial summary judgment to SCE&G based on the RUS.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

ANDERSON and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Regions Bank, **Respondent,**

v.

Bobbie A. Schmauch, **Appellant.**

Bobbie A. Schmauch, **Appellant,**

v.

MCA Skywatch Traffic Network, Inc., Martin, Coleman & Associates, Inc., Donald Joe Schmauch, Jr. and Debra Coleman Schmauch and Richard Furman, **Defendants,**

of whom Richard Furman is **Respondent.**

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

Opinion No. 3651
Heard April 8, 2003 – Filed June 9, 2003

AFFIRMED

Robert C. Childs, III and Laura W. H. Teer, both of Greenville; for Appellant.

Stephanie H. Burton and Elizabeth J. Brady, both of Greenville; for Respondents.

ANDERSON, J.: Regions Bank brought suit against Bobbie A. Schmauch (Appellant) to collect amounts owed on two loans allegedly guaranteed by Appellant. Appellant filed an answer, counterclaim, and third-party complaint. Regions Bank and Richard Furman (collectively referred to as Respondents) both moved for summary judgment. Appellant also moved for summary judgment. The trial judge granted Respondents' motions and denied Appellant's motion for summary judgment. Appellant's motion to alter or amend was also denied. We affirm.

FACTS/PROCEDURAL BACKGROUND

Appellant's son, Donald Joe Schmauch (Joe Schmauch), was owner of MCA Skywatch Traffic Network, Inc. (MCA) and Martin, Coleman & Associates, Inc. (Martin Coleman). Appellant provided financial support for Joe Schmauch's businesses on many occasions, including loaning him money and co-signing on loans. The businesses were established to purchase helicopters and use them to provide air surveillance for local broadcast stations and power companies.

On February 15, 1996, Joe Schmauch obtained a loan (first loan) from Greenville National Bank[1] for $100,000.00 on behalf of Martin Coleman. Appellant accompanied Joe Schmauch to obtain the loan. A certificate of deposit (CD) owned by Appellant was listed as collateral for the loan. Richard Furman conducted the loan closing and executed the necessary

[1] Regions Bank purchased Greenville National Bank.

paperwork. The note provided for payments to begin March 15, 1996 and the balance due on February 15, 1999. Appellant has admitted making payments on the loan when Joe Schmauch or Martin Coleman was unable to make the payments.

Martin Coleman received a second loan (second loan) for $40,000.00 from Regions Bank on May 30, 1996. Appellant signed a Guaranty Agreement on May 30, 1996. However, neither the borrower's name nor the liability section of the Guaranty was completed.

On July 17, 1996, Martin Coleman renewed the second loan and borrowed additional funds to bring the total to $60,000.00. A second Guaranty Agreement purports to bear Appellant's signature. The Guaranty provides for unlimited liability with regards to the loans given to Martin Coleman. While the July 17, 1996 Guaranty is completely filled out, it does not contain a reference to a specific loan number. It is simply matched to the loan by the date on the Guaranty.

The second loan was again renewed on September 12, 1996, and additional funds were borrowed bringing the total to $65,190.80. An additional Guaranty is in the possession of Regions Bank. While the Guaranty purports to bear Appellant's signature, she denied it is her signature. The second loan was renewed several more times, including December 4, 1996. The December Note indicates Appellant is the co-borrower. However, Furman admitted she was listed as the co-borrower in error. Appellant also made payments on the second loan.

On February 15, 1999, the balance remaining on the first loan became due. Martin Coleman did not make payment. Regions Banks liquidated the CD and applied the proceeds to the amount due on the loan. The proceeds left a balance due of $1,726.05. The second loan came due on June 7, 1999. The balance due on the second loan was $51,154.79. Payment by Appellant was refused, and Regions Bank brought the instant action.

