The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF JORDAN DELAINE WHITE, PETITIONER

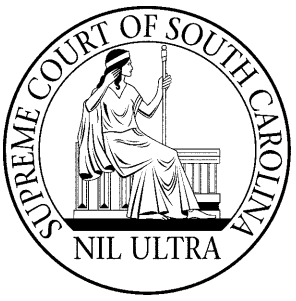
On April 11, 2005, Petitioner was definitely suspended from the practice of law for eighteen months. In the Matter of White, 363 S.C. 523, 611 S.E.2d 917 (2005). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than October 12, 2009.

Columbia, South Carolina
August 12, 2009



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 36
August 17, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sundown Operating Company, Inc., a South Carolina Corporation; Sunrise Coin Company, Inc., a South Carolina Corporation; and High Noon Properties, Inc., a South Carolina Corporation; Respondents,

v.

Intedge Industries, Inc., a New Jersey Corporation; Quickie Food Stores of North Myrtle Beach, Inc., d/b/a Hardwick's Bar & Restaurant Supplies, a South Carolina Corporation; BFPE International, Inc., f/k/a Atlantic Fire Systems, Inc., a Maryland Corporation; Wormald Fire Systems, Inc., f/k/a Ansul Fire Systems, Inc., a Delaware Corporation; and Ansul Incorporated, a Delaware Corporation, Defendants,

of whom BFPE International, Inc., f/k/a Atlantic Fire Systems, Inc., a Maryland Corporation is Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Horry County
Steven H. John, Circuit Court Judge
J. Stanton Cross, Jr., Circuit Court Judge

Opinion No. 26700
Heard February 5, 2009 – Filed August 17, 2009

AFFIRMED

Eugene Matthews, of Richardson, Plowden & Robinson, of Columbia, and Michael S. Hopewell, of Turner, Padget, Graham & Laney, of Florence, for Petitioner.

Daniel F. Blanchard, III, of Rosen, Rosen and Hagood, of Charleston, Peter F. Asmer, Jr., of Cozen O'Connor, of Charlotte, and Susan C. Rosen, of Rosen Law Firm, of Charleston, for Respondents.

CHIEF JUSTICE TOAL: This action for negligence and breach of contract arises out of a fire that burned down a restaurant and pub owned by Respondents Sundown Operating Company, Inc. ("Sundown"), Sunrise Coin Company, Inc. ("Sunrise"), and High Noon Properties, Inc. ("High Noon") (hereinafter referred to collectively as "Respondents"). Respondents filed suit against Defendant BFPE International, Inc. ("Petitioner") and four other defendants (hereinafter referred to collectively as "Defendants"). The trial court granted a default judgment against Petitioner, and following a damages

hearing, the master-in-equity awarded damages to Respondents. Both parties appealed. The court of appeals affirmed the trial court. *Sundown Operating Co. v. Intedge Indus., Inc.*, Op. No. 2007-UP-091 (S.C. Ct. App. filed Feb. 23, 2007). We granted in part Petitioner's request for a writ of certiorari to review that opinion.

FACTUAL/PROCEDURAL BACKGROUND

On September 16, 1998, Respondents' restaurant and pub burned down. On August 24, 2001, Respondents filed suit against Defendants, alleging that an electric fryer had malfunctioned and ignited a quantity of frying oil. Respondents had a service contract with Petitioner to install, maintain, inspect, and service the restaurant's fire extinguishing and suppression systems. Respondents asserted claims for negligence and breach of contract against Petitioner, on the grounds that Petitioner failed to properly maintain and inspect the fire suppression system.

Petitioner is incorporated in Maryland and has various business locations in Maryland, Virginia, North Carolina, and South Carolina. At the time of the lawsuit, Petitioner did not have a registered agent listed with the South Carolina Secretary of State.

On August 27, 2001, Respondents mailed copies of the summons and complaint to Donald R. Leonard, who was Petitioner's registered agent in Maryland and North Carolina at the time, at two separate addresses in Myrtle Beach and Rocky Mount, North Carolina. In Myrtle Beach, Petitioner's manager, Randy Adams, received the package and was advised by the mail carrier that he could sign for Leonard, who was absent. Adams signed Leonard's name to the receipt, which was dated and returned to Respondents on August 28, 2001. In Rocky Mount, Leonard himself signed the return receipt on September 4, 2001.

On September 5, 2001, Leonard gave the summons and complaint to the general manager of Petitioner's Clayton, North Carolina office, who then forwarded the papers to Petitioner's vice-president. On or about September

14, 2001, Petitioner's vice-president notified Petitioner's insurance agent of the lawsuit. On October 1, 2001, the vice-president forwarded the summons and complaint to the insurance agent. On October 2, 2001, the insurance agent telephoned Respondents' counsel to request an extension of time to file an answer to the complaint. Respondents' counsel informed the agent that he had already moved for an entry of default based upon the August 28, 2001 service date. On October 2, 2001, the Horry County Clerk of Court filed the entry of default.

On October 18, 2001, Petitioner filed a motion to set aside default and permit enlargement of time. On October 29, 2001, Respondents filed a motion for a default judgment. On December 10, 2001, Respondents moved for, and the Horry County Clerk of Court filed, a second entry of default based upon the September 4, 2001 service date.

On March 18, 2002, the trial court conducted a hearing and found that Petitioner had shown good cause to set aside the entry of default and permit an enlargement of time to file an answer and instructed the company to submit a proposed order. The trial court based its ruling in part on the recent court of appeals decision in *Pilgrim v. Miller*, 2002 WL 44112 (S.C. Ct. App. Jan. 14, 2002) (*Pilgrim I*). The next day, Respondents' counsel requested that the trial court delay its formal order in light of the Court of Appeals' decision to rehear *Pilgrim I.* The trial court agreed. On June 17, 2002, the court of appeals reversed its original opinion in *Pilgrim I*.[1] *Pilgrim v. Miller*, 350 S.C. 637, 567 S.E.2d 527 (Ct. App. 2002) (*Pilgrim II*).

On July 18, 2002, the trial court again heard Petitioner's motion to set aside the entry of default. The trial court issued an order finding the August 28, 2001 service date to be invalid, but held that Petitioner was not entitled to

[1] Although the *Pilgrim II* opinion was vacated by this Court on April 25, 2003, the court of appeals in the instant case observed that the portions relied upon by the trial judge are "still good law." *See Bage v. Southeastern Roofing Co.*, S.C. Sup. Ct. Order dated July 23, 2009 (Shearouse Adv. Sh. No. 33 at 82) (discussing vacation of *Pilgrim II* opinion).

set aside the entry of default with regard to the September 4, 2001 service date.

The case was then referred to the master-in-equity for a hearing to assess damages. The master entered judgment in the amount of: $273,336.00 in actual damages to Sunrise; $394,848.38 in actual damages to Sundown; and $524,800.70 in actual damages to High Noon. The master denied Respondents' requests for prejudgment interest.

The parties filed cross-appeals. The court of appeals held that Respondents were properly denied prejudgment interest; that both the August 28, 2001 and September 4, 2001 service dates were valid; and that the trial court did not err in failing to set aside the entry of default. Both parties filed petitions for a writ of certiorari with this Court. We denied Respondents' petition and granted in part Petitioner's petition. Petitioner presents the following question for our review:

> Did the court of appeals err in failing to set aside the entry of default?

STANDARD OF REVIEW

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Mitchell Supply Co., Inc. v. Gaffney,* 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988). An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997).

LAW/ANALYSIS

Petitioner contends that it has shown good cause under the minimal standard required by Rule 55(c), SCRCP, and that the trial court and the court of appeals erred in applying a heightened standard to conclude that the company was not entitled to set aside the entry of default. Although we have some concerns about the lower courts' conflation of the Rule 60(b) and Rule 55(c) standards, we do not believe Petitioner meets even the most minimal showing of good cause, and is therefore not entitled to relief from the entry of default.

I. Differentiating the Standards for Relief Under Rule 55(c) and Rule 60(b)

We must acknowledge at the outset that there has been some recent confusion in the case law regarding the application of the standards for relief set forth in Rule 55(c) and Rule 60(b). We take this opportunity to reassert the basic legal premise that the standard for granting relief under Rule 60(b) is more rigorous than under Rule 55(c), and that an entry of default may be set aside for reasons that would be insufficient to relieve a party from a default judgment.

Rule 55(a) provides that when a party fails to respond to a complaint, the clerk shall record an entry of default. However, Rule 55(c) permits a party to move to set aside the entry of default. The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." Rule 55(c), SCRCP. This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the

plaintiff if relief is granted. *Wham v. Shearson Lehman Bros., Inc*., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989). The trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause. *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 179, 463 S.E. 2d 636, 639 (Ct. App. 1995). A motion under Rule 55(c) is addressed to the sound discretion of the trial court. *Williams v. Stalnaker*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994).

Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP. The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the "good cause" standard established in Rule 55(c). *Ricks v. Weinrauch*, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987). Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or "other misconduct of an adverse party." Rule 60(b), SCRCP. The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default.

It is often observed, as the court of appeals held in the present case, that the criteria for obtaining relief from judgment under Rule 60(b) – mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation – are relevant in determining whether good cause has been shown under Rule 55(c), SCRCP. *See New Hampshire Ins. Co. v. Bey Corp*., 312 S.C. 47, 50, 435 S.E.2d 377, 378-79 (Ct. App. 1993) (holding that, "as a practical matter," the 60(b) factors are relevant under both rules). However, we caution that this language invites trial courts to apply a heightened standard to Rule 55(c) motions. The Rule 60(b) factors are indeed relevant to a Rule 55(c) analysis, but only insomuch as proof of any one of these factors is sufficient to show "good cause." No trial court should ever find good cause lacking based solely on the absence of a Rule 60(b) factor.

II. The Merits of Petitioner's Appeal

Petitioner argues that the trial judge should have set aside the entry of default because the company showed "good cause" by asserting its insurance agent was negligent for failing to answer the complaint and because (1) it promptly moved for relief; (2) it has a meritorious defense; and (3) Respondents would suffer no prejudice if the court set aside the entry of default. We disagree.

Initially, we reject Petitioner's argument that it should be granted relief from the entry of default because it should not be held responsible for the negligence of its insurance agent in failing to answer the complaint. This argument is without merit, as the law is clear that an attorney or insurance company's misconduct is imputable to the client. *See Williams v. Vanvolkenburg*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994) (observing that an attorney's negligence in failing to answer is imputable to the defendant); *Roberts v. Peterson*, 292 S.C. 149, 151, 355 S.E.2d 280, 281 (Ct. App. 1987) (recognizing that negligence of an attorney or insurance company is imputable to a defaulting litigant). Although the presence of other factors, in the totality of the circumstances, may amount to a showing of "good cause," a defendant may not be relieved from the entry of default *solely* because it relied to its detriment on a negligent insurance agent. *See Ricks*, 293 S.C. 372, 360 S.E.2d 535 (holding that good cause was shown in the totality of circumstances involving misplaced reliance on insurance agent).

In this case, Petitioner shares the responsibility for the entry of default with its insurance agent. Petitioner did not forward the summons and complaint to the insurance agent until approximately two weeks after initially notifying the agent of the lawsuit and several days after the time to answer expired. Furthermore, Petitioner's "good cause" argument is based entirely upon the September 4, 2001 service date. Petitioner has put forth no explanation with regard to the fate of the summons and complaint served on Randy Adams on August 28, 2001. As the court of appeals correctly held,

this service was proper pursuant to *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 456 S.E.2d 897 (1995).[2] Even if we were to assume that Petitioner showed good cause as to why the summons and complaint that arrived in Rocky Mount was not answered in a timely manner, we must nevertheless affirm the entry of default because Petitioner has failed to show good cause as to why the summons and complaint that arrived in Myrtle Beach went unanswered.

CONCLUSION

For the reasons stated herein, we affirm the opinion of the court of appeals.

WALLER, PLEICONES, JJ., and Acting Justices R. Knox McMahon and E. C. Burnett, III, concur.

[2] We declined to grant certiorari as to this particular question.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ronnie Lane, Respondent,

v.

Gilbert Construction Company, LTD., Appellant.

Appeal from Florence County
Thomas A. Russo, Circuit Court Judge

Opinion No. 26701
Heard May 12, 2009 – Filed August 17, 2009

AFFIRMED

Everett A. Kendall, II, of Sweeny, Wingate & Barrow, of Columbia, for Appellant.

D. Kenneth Baker, of Darlington, James H. Moss and H. Fred Kuhn, Jr., both of Moss, Kuhn & Fleming, of Beaufort, for Respondent.

JUSTICE PLEICONES: In this premises liability action, a jury found for Respondent Ronnie Lane (Lane) in the amount of $75,000. The

trial court then granted Lane's motion for a new trial absolute, which ruling Gilbert now challenges on appeal. We affirm.

FACTS

Appellant Gilbert Construction Company LTD (Gilbert) entered into an agreement to renovate McLeod Regional Medical Center (Hospital). The renovation included work on a courtyard, accessible by an emergency exit from the building. The superintendent of Gilbert testified that during the demolition/foundation phase of the project six holes for footings were created on the site, including one in the courtyard. A number of the holes were covered, but Gilbert decided not to cover the hole in the courtyard. The superintendent explained that he believed that the area was cordoned off.

Sometime between 2:30 and 3:30 a.m. Lane, an HVAC mechanic at the Hospital working the "graveyard shift," responded to the latest in a series of false fire alarms. Lane testified that each time the alarm was activated the alarm system automatically alerted the fire department. Since the fire department had previously responded to false alarms twice during Lane's shift that night, he decided to walk down to tell the switchboard operator to put the system in "test mode" so that it would not automatically alert the fire department.

Lane knocked on the door to the switchboard room and, receiving no answer, chose to walk out of the emergency exit and into the courtyard in order to reach another door to the security and switchboard area. The emergency exit door was slightly ajar and when Lane opened it he saw "caution tape" hanging down on the side of the door. He then stepped out into what he described as "pitch black dark" and fell into the hole, breaking his ankle.

Lane underwent a number of surgeries to repair his ankle and missed weeks of work. All told, Lane's medical care related to the ankle injury totaled $73,754. On cross examination, Lane admitted that he returned to work in his previous capacity as an HVAC mechanic in between his

surgeries, though in sedentary work. Following his last surgery, he was assigned to a new job as a computer operator. In his new job, Lane works at a desk in shifts from 7:00 a.m. until 3:30 p.m., rather than the "graveyard" shift he worked as an HVAC mechanic.

An expert for Lane conducted a vocational assessment and determined that Lane was not capable of performing the job that he had prior to the injury. She further opined that Lane would only be eligible for minimum wage positions if he were to lose the position he currently has.

The jury found Lane 45% at fault and Gilbert 55% at fault and awarded $75,000 in actual damages. Lane moved for a new trial absolute which the court granted.

ISSUES

I. Did the trial court err in denying Gilbert's motion for a directed verdict?

II. Did the trial court err in granting a new trial?

III. Did the trial court's order granting a new trial deprive Gilbert of its right to trial by jury?

DISCUSSION

I. Did the trial court err in denying Gilbert's motion for directed verdict?

Gilbert contends that the evidence does not support classification of Lane as an invitee and instead only supports classification as a licensee or trespasser. Furthermore, Gilbert argues that there is no evidence to show a breach of the landowner's duty to a licensee or trespasser and therefore, Gilbert is entitled to a directed verdict. We disagree.

"A motion for directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability." Ecclesiastes Production Ministries v. Outparcel Assoc., LLC, 374 S.C. 483, 490, 649 S.E.2d 494, 497 (Ct. App. 2007), *citing* Carolina Home Builders, Inc. v. Armstrong Furnace Co., 259 S.C. 346, 358, 191 S.E.2d 774, 779 (1972).

"Under a premises liability theory, a contractor generally equates to an invitor and assumes the same duties that the landowner has, including the duty to warn of dangers or defects known to him but unknown to others." Larimore v. Carolina Power & Light, 340 S.C. 438, 448, 531 S.E.2d 535, 540 (Ct. App. 2000).

The trial court classified Lane as an "invitee." An invitee is a person "who enters onto the property of another by express or implied invitation, his entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land, and there is a mutuality of benefit or a benefit to the owner." Singleton v. Sherer, 377 S.C. 185, 199, 659 S.E.2d 196, 204 (Ct. App. 2008), *quoting* Sims v. Giles, 343 S.C. 708, 716-17, 541 S.E.2d 857, 862 (Ct. App. 2001).

Gilbert contends that Lane was not an invitee because he had no consent, either express or implied, to be in the courtyard and because his presence in the courtyard was not to the interest or advantage of Gilbert. We find that there was at least implied consent to use the area since it was immediately outside of an emergency exit. Moreover, Lane was at least partly benefiting Gilbert by attempting to have the switchboard disable the automatic alert to the fire department. Lane testified that the fire alarm repeatedly sounded during his shift. Each time the alarm sounded, the alarm system automatically notified the fire department. By instructing the switchboard to place the system in "test" mode, Lane could ensure that the business of both the Hospital and Gilbert would not be repeatedly interrupted by the sounding of the alarm, unnecessary evacuations, and arrival of fire department personnel.