Regions Bank brought this collection action against Appellant on September 3, 1999, seeking to recover the balances owed on the two loans to

Martin Coleman. Appellant filed an amended answer in which she made a general denial and proffered numerous allegations including fraud, discharge, forgery, equitable estoppel, coercion, and failure to provide notice of default. She also counterclaimed alleging, among others, negligence, breach of fiduciary duty, conversion, and fraud. Moreover, she asserted a third-party claim against Furman for negligence, breach of fiduciary duty, conversion, and fraud, among other claims.[2]

Respondents moved for summary judgment on July 10, 2001. Appellant also moved for summary judgment. At the hearing on the motions, Appellant withdrew several of her defenses, counterclaims, and third-party claims. The trial judge granted Respondents' motions for summary judgment. The court found the loan documents were clear and there was a contract between Appellant and Regions Bank for Appellant to guarantee the loans. The court concluded Appellant breached the Guaranty contract and awarded Regions Bank damages of $62,924.52 plus interest until the judgment is paid. The judge decided there was no evidence of forgery, fraud, or equitable estoppel.

The court determined Respondents did not owe Appellant any duty of care, and therefore, there were no grounds upon which to find them negligent. The court determined that the relationship between Regions Bank and Appellant was that of creditor-debtor and not a fiduciary relationship. Summary judgment was awarded to Respondents on Appellant's claim of conversion because the court held she pledged the CD as collateral and had no right to possession at the time the CD was liquidated. Finally, the court ruled Appellant did not establish fraud on the part of Respondents. Appellant's motion to alter or amend the judgment was denied.

[2] Appellant also filed third-party causes of action against MCA, Martin Coleman, Joe Schmauch, and Debra Coleman Schmauch.

ISSUES

I. Did the trial court err when it found Appellant pledged her CD as collateral and properly completed a Guaranty Agreement in granting summary judgment in favor of Regions Bank on its collection action?

II. Did the trial court err in granting summary judgment in favor of Respondents on Appellant's claim of fraud?

III. Did the trial court err in granting summary judgment in favor of Respondents on Appellant's claim of equitable estoppel?

IV. Did the trial court err in granting summary judgment in favor of Respondents on Appellant's claim of negligence?

V. Did the trial court err in granting summary judgment in favor of Respondents on Appellant's claim of breach of fiduciary duty?

VI. Did the trial court err in granting summary judgment in favor of Respondents on Appellant's claim of conversion?

STANDARD OF REVIEW

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; see also Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997); Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998). In reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court: summary judgment is proper when "there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991). Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 130, 558 S.E.2d 271, 273 (Ct. App. 2001). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rule 56(c), SCRCP; SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990); Peterson v. W. Am. Ins. Co., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999). "In determining whether 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 nonmoving party." Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001); accord Williams v. Chesterfield Lumber Co., 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976).

LAW/ANALYSIS

I. LIABILITY FOR PLEDGE AND AS GUARANTOR

A. Breach of Guaranty Agreement

Appellant contends the trial court erred in granting summary judgment to Regions Banks on the issue of her liability for payment on the second loan. She maintains there is a genuine issue of material fact as to whether she is liable under the guaranty agreements due to the irregularities claimed and her lack of an understanding that her liability was unlimited.

In order to find Appellant breached a contract with Regions Bank, a contract must first be found to exist. A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. Prescott v. Farmers Tel. Co-op, Inc., 335 S.C. 330, 335, 516 S.E.2d 923, 925 (1999); Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997). "A contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act." Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984). "Stated another way, there must be an offer and an acceptance accompanied by valuable consideration." Roberts, 327 S.C. at 483, 486 S.E.2d at 773; Carolina Amusement Co., Inc. v. Connecticut Nat'l Life Ins. Co., 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993). The issue in this case involves Appellant's acceptance of the contract.

Appellant has acknowledged that two of the guaranty agreements contain her signature: the May 30 and July 17 agreements. The May 30 Guaranty Agreement is incomplete and therefore cannot constitute acceptance. However, the July 17 Guaranty Agreement is complete and purports to bind Appellant to unlimited liability for Martin Coleman's present and future indebtedness:

> The liability of the undersigned under this Guaranty Agreement:
>
> X shall be UNLIMITED as to amount and the undersigned shall be liable for all debts of the borrower.