Moreover, even if Lane did not provide a benefit to Gilbert, Gilbert would not be entitled to a directed verdict if Lane were classified as a licensee.

"A licensee is a person who is privileged to enter upon land by virtue of the possessor's consent." Neil v. Byrum, 288 S.C. 472, 473, 343 S.E.2d 615, 616 (1986). "When a licensee enters onto the property of another, the primary benefit is to the licensee, not the property owner." Singleton, 377 S.C. at 198, 659 S.E.2d at 203.

"A landowner owes a licensee a duty to use reasonable care to discover the licensee, to conduct activities on the land so as not to harm the licensee, and to warn the licensee of any concealed dangerous conditions or activities." Singleton, 377 S.C. at 201, 659 S.E.2d at 204. In our view, the evidence presented at trial raised a jury question as to whether or not Gilbert met the duty owed to Lane as a licensee. Therefore, even assuming Lane was a licensee, the trial judge did not err in denying the motion for a directed verdict. See Ecclesiastes Production Ministries, *supra*.

We find that the trial court properly classified Lane as an invitee. Moreover, even assuming Lane is not an invitee, Gilbert would not be entitled to a directed verdict. Consequently, the trial judge did not err in denying Gilbert's motion for a directed verdict.

II. Did the trial court err in granting a new trial?

Gilbert argues that the trial court erred in granting Lane a new trial. We disagree.

In South Carolina, a trial judge may grant a new trial following a jury verdict under the Thirteenth Juror Doctrine. The doctrine "entitles the judge to sit, in essence, as the thirteenth juror when he finds 'the evidence does not justify the verdict,' and then to grant a new trial based solely 'upon the facts.'" Norton v. Norfolk Southern Railway Co., 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002), *citing* Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265

(1990). As the thirteenth juror, the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict. Id.

Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. Norton, 350 S.C. at 478, 567 S.E.2d at 854. This Court's review is limited to consideration of whether evidence exists to support the trial court's order. Id. at 478-79, 567 S.E.2d at 854. As long as there is conflicting evidence, this Court has held the trial judge's grant of a new trial will not be disturbed. Id.

The judge is not required to explain the reasons for his decision. Id. In this case, however, the trial judge provided an explanation in the order granting the motion for a new trial. The court noted that Lane presented evidence at trial, which was "uncontested by the defendant," of actual medical costs of $73,754, lost wages from the date of injury up until the time of trial of $17,248, and a 21% permanent impairment rating. The court also noted that the jury heard testimony from two experts opining that Lane suffered a loss of personal services to his family equivalent to $19,381, such as household chores, and is unable to perform the duties required by his prior job as an HVAC mechanic. The court concluded:

> [A]fter careful review of all of the facts and circumstances of this case and other cases in the state of South Carolina, this Court believes that an amount of Seventy Five Thousand and no/100 ($75,000.00) Dollars can only be explained on the basis of passion, prejudice or caprice on the part of the jury. The jury's verdict in this case shocks the conscience of this Court, as an award of damages, particularly the considerations, or lack thereof, of the uncontested damages presented by the Plaintiff, including a Twenty-One (21%) percent permanent impairment to health. As such, this Court finds that the jury's verdict in this matter is grossly inadequate in light of the evidence presented.

The trial judge then granted Lane's motion for a new trial absolute.

A. Did the trial court commit legal error in viewing certain damages as "unconstested?"

Gilbert first argues that it was legal error for the trial judge to base his order on the idea that certain damages were "uncontested." Gilbert contends that it "did contest those damages, denying them in its Answer, by not stipulating as to damages and by questioning Lane's claims in cross-examining various witnesses about them." In Gilbert's view, the trial court's Order implied that Gilbert was required to put up witnesses to contest the claim of damages and thereby shifted the burden of proof from the plaintiff to the defendant. We disagree.

In considering a motion for a new trial, the trial judge must look to see if the evidence justifies the jury verdict. See Norton, 350 S.C. at 478, 567 S.E.2d at 854. The court, in making such an inquiry, is perfectly justified in noting whether the evidence presented to the jury was or was not challenged in front of the jury.

Moreover, the trial judge's statement that certain evidence was "uncontested" was not factually incorrect, since the evidence in question was not challenged by Gilbert at trial, even on cross-examination. Gilbert's counsel told the jury in his opening statement:

> We are not contesting that he was injured. We are not going to challenge those areas about his life. He was injured. He has undergone a lot of medical treatment. But, there is one part of his damages that we are going to talk about. We do take exception to the future los[t] wages that you are going to hear.

As promised, Gilbert did not challenge the medical costs, lost wages prior to trial, or physical impairment rating. Instead, Gilbert chose to focus on disputing Lane's claims for future lost wages, and succeeded as the jury awarded $0 for that particular claim.

The trial court committed no error in noting that certain damages were "uncontested" in its order granting a new trial.

B. Is there evidence to support the trial court's order?

Gilbert contends that the trial court erred in granting a new trial because there is no evidence to support the order. We disagree.

On a special verdict form, the jury awarded $75,000 in actual damages of which it attributed $0 to future diminished earning capacity. Gilbert argues that the jury properly declined to award earning capacity since, at the time of trial, Lane was employed in a job that paid better than his previous job. Gilbert also posits reasons why the jury might choose to reduce the awards for pre-trial personal services, pain and suffering, and medical bills.[1]

Gilbert's points are not entirely without merit. However, the question before this Court on appeal is whether the trial court's decision to grant a new trial is wholly unsupported by the evidence. See Norton, 350 S.C. at 478, 567 S.E.2d at 854. In the instant case, Lane presented evidence of $73,754 in medical bills and $17,248 in lost wages up to the time of trial, neither of which was challenged by Gilbert. Lane also presented evidence that Lane has a 21% physical impairment, experienced pain and suffering related to the accident, and suffered a loss of personal services to his family of $19,381. We find the trial court's decision order granting a new trial is supported by the evidence.

[1] Gilbert contends that the jury may have reduced the amount of damages based on medical bills because (1) though the bills were introduced, there was no testimony that they had been paid, and (2) the jury could have reasonably concluded from Lane's answer that the summary of medical expenses was correct "to my knowledge" that Lane did not know how much he had been billed, or actually paid for medical expenses.

III. Was Gilbert denied its right to a trial by jury?

Gilbert contends that to grant a new trial after the jury verdict was "*de facto* to deny Gilbert its constitutional right to trial by jury." In short, Gilbert contends that the Thirteenth Juror Doctrine is unconstitutional under the South Carolina constitution. We disagree.

The Thirteenth Juror Doctrine is a well-established in South Carolina as the standard for granting a new trial. See Norton, 350 S.C. 477, 567 S.E.2d at 854. This Court has reviewed the doctrine on several occasions and has refused to abolish it. Id. at 478, 567 S.E.2d at 854.

The right to trial by jury is a fundamental right. See Wright v. Colleton County School Dist., 301 S.C. 282, 291, 391 S.E.2d 564, 570 (1990). As such, any abridgement of that right is subject to strict scrutiny. See City of Beaufort v. Holcombe, 369 S.C. 643, 632 S.E.2d 894 (Ct. App. 2006). To meet strict scrutiny, a law or policy must meet a compelling state interest and be narrowly tailored to effectuate that interest. See In re Treatment and Care of Luckabaugh, 351 S.C. 122, 140-41, 568 S.E.2d 338, 347 (2002).

The Thirteenth Juror Doctrine does not abridge the right to a trial by jury since the effect of a trial judge's decision to grant a new trial is to allow another jury trial. Therefore, the parties are not deprived of a trial by jury.

We affirm the trial court's exercise of power under the Thirteenth Juror Doctrine.

CONCLUSION

The trial court did not err in declining to grant a directed verdict for Gilbert based on Lane's status for purposes of premises liability. Furthermore, the trial court did not err in granting a new trial under the Thirteenth Juror Doctrine, nor is the doctrine unconstitutional. Therefore, the decision of the trial court is

AFFIRMED.

WALLER, BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joseph H. Moore, Respondent,

v.

M.M. Weinberg, Jr., and
Weinberg and Brown, LLP, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Sumter County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 26702
Heard May 27, 2009 – Filed August 12, 2009

AFFIRMED

Harry C. Wilson, Jr. and David C. Holler, of Lee, Erter, Wilson, James, Holler & Smith, of Sumter, for Petitioners.