The Guaranty Agreement specifies what debt is being guaranteed:

> NOW, THEREFORE, in consideration of such credit extended and/or to be extended in its discretion by the Bank to the Borrower (whether to the same, greater, or lesser extent than the limit of this guaranty), the undersigned . . . who executes this guaranty agreement to induce the Bank to extend credit to the Borrower, hereby unconditionally guarantees to the Bank . . . the punctual payment when due, with such interest as may accrue

> thereon either before or after any maturity(ies) thereof, of ALL DEBTS AND OBLIGATIONS OF THE BORROWER OR OF THE BORROWER[S] AND ANY OTHER PARTY OR PARTIES, NOW EXISTING OR HEREAFTER ARISING, whether created directly or acquired by endorsement, assignment or otherwise, whether absolute or contingent, secured or unsecured, due or not due, including but not being limited to notes, checks, drafts, bills of exchange, credits and advances, all of which are hereinafter referred to as "debts of the Borrower."

In addition, Appellant waived certain rights by signing the Guaranty:

> The undersigned expressly waives: (a) notice of acceptance of this guaranty and of all extensions of credit to the Borrower; (b) presentment and demand for payment of any of the debts of the Borrower; (c) protest and notice of dishonor or of default to the undersigned or to any other party with respect to any of the debts of the Borrower or with respect to any security therefore; (d) all other notices to which the undersigned might otherwise be entitled; and (e) demand for payment under this guaranty.

Appellant attempts to argue for the first time on appeal that the July 17 agreement was incomplete at the time it was signed. It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998); accord Harris v. Bennett, 332 S.C. 238, 245, 503 S.E.2d 782, 786 (Ct. App. 1998). Additionally, Appellant has presented no evidence that the contract, which appears in the record completed, was actually signed before it was completed.

Finally, Appellant insists that while her signature may be on the Guaranty Agreement, she never intended to enter into an agreement for unlimited liability. She was queried: "Do you recall being asked to personally guarantee that if they defaulted on one or more of the loans they had that you would pay if they defaulted." She answered: "No." As noted

above, Appellant provides no legal authority for why her lack of understanding would provide a means to rescind an otherwise valid contract.

Even if her contention is assumed to be one of unilateral mistake, it is unavailing absent proof of fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to rescission. See Truck South, Inc. v. Patel, 339 S.C. 40, 49, 528 S.E.2d 424, 429 (2000) ("Unilateral mistake is not by itself grounds for rescinding the contract unless the mistake has been induced by fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to rescission, without negligence on the part of the party claiming rescission, or where mistake is accompanied by very strong and extraordinary circumstances which would make it a great wrong to enforce the agreement."); Alderman v. Bivin, 233 S.C. 545, 552, 106 S.E.2d 385, 389 (1958) ("A contract may be reformed or rescinded . . . where the mistake is not mutual, unilateral, and has been induced by the fraud, deceit, misrepresentation, concealment, or imposition in any form of the party opposed in interest to the reformation or rescission, without negligence on the part of the party claiming the right . . . ."). Here, she fails to present evidence of her lack of understanding as the basis for the unilateral mistake. Additionally, Appellant averred that she did not read the documents placed in front of her:

> Q. Did you look at the form where it's check marked by unlimited?
>
> A. That's right.
>
> Q. Did you ask anybody any questions as to why the check mark was there?
>
> A. I never looked at it. I have people come in the store and buy boats, and they never read it.
>
> Q. They never read any of the forms?
>
> A. They never read it.

Q. Is it fair to say that when you went to [Regions Bank] and signed any of the documents that you signed that you didn't take the time to study them?

A. No I didn't. I just trusted Richard [Furman].

Q. And did you ever ask Mr. Furman what any of them meant?

A. No.

A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it. Sims v. Tyler, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981); Evans v. State Farm Mut. Auto Ins. Co., 269 S.C. 584, 587, 239 S.E.2d 76, 77 (1977). A person signing a document is responsible for reading the document and making sure of its contents. Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it. Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 39, 340 S.E.2d 786, 789 (1986); Sanders v. Allis Chalmers Mfg. Co., 237 S.C. 133, 139-40, 115 S.E.2d 793, 796 (1960); Stanley Smith & Sons v. D.M.R. Inc., 307 S.C. 413, 417, 415 S.E.2d 428, 430 (Ct. App. 1992). One who signs a written instrument has the duty to exercise reasonable care to protect himself. Maw v. McAlister, 252 S.C. 280, 285, 166 S.E.2d 203, 205 (1969); Evans, 269 S.C. at 587, 239 S.E.2d at 77; DeHart v. Dodge City of Spartanburg, 311 S.C. 135, 139, 427 S.E.2d 720, 722 (Ct. App. 1993). "The law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document." Citizens & S. Nat'l Bank of South Carolina v. Lanford, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994).

This rule is subject to the exception that if the party is ignorant and unwary, his failure to read the document may be excused. Burwell, 288 S.C. at 40, 340 S.E.2d at 789; Thomas v. Am. Workmen, 197 S.C. 178, 182, 14 S.E.2d 886, 887 (1941); Austin v. Indep. Life & Accident Ins. Co., 296 S.C. 156, 160, 370 S.E.2d 918, 921 (Ct. App. 1988). However, our court very strictly construes this exception. Burwell, 288 S.C. at 40, 340 S.E.2d at 789.

In determining whether a party can be classified as ignorant and unwary, an individual's education, business experience and intelligence are all considered. Burwell, 288 S.C. at 40, 340 S.E.2d at 789-90; Thomas, 197 S.C. at 182, 14 S.E.2d at 888; Austin, 296 S.C. at 160, 370 S.E.2d at 921.

Adverting to Appellant's education, business experience and intelligence, we refute any attempt to classify her as ignorant and unwary. Appellant has loaned money and co-signed loans for her son in the past. She has been involved in the operations of a business. Furthermore, the literature advertising her son's businesses lists her as having over thirty years experience in the marine business. Appellant does not fall into this narrow exception; and therefore, she cannot avoid the effect of the Guaranty Agreement by claiming she did not read it.

Finally, Appellant made payments on the notes. The use of loan numbers on her checks indicated she paid on more than one loan. The following colloquy elucidates her knowledge of the second loan:

> Q. Is it fair to say that somehow by putting that number on those checks you knew there was another loan?
>
> A. I guess so.
>
> . . . .
>
> Q. You've got more than one loan number on your checks?
>
> A. Oh, Yeah, I'm sure.
>
> Q. When you put those on there, did you understand there was more than one loan?
>
> A. I guess I did, there was more than one loan.

We agree with the trial court that the documents are unambiguous and clearly obligate Appellant to pay any sums due under the second loan and its

renewals to Martin Coleman. She has failed to provide any evidence indicating the contract should be rescinded and has not proven her lack of understanding warranting rescission. The trial court correctly concluded Appellant signed the Guaranty Agreement and was bound to pay the balance due on the second loan.

B. Pledge of Certificate of Deposit[3]

1. Intent to Pledge CD as Collateral

Appellant argues she never signed the hypothecation agreement and therefore, never assigned her CD to be used by Joe Schmauch as collateral for the first loan to Martin Coleman. She further insists Regions Bank had no right to liquidate the CD because it had not perfected its security interest. We disagree.

First, Appellant asserts she never pledged her CD as collateral because she never signed the hypothecation agreement. During her deposition, she indicated the signature on the hypothecation agreement was not hers. She also introduced the testimony of Dawn Edwards, who was hired as an expert in handwriting analysis:

> If Ms. Schmauch was not impaired and there was not any other physical or medical or use of medicines or anything of that nature, given the 45 documents that I've looked at that should show her natural variation in writing, yes, I'd say that there would be more reason to believe that it was not her genuine signature, if the other factors could be eliminated.

[3] Appellant maintains the trial court erred in granting summary judgment regarding her liability on the first loan because Regions Bank never had a security interest in the CD and therefore, had no right to the proceeds. She also contends the trial court erred in granting Respondents' summary judgment on her counterclaim and third-party action for conversion of the CD and interest. Because these claims relate to the same facts, they will be addressed together.

Edwards professed that she briefly examined the signatures.

Additionally in her report, Edwards conclusively determines several signatures are those of Appellant, including the ones on the May 30 and July 17 Guaranty Agreements. However, regarding the hypothecation agreement, she writes: "A definite determination is precluded regarding the . . . names."