A. Camden Lewis, Peter D. Protopapas and Brady R. Thomas, of Lewis & Babcock, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Respondent Joseph H. Moore filed suit against Petitioners M.M. Weinberg, Jr. and Weinberg and Brown, LLP after Petitioners disbursed funds in which Moore claimed an interest. The trial court granted Petitioners' motion for summary judgment. The court of appeals affirmed in part, reversed in part, and remanded. *Moore v. Weinberg*, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007). This Court granted a writ of certiorari to review that decision. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Respondent Moore and Clarence Wheeler began a business relationship in the 1980s. Over the course of their relationship, the two men entered into numerous loan agreements, and in November 1999, Wheeler approached Moore seeking to borrow money. Wheeler informed Moore that he was currently the plaintiff in a lawsuit which involved the sale of his music business and that Petitioner Weinberg was representing him in the matter. Weinberg had been Wheeler's attorney for approximately 30 years and had represented him in numerous matters, in addition to the music business matter. Wheeler further informed Moore that $100,000 had been deposited in an escrow account with the clerk of court pending the resolution of the litigation and proposed using the escrow funds as security for the loan. Moore then spoke with Weinberg regarding the escrow account and the proposed loan agreement. After Weinberg assured Moore that the escrow account did in fact contain $100,000 and was pending upon the resolution of the litigation, Moore agreed to loan Wheeler $80,000. Wheeler executed a note to Moore for $92,000, which included a $12,000 built-in premium. Weinberg then prepared an assignment securing the note which provided that:

> Clarence Wheeler does by this instrument assign to Joseph Moore so much of any recovery that he may make from the

> debt owed to him by [the music business] and the escrow account, which is pending as a result of said litigation, unto Joseph Moore.

In 2002, Weinberg settled the music business litigation on behalf of Wheeler for $100,000.[1] After the clerk transferred the funds from the escrow account to Weinberg, Weinberg failed to remember that the escrow funds had been assigned to Moore and immediately disbursed $72,458 of the funds to Wheeler and retained $25,000 for attorney's fees. While Moore was out of town, Wheeler tendered $50,000 to Moore's son for payment of the debt.[2] Moore later informed Wheeler the $50,000 payment did not fully satisfy the note. Accordingly, they signed a handwritten agreement on the bottom of the note, which provided:

> I, Clarence Wheeler, agree that I owe Joseph H. Moore $80,000 since March 17, 2000 and agree to pay him 6% interest on the $80,000 balance. Clarence Wheeler paid $50,000 on June 19, 2002.

Wheeler failed to pay Moore in accordance with the new agreement.

Moore filed claims against Weinberg for negligence, conversion, and civil conspiracy. The trial court granted summary judgment in favor of Weinberg because Moore and Weinberg did not have a "legal relationship" and because it found that the subsequent handwritten agreement contained on the note constituted a novation. The court of appeals held that the trial court erred in granting summary judgment on the negligence claim because there was evidence that Weinberg owed a duty to Moore. Additionally, the court held the defense of novation was not applicable in this tort action because

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[1] At the time of the settlement, the escrow account had earned $10,829 in interest. The settlement agreement provided that Wheeler would retain $100,000, while the defendants would retain the $10,829 earned in interest.

[2] Wheeler testified that he mistakenly believed that he owed $50,000 on the debt.

novation is a defense sounding in contract. Finally, the court of appeals held the trial court erred in granting summary judgment on Moore's conversion claim because Moore had a valid assignment to a portion of the escrow account and Weinberg was on notice of the assignment.

This Court granted a writ of certiorari to review the following issue:

> Did the court of appeals err in holding that an attorney may be liable to a third party for disbursing funds to the attorney's client where the attorney was aware that the funds were assigned to the third party?

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. 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. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

LAW/ANALYSIS

I. Negligence

Weinberg argues that the court of appeals erred in reversing the trial court's grant of summary judgment on the negligence claim. We disagree.

In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and

proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages. *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2006).

Weinberg contends that allowing a cause of action against an attorney under these circumstances will intrude upon the attorney/client relationship and greatly hinder an attorney's ability to represent his client. In our view, Weinberg's argument misses the mark. Weinberg acted as the escrow agent and owed a fiduciary duty to Moore by virtue of this role. Therefore, it makes no difference that Weinberg was Wheeler's lawyer and represented him in other matters. Under the facts of this case, the duty arises from an attorney's role as an escrow agent and is independent of an attorney's status as a lawyer and distinct from duties that arise out of the attorney/client relationship.

Furthermore, we hold that Moore presented evidence that Weinberg's performance fell below the standard of care. In addition to submitting an affidavit from an attorney stating that Weinberg breached the standard of care, Weinberg essentially admitted that he was negligent in failing to disburse the funds in accordance with the agreement by testifying that he simply overlooked the terms of the agreement.

Accordingly, we hold that the trial court erred in granting Weinberg's motion for summary judgment on the negligence claim.

II. Conversion

Weinberg argues that the court of appeals erred in reversing the trial court's grant of summary judgment on the conversion claim. We disagree.

Conversion is defined as the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 498, 392 S.E.2d 789, 792 (1990). Money may be the subject of conversion when it is capable of being identified and there may be

conversion of determinate sums even though the specific coins and bills are not identified. *Id.*

Moore alleged in the complaint that he owned an interest in the proceeds from the litigation pursuant to the assignment, that Weinberg was aware of his interest in the proceeds, and that Weinberg wrongfully disbursed those proceeds. Viewing the evidence in a light most favorable to Moore, a genuine issue of material fact exists as to the conversion claim, and the court of appeals therefore correctly reversed the trial court's grant of summary judgment.

CONCLUSION

For the foregoing reasons, we affirm the court of appeals' decision and hold that the trial erred in granting Weinberg's motion for summary judgment on the negligence claim and conversion claim.

WALLER, BEATTY, JJ., and Acting Justices James E. Moore and Dorothy Mobley Jones, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jerry D. Duncan and Anna M. Duncan — Respondents,

v.

Ford Motor Company — Appellant.

Appeal From Laurens County
J.C. Nicholson, Circuit Court Judge

Opinion No. 4607
Heard November 5, 2008 – Filed August 12, 2009

AFFIRMED

Curtis L. Ott and Carmelo B. Sammataro, both of Columbia, for Appellant.

Karl S. Brehmer and L. Darby Plexico, III, both of Columbia, for Respondents.

HEARN, C.J.: Jerry and Anna Duncan initiated this lawsuit against Ford Motor Company after a fire, originating under the hood of their 2000 Ford Expedition, destroyed their home. The Duncans alleged Ford knowingly installed a defective speed control deactivation switch into the

vehicle, which caused it to ignite. At the conclusion of trial, the jury awarded the Duncans $620,759.79 in actual damages, reduced to $589,721.80 in proportion to their comparative fault, and $3 million in punitive damages. Ford appeals. We affirm.

FACTS

Ford manufactured the Duncans' Ford Expedition in December 1999. A short time later, the Duncans purchased the vehicle and drove it without major incident until March 1, 2005. On that day, Anna Duncan parked her vehicle in the carport next to her home and walked inside. A few minutes later, her husband, Jerry, walked outside and observed fire coming from underneath the hood of the Expedition. Upon seeing the fire, Jerry told his wife to call 911, tried to put the fire out with a fire extinguisher, and attempted to drive the car away from their home. When the fire extinguisher failed and the car did not start, Jerry attempted to use the hayfork on the front of his tractor to remove the car from the premises. However, this effort was also unsuccessful. By this time, the fire had spread to the carport, and strong winds quickly pushed the flames from the carport to the Duncans' adjacent home. The Duncans fled to the end of the driveway and watched as the fire destroyed their home.

Prior to this incident, Ford recalled two lines of vehicles because of under-hood fires. First, in 1999, Ford recalled the panther platform line of vehicles, consisting of the Lincoln Town Car, the Ford Crown Victoria, and the Mercury Grand Marquis. Later, in 2005, Ford recalled the F-Series line of vehicles, including the Expedition. Ford attributed the under-hood fires in both lines of vehicles to the failure of the speed control deactivation switch (the switch). The switch, designed and manufactured by Texas Instruments, contained a hydraulic side and an electrical side separated by a thin layer of plastic called the kapton seal. The chief function of the kapton seal was to prevent brake fluid from entering the electrical side of the switch. In both the 1999 and 2005 recalls, Ford determined the fires were caused by the failure of the kapton seal to prevent fluid from entering the electrical side of the switch. Ford first installed the switch in panther platform vehicles in 1992. The next year, Ford installed the switch in the F-Series line of vehicles. The

design of the switch and its component parts has remained unchanged since its initial installation in the panther platform line of vehicles in 1992.