We find, even if there is sufficient evidence that a jury could consider the signature on the hypothecation agreement a forgery, Appellant admitted (1) she pledged her CD; (2) she intended to pledge her CD so Joe Schmauch could get the $100,000.00 loan; and (3) she signed papers to pledge her CD. Specifically, she testified:

> Q. When you went to [Regions Bank] with your son in connection with the $100,000 loan, did you sign an agreement agreeing to pledge your certificate of deposit?
>
> A. Yes, I did.
>
> . . . .
>
> A. I signed something.
>
> Q. And you understood that you were putting up your CD for this loan?
>
> A. Right.
>
> Q. And your CD was how much?
>
> A. $100,000.
>
> . . . .
>
> Q. What did you think you were going [to the Bank] for?

A. Well, to use my CD as security in case he didn't pay [the first loan] back.

. . . .

Q. Did you think that you had to guarantee the loan?

A. If he didn't pay it.

Q. And how did you understand that you would have to do that if he didn't pay it?

A. Give him my CD, I guess.

Appellant admitted not reading the papers placed in front of her when she went to the bank to pledge her CD.

Based upon her testimony, it is clear she intended to and did in fact pledge her CD as collateral for the first loan. She admitted signing papers in order to pledge her CD. The trial court correctly decided she pledged her CD as collateral for the loan, and when the loan was not repaid, Regions Bank had the right to collect payment.

2. Conversion

The South Carolina Supreme Court discussed conversion in Crane v. Citicorp Nat'l Servs., Inc., 313 S.C. 70, 437 S.E.2d 50 (1993):

> Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights. To establish the tort of conversion, it is essential that the plaintiff establish either title to or right to the possession of the personal property.

Id. at 73, 437 S.E.2d at 52 (internal citations omitted). Conversion may arise by some illegal use or misuse, or by illegal detention of another's personal property. Owens v. Andrews Bank & Trust Co., 265 S.C. 490, 496, 220 S.E.2d 116, 119 (1975); Castell v. Stephenson Fin. Co., 244 S.C. 45, 50-51, 135 S.E.2d 311, 313 (1964). Conversion is a wrongful act which emanates by either a wrongful taking or wrongful detention. Castell, 244 S.C. at 50-51, 135 S.E.2d at 313; Kirby v. Horne Motor Co., 295 S.C. 7, 11, 366 S.E.2d 259, 261 (Ct. App. 1988). Apodictically, Appellant must demonstrate she had the right to possess the CD at the time Regions Bank liquidated it to satisfy the loan. As we have recognized she pledged the CD as collateral, she did not have the right to possession. An action for conversion may not lie.

Appellant's contention that Regions Bank failed to perfect the security interest is also without merit. The CD was properly pledged. As such, the CD was in the possession of the Bank, and therefore, the security interest was perfected under S.C. Code Ann. section 36-9-313(a) (Supp. 2002) ("[A] secured party may perfect a security interest in negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral.").

The trial court correctly concluded Appellant pledged her CD as collateral on the first loan. Additionally, Regions Bank had a right to liquidate the CD once the balance on the first loan was due and payable. Finally, Respondents are not liable for conversion, as Appellant had no right to possess the CD at the time of Regions Bank's assumption of the CD.

II. NEGLIGENCE

Appellant declares the trial court erred in granting summary judgment to Respondents on her negligence claim. She asserts Respondents owed her a duty of care because she was particularly vulnerable in this situation and dependent on the bank for guidance. She also maintains the bank holds "an exalted public position and an extra measure of trust is given to the Bank" in the proper execution of loan documents.

Negligence is the breach of a duty of care owed to the plaintiff by the defendant. Bell v. Atl. Coast Line R.R. Co., 202 S.C. 160, 181, 24 S.E.2d 177, 186 (1943); Crawford v. Atl. Coast Line R.R. Co., 179 S.C. 264, 270, 184 S.E.2d 569, 571 (1936). To state a cause of action for negligence, the plaintiff must allege facts which demonstrate: (1) a duty of care owed by the defendant; (2) a breach of that duty by negligent act or omission; and (3) resulting in damages to the plaintiff; and (4) the damages proximately resulted from the breach of duty. Thomasko v. Poole, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002); Kleckley v. Northwestern Nat'l Cas. Co., 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000); Bergstrom v. Palmetto Health Alliance, 352 S.C. 221, 229, 573 S.E.2d 805, 808-09 (Ct. App. 2002). In determining whether a particular act is negligent, the test used is what would a person of ordinary reason and prudence do under those circumstances at that time and place. See Spahn v. Town of Port Royal, 326 S.C. 632, 637, 486 S.E.2d 507, 510 (Ct. App. 1997) (holding where motorist is suddenly placed in an emergency situation, through no fault of his own, and is compelled to act instantly to avoid a collision, he is not negligent if he makes a choice that a person of ordinary judgment might make if placed in same emergency situation). The issue is what, if any, duty a bank owes a customer in the regular course of its business.

In Citizens & S. Nat'l Bank of South Carolina v. Lanford, 313 S.C. 540, 443 S.E.2d 549 (1994), the supreme court held the bank did not owe a duty to tell the guarantor that his liability was for the entire loan amount. The court explicated: "The law does not impose a duty on the bank to explain to an individual what [she] could learn from simply reading the document." Id. at 545, 443 S.E.2d at 551. Appellant's claim that the bank was negligent in not ensuring she understood her liability is equally unavailing.

Next, Appellant claims Respondents were negligent because they failed to require and ensure documents were properly completed and to follow banking procedures for completing the documents. Again, if Appellant read the May 30 Guaranty, she would know it was incomplete. In any event, her liability is based on the July 17 Guaranty, which was properly completed. Appellant could not prove how the deficiency to complete the documents proximately caused any of her alleged injuries.

Appellant contends Respondents had a duty to advise her about the financial condition of Martin Coleman. However, in PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988), this court found no obligation to notify the guarantor of additional extensions of credit where the guaranty was continuing and the guarantor waived the right to notice. This is precisely the situation at hand. Appellant signed an unlimited guaranty for all current and future debts of Martin Coleman. She agreed to waive all notices to which she would otherwise be entitled. We find there was no duty to apprise Appellant of Martin Coleman's obligations or the renewal of the loans.

Appellant cites Jacques v. First Nat'l Bank of Maryland, 515 A.2d 756 (Md. 1986) in support of her contention that Respondents owed her a duty of care. It involves a situation where the bank erroneously told the plaintiffs they qualified for financing when they did not qualify. The plaintiffs were required to obtain financing at a higher rate. The court ruled, under the particular facts of the case, the bank owed plaintiffs a duty of care in processing the application. Even though the court relied upon the fact that the bank holds a special position, this was in terms of processing and approving financing. The case did not establish an overall duty of care between a bank and its customers.

Appellant claims that she is in a vulnerable position and is dependent on the Bank for guidance. However, she was involved in the operation of a business and as part of the literature advertising Joe Schmauch's businesses, she is listed as having over thirty years experience in the marine business. Additionally, she had loaned money to her son in the past and had guaranteed other loans. Veritably, she was not in a vulnerable position, and the bank owed her no special duty of care.

III. BREACH OF FIDUCIARY DUTY

Appellant argues there was a fiduciary relationship between Respondents and herself. She claims she placed her trust in the Bank regarding her CD and also relied on Furman for advice and information

regarding her pledge of her CD and the guaranty of the second loan. We disagree and find no fiduciary relationship existed in this case.

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. Steele v. Victory Sav. Bank, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988). "A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." O'Shea v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992); Island Car Wash, Inc. v. Norris, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987). A relationship must be more than casual to equal a fiduciary relationship. Steele v. Victory Sav. Bank, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988).

As a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. Brown v. Pearson, 326 S.C. 409, 423, 483 S.E.2d 477, 484 (Ct. App. 1997); Steele, 295 S.C. at 295, 368 S.E.2d at 94. The other party must have actually accepted or induced the confidence placed in him. Id.

South Carolina holds the normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature. Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986); Owens v. Andrews Bank & Trust Co., 265 S.C. 490, 497, 220 S.E.2d 116, 119 (Ct. App. 1975); Johnson v. Serv. Mgmt., Inc., 319 S.C. 165, 167-68, 459 S.E.2d 900, 902 (Ct. App. 1995). However, a bank may be held to a fiduciary duty if it undertakes to advise a depositor as part of services the bank offers. Burwell, 288 S.C. at 40, 340 S.E.2d at 790; Rush v. South Carolina Nat'l Bank, 288 S.C. 560, 562, 343 S.E.2d 667, 668 (Ct. App. 1986). Such a relationship charges the bank with a duty to disclose material facts that may affect its customer's interests. Burwell, 288 S.C. at 40-41, 340 S.E.2d at 790. Yet, no fiduciary relationship between a bank and its depositor exists when the bank is unaware of any special trust reposed in it. Id.; Steele v. Victory Sav. Bank, 295 S.C. 290, 294, 368 S.E.2d 91, 93 (Ct. App. 1988).