One month after the 1999 recall of the panther platform vehicles, a group of scientists employed by Ford produced an internal document, the Special Investigation Team Report (SIT Report), which analyzed the cause of the fires and proposed solutions to remedy the problem. In the report, dated June 11, 1999, Ford acknowledged it did not completely understand the cause of the fires. However, the report identified one of the potential causes as the failure of the kapton seal to prevent brake fluid from entering the electrical side of the switch. The report did not mention deviations in the manufacturing process at Texas Instruments as a reason for the fires. The report outlined ten possible solutions to remedy the fires. Ford did not implement any of these proposed solutions and did not alter the kapton seal of the switch during the 1999 recall.

According to Ford's expert witness, Mark Hoffman, Ford neither incorporated the fixes proposed by the report nor altered the kapton seal because it determined that the seal's failure and the subsequent fires were caused by manufacturing problems at Texas Instruments. Specifically, Hoffman noted the change in the manufacturing process at Texas Instruments, from a manual to an automated system, resulted in component parts deviating from the specifications required by Ford. Accordingly, during the 1999 recall, Ford took two steps. First, it ensured that Texas Instruments resolved its manufacturing issues. Second, it replaced the switches in the panther platform series deviating from its specifications with switches conforming to its specifications.

The Duncans' expert, Jeff Morrill, made three observations when comparing the fire in the Duncans' Expedition to the fires in the recalled 1999 panther platform line of vehicles. First, the switches found in both were identical. Second, the fires were caused by the failure of the kapton seal to prevent brake fluid from entering into the electrical side of the switch. Third, Ford knew of the failure of the kapton seals before manufacturing the Duncans' 2000 Expedition as evidenced by the 1999 recall itself and the SIT Report. The Duncans then asked Kendrick Richardson, an expert in mechanical engineering, whether Ford breached the engineering standard of

care, assuming the above observations reached by Morrill were correct. Richardson responded in the affirmative. The trial court precluded Ford from cross-examining Morrill and Richardson about the manufacturing problems at Texas Instruments, ruling this line of questioning was irrelevant.[1]

The jury returned a verdict in favor of the Duncans, awarding them $620,759.79 in actual damages, reduced to $589,721.80 in proportion to their comparative fault, and $3 million in punitive damages. This appeal followed.

STANDARD OF REVIEW

"[T]he admission or exclusion of evidence in general is within the sound discretion of the trial court." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." Id. at 26, 609 S.E.2d at 509. Appellate courts apply a de novo standard of review in determining whether an award of punitive damages is constitutionally excessive. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001). However, the factual findings made by the district court in conducting the excessiveness inquiry must be accepted unless clearly erroneous. Id. at 435.

LAW/ANALYSIS

I. EVIDENTIARY ISSUES

A. Qualifications of Jeff Morrill

At trial, Jeff Morrill was qualified as an expert in the field of cause and origin of fire; however, the trial court found he was not qualified to offer

[1] At the time of the trial court's ruling, both parties acknowledged that Ford, not Texas Instruments, was liable for the defective switch after installing it into its vehicles. In addition, neither party had introduced evidence of manufacturing problems at Texas Instruments.

design opinions. Ford asserts the trial court erred by allowing Morrill to present design opinions. Ford alleges Morrill gave design opinions when he testified about the reasons for the 1999 and 2005 recalls. In addition, Ford argues Morrill presented a design opinion when he concluded the cause of the recalls was the same. Lastly, Ford claims the trial court erred by allowing Morrill to testify about the 1999 SIT Report because he never worked for Ford and had no firsthand knowledge regarding the 1999 recall or the report. We disagree.

The qualification of an expert witness and the admissibility of expert testimony are matters within the discretion of the trial court. Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997). A trial court's ruling on the admissibility of expert testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair. Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct. App. 2001). "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing." Rule 703, SCRE.

Contrary to Ford's assertions, Morrill testified exclusively in his area of expertise—cause and origin of fire—and never offered any design opinions. He testified that Ford recalled both lines of vehicles because of under-hood fires. Next, Morrill stated the cause of the fires in both lines of vehicles was due to the failure of the kapton seal to prevent brake fluid from entering the electrical side of the switch. Morrill never testified that the kapton seal was defectively designed; rather, he only stated it caused fires. As an expert in cause and origin of fire, Morrill was qualified to offer such an opinion. In forming his conclusion, Morrill relied on the SIT Report. Because he relied on the report in forming his opinion, Morrill could testify about the report, regardless of whether he possessed firsthand knowledge of the report, the recalls, or worked at Ford. See Hundley ex. rel. Hundley v. Rite Aid of S.C., Inc., 339 S.C. 285, 295, 529 S.E.2d 45, 50 (Ct. App. 2000) ("An expert witness may state an opinion based on facts not within his firsthand knowledge."); State v. Slocumb, 336 S.C. 619, 640, 521 S.E.2d 507, 518 (Ct. App. 1999) (noting an expert may testify about the facts or data upon which he or she bases an opinion, as long as they are of a type reasonably relied upon by other experts in the field). Accordingly, the trial court properly

allowed Morrill to testify in his area of expertise at trial and further, did not err in allowing him to base his opinion on the SIT Report.

B. Richardson Hypothetical

Next, Ford argues the trial court erred by allowing the Duncans to ask Kendrick Richardson whether Ford breached its engineering standard of care based on the conclusions of Morrill. Ford asserts the question was misleading because it failed to mention the manufacturing problems at Texas Instruments that led to the 1999 recall. We disagree.

An expert can offer opinions based upon hypothetical questions embracing facts supported by the evidence. Gazes v. Dillard's Dep't Store, Inc., 341 S.C. 507, 514, 534 S.E.2d 306, 310 (Ct. App. 2000). A hypothetical question need not include all of the details in a particular case. Brown v. La France Indus., 286 S.C. 319, 327, 333 S.E.2d 348, 353 (Ct. App. 1985). It is sufficient that substantially all the material facts necessary to the formation of an intelligent opinion are included in the hypothetical question. Id.

We have already determined Morrill was qualified to offer the testimony he presented at trial. As a result, Richardson, an expert in the field of mechanical engineering, could give his opinion as to whether Ford breached its engineering standard of care based on Morrill's conclusions. See Gazes, 341 S.C. at 514, 534 S.E.2d at 310 (noting an expert can answer hypothetical questions based upon evidence admitted at trial). In addition, the question was not misleading even though it omitted the manufacturing problems at Texas Instruments. The question was based on Morrill's testimony and the SIT Report. Neither Morrill's Testimony nor the SIT Report referred to manufacturing issues at Texas Instruments. Therefore, the trial court did not abuse its discretion by allowing Richardson to respond to the hypothetical question posed by the Duncans.

C. Cross-examination of Morrill and Richardson

Ford asserts the trial court erred in preventing it from asking the Duncans' experts, Morrill and Richardson, who manufactured the switch and

why Ford decided to recall the panther platform line of vehicles in 1999. We disagree.

"The scope of cross-examination rests largely in the discretion of the trial court." Watson ex rel. Watson v. Chapman, 343 S.C. 471, 482, 540 S.E.2d 484, 489 (Ct. App. 2000). To warrant the reversal of a limitation placed on the scope of cross-examination by the trial court, a manifest abuse of discretion and prejudice must be demonstrated. Vacation Time of Hilton Head Island, Inc. v. Lighthouse Reality, Inc., 286 S.C. 261, 266, 332 S.E.2d 781, 784 (Ct. App. 1985). A manufacturer who incorporates into his product a component made by another has a responsibility to test and inspect such component, and his negligent failure to properly perform such duty renders him liable for injuries proximately caused as a consequence. Nelson v. Coleman Co., 249 S.C. 652, 657, 155 S.E.2d 917, 920 (1967); see S.C. Code Ann. § 15-73-10 (2005) ("One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property . . . .") (emphasis added).[2]

Initially, the trial court did not err in preventing Ford from asking Morrill and Richardson who manufactured the switch. As Nelson makes clear, Ford was legally responsible for the switch in the event it failed and caused damage because it incorporated the switch manufactured by Texas Instruments into its vehicles. 249 S.C. at 657, 155 S.E.2d at 920. Therefore, the fact Texas Instruments manufactured the switch was irrelevant. See Rule 611(b), SCRE ("A witness may be cross-examined on any matter relevant to any issue in the case . . . ."). Next, we believe the trial court acted within its discretion in precluding Ford from asking the Duncans' experts why it decided to recall the panther platform line of vehicles in 1999. Ford produced no evidence in support of its contention that the 1999 recall was prompted by manufacturing defects at Texas Instruments either before or during the cross-examination of Morrill and Richardson. Because no

[2] For liability to attach under the statute, the seller must also be in the business of selling the defective product, and the product must be expected to and ultimately reach the consumer without a substantial change in condition. § 15-73-10 (2005).

evidence supported Ford's claim that the 1999 recall was prompted by manufacturing defects at Texas Instruments, the trial court acted within its discretion in preventing Ford from questioning the Duncans' experts in that regard. At this point in the trial, Ford's contention that manufacturing defects at Texas Instruments caused it to recall vehicles in 1999 amounted to mere conjecture. See State v. Johnson, 338 S.C. 114, 124, 525 S.E.2d 519, 524 (2000) (noting a trial court may limit cross-examination that is only marginally relevant). Accordingly, the trial court acted within its discretion.