There is no evidence in this case that Appellant placed a special trust in Furman or Regions Bank. She was merely a depositor. She testified that she relied on no one before pledging her CD. She admitted never asking questions about the guaranty or any documents that she signed. Appellant has not demonstrated that Furman or anyone with Regions Bank undertook to advise her as part of a service offered by the bank. Indubitably, no fiduciary relationship was created in this case.

IV. FRAUD

Appellant asserts Respondents committed fraud by withholding information or providing her false information. She argues Respondents committed fraud by: (1) continuing to make loans based upon Appellant's ability to pay with the intention to only collect from Appellant; (2) failing to inform Appellant of Martin Coleman's financial condition; and (3) failing to inform her that her liability was unlimited. We disagree. There is no evidence to establish Respondents committed fraud.

Fraud is an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to her or to surrender a legal right. Black's Law Dictionary 660 (6th ed. 1990). In order to prove fraud, the following elements must be shown: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. First State Sav. & Loan v. Phelps, 299 S.C. 441, 446-47, 385 S.E.2d 821, 824 (1989); Moorhead v. First Piedmont Bank & Trust, 273 S.C. 356, 359, 256 S.E.2d 414, 416 (1979); Kiriakides v. Atlas Food Sys. & Servs., Inc., 338 S.C. 572, 586, 527 S.E.2d 371, 378 (Ct. App. 2000); Ardis v. Cox, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). Each and every one of these elements must be proven by clear, cogent, and convincing evidence. First State Sav. & Loan, 299 S.C. at 447, 385 S.E.2d at 824; Lundy v. Palmetto State Life Ins. Co., 256 S.C. 506, 510, 183 S.E.2d 335, 337 (1971). The right to rely must be determined

in light of the plaintiff's duty to use reasonable prudence and diligence under the circumstances in identifying the truth with respect to the representations made to him. Florentine Corp., Inc. v. PEDA I, Inc., 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985). Moreover, there is no right to rely, as required to establish fraud, where there is no confidential or fiduciary relationship and there is an arm's length transaction between mature, educated people. This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests. Florentine Corp., Inc., 287 S.C. at 386, 339 S.E.2d at 114; Parks v. Morris Homes Corp., 245 S.C. 461, 467, 141 S.E.2d 129, 132 (1965) (holding a party has a duty to exercise reasonable care to protect himself or herself against fraud by reading a contract before he signs it); Outlaw v. Calhoun Life Ins. Co., 236 S.C. 272, 276, 113 S.E.2d 817, 819 (1960) (stating one cannot complain of fraud in misrepresentation of contents of written instrument signed by her when the truth could have been discovered by reading the instrument). The principle of the right of reliance upon representations is closely bound up with a duty on the part of the plaintiff to use some measure of protection and precaution to safeguard his own interest. Thomas v. Am. Workmen, 197 S.C. 178, 182, 14 S.E.2d 886, 888 (1941).

> It is largely because the law of fraud requires [a claimant] to prove his ignorance of the falsity of the representation and his right to rely on the falsity that the courts long ago established the rule that ordinarily one cannot complain of fraud in the misrepresentation of the contents of a written instrument signed by him when the truth could have been ascertained by reading the instrument, and that one entering into a written contract must read it and avail himself of every reasonable opportunity to understand its content and meaning.

PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., Inc., 297 S.C. 176, 180, 375 S.E.2d 331, 333 (Ct. App. 1988).

Appellant could easily have determined for herself the extent of her liability by reading the July 17 Guaranty. It clearly enunciated that she was guaranteeing all debts, present and future, and that her liability was

unlimited. Appellant now cannot complain because the extent of her liability was not explained to her by Respondents.

Additionally in the Guaranty, Appellant waived notice of default by Martin Coleman on the debts. She agreed to payment whether or not demand was made of Martin Coleman. Appellant made payments on the notes, as evidenced by the checks entered into the record indicating multiple loan numbers. She knew Martin Coleman had not made all payments, and she made the payments when Martin Coleman defaulted.

Finally, Appellant cannot complain that Respondents did not inform her of Martin Coleman's financial condition. Non-disclosure is fraudulent when there is a duty to speak. Manning v. Dial, 271 S.C. 79, 83, 245 S.E.2d 120, 122 (1978). In Jacobson v. Yaschik, 249 S.C. 577, 585, 155 S.E.2d 601, 605 (1967), the court announced the requirements for having a duty to speak:

> The duty to disclose may be reduced to three distinct classes: (1) where it arises from a preexisting definite fiduciary relation between the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

Luculently, there are no fiduciary relationship and no expressed repose of trust between the parties. Additionally, Appellant could have easily discerned the financial condition of Martin Coleman by asking her son, with whom she had quite an involved financial relationship. Appellant was required to put forth her collateral in order for Martin Coleman to obtain the first loan. She was required to make payments on both the first and second loans because Martin Coleman did not make the payments. We do not see

how Respondents can be required to inform her of the financial condition of the company when she could easily have obtained the information herself.

We hold Appellant had the opportunity to read the documents she signed, and that in not doing so failed to exercise reasonable diligence in protecting her own interest. She had every opportunity to determine the financial condition of Martin Coleman by asking her son. Finally, according to the Guaranty, Respondents had every right to seek payment from Appellant without proceeding or issuing a demand against Martin Coleman.

V. EQUITABLE ESTOPPEL

Appellant contends Respondents were estopped from collecting payment from her because they did not provide her with information regarding the extent of her liability and she believed she had limited liability. We find her claim to be without merit.

> Elements of equitable estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. Essential elements of estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position.

Zabinski v. Bright Acres Assocs., 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001) (internal citations omitted).

Application of equitable estoppel does not require an intentional misrepresentation. It is sufficient if the plaintiff reasonably relied upon the words or conduct of the defendant in allowing the limitations period to expire. Dillon County Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 218-19, 332 S.E.2d 555, 561 (Ct. App. 1985) (overruled on other ground by Atlas Food Sys v. Crane Nat'l Vendors, 319 S.C. 556, 462

S.E.2d 858 (1995)); Brown v. Pearson, 326 S.C. 409, 419, 483 S.E.2d 477, 482 (Ct. App. 1997). "Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel." S. Dev. Land & Golf Co. v. South Carolina Pub. Serv. Auth., 311 S.C. 29, 33, 426 S.E.2d 748, 751 (1993) (citation omitted).

Whether the actions lulled the plaintiff into "a false sense of security" is usually a question of fact. Dillon County Sch. Dist No. Two, 286 S.C. at 219, 332 S.E.2d at 561. However, summary judgment is proper where there is no evidence of conduct warranting estoppel. Vines v. Self Mem'l Hosp., 314 S.C. 305, 309, 443 S.E.2d 909, 911 (1994). "One with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been mis[led]." S. Dev. Land & Golf Co., 311 S.C. at 34, 426 S.E.2d at 751.

In the instant case, Appellant was able to ascertain the true nature of her liability for payment on Martin Coleman's debt by reading the July 17 Guaranty Agreement. In failing to read the agreement or seek to understand the nature of her liability within the agreement, she cannot claim to have been misled by Respondents' silence regarding her liability or any false statements regarding her liability. The trial court was correct in granting Respondents summary judgment on Appellant's equitable estoppel claim.

CONCLUSION

We find Appellant intended to and did pledge her CD as collateral for the first loan to Martin Coleman. Regions Bank and Appellant had a properly signed and completed Guaranty Agreement on July 17, 1996, providing for unlimited liability for all current and future debts of Martin Coleman. The trial court properly granted summary judgment to Regions Bank for the amount due and payable on its collection action. Next, we find Appellant did not read the documents she signed, and if she had read the documents, she would have been apprised of the nature of her liability and the waiver of all notices due to her. The trial court was correct in granting summary judgment to Respondents on Appellant's counterclaims and third-

party causes of action for negligence, breach of fiduciary duty, conversion, fraud, and equitable estoppel. Accordingly, the decision of the trial court is

AFFIRMED.

CONNOR and HUFF, JJ., concur.