Moreover, even if the trial court committed error, Ford did not suffer any prejudice. See Fields, 363 S.C. at 25, 609 S.E.2d at 509 (holding reversal based on the admission or exclusion of evidence is not warranted absent a showing of both error and resulting prejudice). After preventing Ford from cross-examining the Duncans' experts about Ford's reason for the 1999 recall, the trial court later gave Ford the opportunity to recall Morrill and Richardson to the witness stand and ask them about Ford's reason for the 1999 recall. Ford, however, chose not to do so. In addition, Ford's expert, Mark Hoffman, testified about the manufacturing defects at Texas Instruments as the reason for the 1999 recall. This was precisely the information Ford sought to elicit from the Duncans' experts during cross-examination. See Baber v. Greenville County, 327 S.C. 31, 41, 488 S.E.2d 314, 320 (1997) ("There is no error in excluding testimony which is subsequently admitted into evidence."); S.C. Dep't of Highways & Pub. Transp. v. Galbreath, 315 S.C. 82, 86, 431 S.E.2d 625, 628 (Ct. App. 1993) ("Even if the trial court erred in excluding evidence, there is no reversible error where the testimony would have been cumulative."). Thus, even assuming the trial court committed error in limiting the scope of Ford's cross-examination, such error does not warrant reversal on appeal because Ford did not suffer any prejudice as a result.

D. 1999 Recall of Panther Platform Vehicles

Ford contends the trial court erred by admitting the 1999 recall of the panther platform line of vehicles into evidence. Ford asserts the switch failure in the recalled panther platform line of vehicles was not substantially similar to the alleged switch failure in the Duncans' Expedition. Ford argues the switch failure and subsequent recall of the 1999 panther platform line of

vehicles was due to manufacturing deviations at Texas Instruments. By contrast, Ford asserts the Duncans' Expedition contained a switch meeting Ford's specifications. We disagree.

The trial court did not abuse its discretion by allowing the 1999 recall of the panther platform line of vehicles into evidence. Ford concedes the recalled panther platform vehicles contained a switch with the same design and same component parts as the switch found in the Duncans' Expedition. Moreover, Ford's expert, Mark Hoffman, acknowledged Ford recalled the panther platform vehicles because a failure in the kapton seal allowed brake fluid to enter the electrical side of the switch. Duncans' expert, Jeff Morrill, testified the fire in the Duncans' Expedition started because of an identical failure of the kapton seal. These facts demonstrate that the under-hood fires that prompted the 1999 recall of the panther platform line of vehicles were substantially similar to the under-hood fire in the Duncans' Expedition, which caused their home to be destroyed. See Whaley v. CSX Transp., Inc., 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005) (noting other incidents must be substantially similar to be relevant and admissible in a products liability action).

E. Emotional Distress

Ford argues the trial court erred by submitting Anna Duncan's claim for emotional distress to the jury in the absence of expert testimony. In addition, Ford contends the trial court erred by charging the jury that the "plaintiffs" may recover for emotional distress when only Anna presented evidence of emotional distress. We disagree.

Exclusive of the Duncans' claim for emotional distress, Jerry Duncan testified that they sustained $627,958.59 in actual damages.[3] The jury awarded the Duncans $620,759.79 in actual damages. Therefore, because the jury verdict is less than the evidence of actual damages presented at trial, the verdict should not be disturbed on appeal. See Burns v. Universal Health

[3] $440,000 for the house, $156,120.32 for personal items, $21,000 for the use of the house, $9,734.47 for landscaping, $898.80 in hotel stays, and $205.00 electrician fees.

Servs., Inc., 361 S.C. 221, 232, 603 S.E.2d 605, 611 (Ct. App. 2004) (stating the verdict will be upheld if any evidence sustains the factual findings implicit in the jury's verdict).

F. Threadgill Appraisal

Ford contends the trial court abused its discretion by not admitting Jack Threadgill's appraisal of the Duncans' home into evidence because it qualified as a business record.[4] At a minimum, Ford argues Threadgill's appraisal should have been admissible to impeach Keith Ridgeway's appraisal of the Duncans' home because Ridgeway relied on the factual information of Threadgill's appraisal.[5] We disagree.

A report kept in the course of regularly conducted business activity is admissible unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. Rule 803(6), SCRE. However, subjective opinions and judgments found in business records are not admissible. Id.

The trial court did not abuse its discretion by excluding Threadgill's appraisal of the Duncans' home. Ford only sought to introduce the document to show the value Threadgill assigned to the home. The business records exception does not allow subjective opinions to be introduced into evidence. Threadgill's valuation of the Duncans' home was nothing more than a subjective opinion. In the alternative, Ford argues the objective factual portions of Threadgill's appraisal should have been admissible at trial. However, Ford never sought to introduce the factual portions of Threadgill's appraisal at trial; rather, Ford only sought to admit Threadgill's estimate of the value of the Duncans' home. Accordingly, Ford's argument concerning the factual portions of the Threadgill appraisal is not preserved for appellate review. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (stating issues not raised and ruled upon in the trial court will not be considered on appeal).

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[4] Threadgill was deceased at the time of the trial.

[5] Threadgill valued the Duncans' home at $251,415.00, while Ridgeway valued it at $295,711.00.

II. PUNITIVE DAMAGES

A. Reckless, Willful, or Wanton Conduct

Ford contends the jury's award of punitive damages should be reversed because its conduct did not rise to the level of reckless, willful, or wanton. Ford contends it had no notice that switches meeting its manufacturing specifications would cause fires. Ford argues the Duncans' Expedition, unlike the recalled panther platform line of vehicles, contained a properly manufactured switch. Although Ford acknowledges the recalled panther platform line of vehicles contained a switch matching the same design and containing the same component parts as the switch in the Duncans' Expedition, it asserts that the fires under the hood of the panther platform line of vehicles were caused by deviations in the manufacturing process at Texas Instruments. We disagree.

Under South Carolina law, punitive damages may be awarded to punish tortfeasors who have acted in a "reckless, willful, or wanton" manner. Taylor v. Medenica, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). The plaintiff must prove punitive damages by clear and convincing evidence. S.C. Code Ann. § 15-33-135 (2005). Clear and convincing evidence is: "that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." Anderson v. Augusta Chronicle, 355 S.C. 461, 473, 585 S.E.2d 506, 512 (Ct. App. 2003). The clear and convincing standard is the highest burden of proof known to civil law. Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct. App. 2004).

Clear and convincing evidence supports the jury's award of punitive damages. Here, Ford knew the kapton seal it installed in automobiles could fail and that such failure was causing fires before manufacturing the Duncans' Expedition in December 1999. Shortly after recalling the panther platform line of vehicles in May 1999, Ford assigned a group of scientists to investigate the cause of the under-hood fires in the panther platform vehicles. The scientists detailed their findings in the SIT Report, dated June 11, 1999, and identified the failure of the kapton seal to prevent brake fluid from

penetrating it as a potential cause of the fires. Ford argues manufacturing deviations at Texas Instruments prompted the 1999 recall and caused the kapton seal to fail. However, Ford never produced any document and only one witness, a mechanical engineer at Ford, to support this claim. In fact, the SIT Report never mentioned the manufacturing problems at Texas Instruments. Thus, the evidence clearly demonstrates Ford had knowledge, as of June 11, 1999, the kapton seal could fail and that this failure could cause fires. In spite of this knowledge, Ford did not make any changes to the switch itself or to the kapton seal; in fact, Ford installed a switch in the Duncans' Expedition in December 1999 that was virtually identical to that previously installed in the recalled vehicles.[6] This conduct rises to the level of reckless, willful, and wanton.

B. Jury Instructions

Ford argues the trial court should have instructed the jury not to consider conduct occurring outside of South Carolina or harm to non-parties when deciding whether to award punitive damages. Ford contends evidence of two nationwide recalls created a risk that the jury might award punitive damages to the Duncans on these improper bases. We disagree.

"The practice of awarding punitive damages originated in principles of criminal law to deter the wrongdoer and others from committing like offenses in the future." James v. Horace Mann Ins. Co., 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006) (citing Laird v. Nationwide Ins. Co., 243 S.C. 388, 393, 134 S.E.2d 206, 210 (1964)). Because of the quasi-criminal nature of punitive damages, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Atkinson v. Orkin Exterminating Co., 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004). The United States Supreme Court has interpreted the Due Process Clause to prohibit a state from imposing punitive damages to punish a defendant for unlawful acts committed outside of the

[6] Ford repeatedly argues the SIT Report is being read out of context. However, the document is straight-forward. It establishes potential causes of the under-hood fires and offers solutions on how to fix them. According to the report, one of the two causes of the fires is the failure of the kapton seal.

state's jurisdiction. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003). "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon non-parties or those whom they directly represent . . . ." Philip Morris v. Williams, 549 U.S. 346, 353 (2007). When the evidence and arguments submitted in the case create a risk of improper punishment, the trial court must, upon request, properly instruct the jury on the constitutional limits of punitive damages. Id. at 357.

Neither the evidence nor the arguments in this case necessitated the jury charge argued by Ford. The Due Process Clause does not require the jury charge advanced by Ford. The Due Process Clause only requires such a charge when the evidence or arguments presented at trial create a risk that the jury may award punitive damages for conduct occurring outside of the state or for harm to non-parties. Id. at 357. Contrary to Ford's assertions, the Duncans did not introduce evidence creating such a risk. The Duncans introduced the 1999 recall solely for the purpose of demonstrating Ford's knowledge of the defective kapton seal at the time it installed the same kapton seal in the Duncans' Expedition. In addition, the Duncans introduced the 2005 recall of the Ford Expedition to demonstrate that the recall was due to the same failure of the kapton seal that the Duncans claimed caused the fire in their Expedition. As the United States Supreme Court stated in TXO Prod. Corp. v. Alliance Res. Corp., a plaintiff can introduce evidence of out-of-state conduct to demonstrate the degree of reprehensibility of the defendant's conduct. 509 U.S. 443, 462 n.28 (1993). Simply put, the Duncans only introduced evidence of nationwide recalls to demonstrate the reckless or willful nature of Ford's conduct in this case. The Duncans never offered any evidence of how many automobiles Ford recalled or how many injuries the under-hood fires caused. Accordingly, the Due Process Clause did not require the jury charge suggested by Ford.

C. Ford's Wealth

At trial, the Duncans called Dr. Oliver Wood to testify about Ford's general wealth and its financial ability to respond to an award of punitive damages. During his testimony, Wood testified as to Ford's net worth, assets, gross profits, and the amount of compensation it paid executives. Ford

argues the trial court should not have allowed Wood to testify because his testimony invited the jury to return an award of punitive damages against it based solely on its financial well-being.[7] In particular, Ford argues the amount of compensation it paid executives lacked any relationship to its financial ability to respond to punitive damages and was nothing more than a transparent attempt to appeal to the jury's passion. We disagree.

In Frazier v. Badger, the South Carolina Supreme Court reaffirmed the proposition that a defendant's ability to pay is a relevant factor in assessing punitive damages. 361 S.C. 94, 106, 603 S.E.2d 587, 593 (2004) (citing Rogers v. Florence Printing Co., 233 S.C. 567, 106 S.E.2d 258 (1958)). In Pac. Mut. Life Ins. Co. v. Haslip, the United States Supreme Court stated the "financial position" of the defendant is one factor that can be taken into account in assessing punitive damages. 499 U.S. 1, 20 (1991). However, the Supreme Court later acknowledged that evidence of a defendant's wealth creates the potential that juries will use their verdicts to compensate plaintiffs in an arbitrary fashion. Campbell, 538 U.S. at 417; see also BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.").

The trial court properly allowed Wood to testify about Ford's ability to respond to a punitive damages award. During his testimony, Wood testified beyond the mere net worth of Ford and informed the jury of Ford's assets, gross profits, and the amount of compensation it paid executives. Appellate courts in our state have allowed testimony beyond a defendant's mere net worth to establish its ability to pay a punitive damages award. See Bryant v. Waste Mgmt., Inc., 342 S.C. 159, 170, 536 S.E.2d 380, 386 (Ct. App. 2000) (allowing testimony of the defendant's assets, liabilities, net worth, shareholders' equity, operating revenue, and net income per day to establish whether the defendant could pay punitive damages). In addition, Wood's testimony concerning the state of Ford's economic affairs allowed the jury to follow the instructions of the trial court and "punish the defendant but not [e]ffect economic bankruptcy." Therefore, the trial court properly allowed

[7] Ford offered to stipulate that it had the ability to pay an award of punitive damages.

Wood to testify about Ford's ability to pay punitive damages and such testimony did not offend the Due Process Clause.[8]

D. The Gore Guideposts[9]

There are procedural and substantive constitutional limitations on the award of punitive damages. Campbell, 538 U.S. at 416. In Gore, the United States Supreme Court identified three guideposts to be considered when analyzing whether a punitive damage award is unconstitutionally excessive: (1) the reprehensibility of the defendant's conduct; (2) the ratio between the punitive damages award and the plaintiff's harm as measured by compensatory damages; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. 517 U.S. at 575-83.

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[8] We note this issue may not be preserved for appellate review. Prior to Wood's testimony, Ford asked the court to prevent Wood from testifying about Ford's wealth. The trial court denied Ford's request, stating "I will allow him to testify as to [the] ability [of] Ford . . . to pay a punitive damages award." However, the trial court informed Ford "I'll just have to deal with his testimony on any objections you may have . . . because I think some of it is probably appropriate and some of it is probably not." When Wood testified in regards to Ford's wealth, Ford failed to object. See State v. Kirton, 381 S.C. 7, 43, 671 S.E.2d 107, 125 (Ct. App. 2008) ("To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court.").

[9] We find the trial court conducted a proper post-trial review of the punitive damages award pursuant to Gamble v. Stevenson, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991). The Gamble factors include: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. Id.

1. Reprehensibility of Ford's Conduct

The principle that punishment should fit the crime is deeply rooted in common-law jurisprudence. Id. at 576 n.24. Likewise, the amount of punitive damages imposed on a defendant should reflect "the enormity of his offense." Id. at 575. The Supreme Court has stated that "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." Campbell, 538 U.S. at 419. The Supreme Court has instructed courts to determine the reprehensibility of a defendant's conduct by considering whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. In Campbell, the Court went on to state "[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." Id.

The conduct in this case caused only economic harm as the fire destroyed the Duncans' home and all of their personal possessions. Accordingly, this factor weighs in favor of Ford. However, the fact that the conduct in question caused economic, rather than physical, harm does not end our inquiry.[10] As the Supreme Court stated in Gore, "infliction of economic

[10] Appellate courts in this state have allowed plaintiffs to recover punitive damages when the defendant's conduct caused only economic harm. James v. Horace Mann Ins. Co., 371 S.C. 187, 196, 638 S.E.2d 667, 672 (2006); Jordan v. Holt, 362 S.C. 201, 203-04, 608 S.E.2d 129, 130 (2005); Collins

injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty." 517 U.S. at 576. Accordingly, we continue our analysis.

Moving forward, we find Ford acted with reckless disregard for the health and safety of others by installing a switch in the Duncans' Expedition, which it knew could fail and cause fires. The facts of this case reveal that Ford knew two things before manufacturing the Duncans' Expedition in December 1999. First, as evidenced by the May 1999 recall of the panther platform line of vehicles, Ford knew its vehicles possessed a propensity to cause under-hood fires. Second, as evidenced by the SIT Report, dated June 11, 1999, Ford knew a potential cause of the fires was the failure of the kapton seal to prevent brake fluid from entering the electrical side of the switch. Nonetheless, Ford took no steps to remedy the problem before manufacturing the Duncans' Expedition.[11] Instead, when Ford manufactured the Duncans' Expedition, it installed a switch matching the same design and containing the same component parts as the recalled panther platform line of vehicles. In short, Ford installed a switch into the Duncans' Expedition that it knew could cause fires.[12] This conduct clearly amounts to a reckless disregard for the health and safety of others.

In addition, Ford did not simply install a rogue switch in the Duncans' Expedition which failed and caused the vehicle to ignite into flames. Rather, Ford displayed a pattern of installing switches in its automobiles that caused fires. See id. at 577 ("Our holdings that a recidivist may be punished more

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Entm't Corp. v. Coats & Coats Rental Amusement, 355 S.C. 125, 141, 584 S.E.2d 120, 129 (Ct. App. 2003).

[11] The SIT Report proposed ten solutions to remedy the under-hood fires. Ford failed to implement any of the proposed solutions in the report.

[12] Ford argues it did not know switches manufactured to its specifications could fail and cause fires. In order to accept Ford's argument, we would have to agree with Ford that the 1999 recall and the under-hood fires in the panther platform line of vehicles were the result of manufacturing deviations at Texas Instruments. As we have stated throughout this opinion, Ford simply failed to demonstrate this at trial.

severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance."). This fact is clearly demonstrated by Ford's recall of the panther platform line of vehicles. In May 1999, Ford recalled the panther platform line of vehicles because of under-hood fires. One month later, in the SIT Report, a group of scientists at Ford identified a defective switch as a potential cause of the fires. However, as mentioned above, Ford did nothing to cure the defect in the switches. In fact, the same defect that caused fires under the hood of the recalled panther platform vehicles—the failure of the kapton seal to prevent brake fluid from entering the electrical side of the switch—also caused the fire under the hood of the Duncans' Expedition. Accordingly, Ford repeatedly installed a defective switch in its automobiles; in turn, the same defect in the switch itself caused fires both in the recalled panther platform line of vehicles and the Duncans' Expedition.

Lastly, we find the harm in this case was not the result of intentional malice, trickery, or deceit.[13] That being said, the harm was not the result of a mere accident at Ford. To the contrary, the evidence demonstrates Ford installed a defective switch in the Duncans' Expedition with the knowledge that the switch could fail and cause fires. In analyzing this factor of reprehensibility, we are cognizant of the fact that an award of punitive damages may not be "grossly out of proportion to the severity of the offense." Id. at 576. While Ford's conduct did not rise to the level of intentional malice, trickery, or deceit, Ford's act of installing a switch in the Duncans' Expedition that it knew could cause fires amounts to affirmative misconduct.

After considering all of the aggravating factors associated with reprehensible conduct as set forth in Campbell, we conclude that Ford's installation of a defective switch in the Duncans' Expedition: evidenced a reckless disregard for the health and safety of others; displayed a pattern of installing switches in its automobiles that caused fires; and amounted to affirmative misconduct. Accordingly, we find Ford engaged in sufficiently

[13] The financial vulnerability of the Duncans is not appropriate to consider in determining the reprehensibility of Ford in this case. The inapplicability of this factor to the case before us does not weigh in favor of Ford or against the Duncans in our analysis.

reprehensible conduct so as to justify the jury's award of three million dollars in punitive damages.

2. Reasonableness of Punitive Damages Award

The United States Supreme Court has refused to identify concrete constitutional limits on the ratio between punitive and actual damages. Gore, 517 U.S. at 582. However, the Supreme Court has consistently pointed out that a reasonable relationship between punitive and actual damages must exist. Id. at 580. The Court has stated "in practice few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process." Campbell, 538 U.S. at 425. Simply put, "single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution . . . ." Id.

The reasonableness of a punitive damages award cannot be determined simply by examining the relationship between the punitive damages award and the actual damages award. See Gore, 517 U.S. at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula . . . ."). As the Supreme Court has made clear, the potential harm the defendant's conduct could have caused the plaintiff may also be considered. Williams, 549 U.S. at 354; See Gore, 517 U.S. at 581 ("[T]he proper inquiry is whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.") (emphasis in original) (quoting Haslip, 499 U.S. at 21). In the end, a general concern of reasonableness drives our inquiry. TXO, 509 U.S. at 458.

In light of the harm caused by Ford's conduct, and the potential harm Ford's conduct could have caused to the Duncans, we find the punitive damages award in this case was reasonable. In this case, the Duncans sustained a significant economic loss as a result of Ford's conduct. Ford's installation of a defective switch in the Duncans' vehicle caused the vehicle to ignite into flames. The resulting fire destroyed the Duncans' home along with all of their personal possessions. Aside from the actual harm suffered by the Duncans, Ford's conduct threatened to inflict serious physical injury to the Duncans as well. With these considerations in mind, we hold the jury's

award of punitive damages, amounting to 5.087 times the actual damages awarded in this case, was reasonable.[14]

3. Comparable Civil Fines

Appellate courts must compare the punitive damages award with the civil or criminal penalties that could be imposed for comparable misconduct.[15] Gore, 517 U.S. at 583. In doing so, reviewing courts "should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." Id.

Here, the Duncans were awarded three million dollars in punitive damages. The South Carolina legislature has not adopted legislation that levies fixed civil fines against automobile manufacturers for the manufacturer of vehicles with defective parts. Our state's general products liability statute is the closest piece of legislation contemplating the factual scenario before us. S.C. Code Ann. § 15-73-10 (2005). It is of very little aid in our analysis because it does not fix civil fines; rather, it merely imposes "liability" on manufacturers who sell products in a defective condition. Id. Under federal law, an automobile manufacturer that violates a safety standard, a recall procedure, or manufactures a defective vehicle is liable to the federal government for a civil penalty of no more than $5,000 for each violation, with the maximum penalty not to exceed $15 million. 49 U.S.C.A. § 30165(a)(1) (West. 2005).

In previous cases, our appellate courts have faced similar problems when attempting to compare the punitive damages award with possible civil

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[14] Appellate courts in this state have affirmed punitive damage awards exceeding the ratio in this case. See James, 371 S.C. at 196, 638 S.E.2d at 672 (upholding a punitive damages award 6.82 times the actual damages award); Collins Entm't, 355 S.C. at 141, 584 S.E.2d at 129 (affirming punitive damages award that was ten times the amount of the actual damages award).

[15] More recently, the Supreme Court has questioned the utility of considering criminal penalties when determining monetary awards. Campbell, 538 U.S. at 428.

fines that could be imposed against the defendant for similar misconduct. In Collins, this court observed there were no "legislative judgments imposing civil or criminal penalties" for the conduct in question. 355 S.C. at 142, 584 S.E.2d at 129. Likewise, in James, our supreme court noted the applicable statutes imposed civil fines not to exceed $30,000 for each violation. 371 S.C. at 197, 368 S.E.2d at 672. In both cases, our appellate courts affirmed a punitive damages award exceeding the ratio between punitive and actual damages present in this case. See id. at 196, 638 S.E.2d at 672 (upholding a punitive damages award 6.82 times the actual damages award); Collins, 355 S.C. at 141, 584 S.E.2d at 129 (affirming punitive damages award that was 10 times the amount of the actual damages award). In doing so, both cases stated "the statutory penalties are set at such a low level, there is little basis for comparing it with any meaningful punitive damage award." James, 371 S.C. at 197, 368 S.E.2d at 672; Collins, 355 S.C. at 142, 584 S.E.2d at 129. The applicable civil fines in this case lead us to the same conclusion. After reviewing the guideposts established by the Supreme Court in Gore, we find the jury's award of three million dollars in punitive damages was not unconstitutionally excessive.

Accordingly, the decision of the circuit court is

AFFIRMED.

SHORT, J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Deborah Kay Hackworth and
Edman Hackworth, Respondents,

v.

Greywood At Hammett, LLC, Appellant.

Appeal from Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 4608
Submitted June 1, 2009 – Filed August 12, 2009

AFFIRMED

V. Clark Price and Ella S. Barbery, of Greenville, for Appellant.

Bradford N. Martin, Laura W.H. Teer, and Keely M. McCoy, of Greenville, for Respondents.

WILLIAMS, J.: In this civil case, we must determine whether the trial court erred in dismissing Greywood at Hammett, LLC's (Greywood) cause of action for civil conspiracy against Deborah and Edwan Hackworth (collectively the Hackworths) on the ground the claim was not properly pled. We affirm.

FACTS/PROCEDURAL HISTORY

This case arises out of a dispute between the Hackworths and Greywood over the placement of a road and the need for an easement on the Hackworths' property. Greywood is a South Carolina company in the business of real estate development. In the summer of 2006, Greywood purchased property in Greenville County and began construction of a subdivision (the Subdivision) located close to Hammett Road. The Subdivision was located directly behind the Hackworths' adjoining property. The plan for the Subdivision included an entrance that connected directly to Hammett Road, the location of which would traverse the Hackworths' property. Greywood sought an easement from the Hackworths to construct the entrance on their property.

For consideration of $50,000, the Hackworths agreed to grant Greywood a triangular shaped "sightline" easement[1] on the left side of their property for the entrance into the Subdivision (the Agreement). The terms of the Agreement were recorded in a Commercial Easement Agreement, which both parties signed on September 15, 2006.

Several months later, Greywood approached the Hackworths because it needed to relocate the entrance of the subdivision to the right side of the Hackworths' property. Greywood proposed a "land swap," whereby the Hackworths would switch the access to the right side of their property. The

[1] A "sightline" easement is a triangular-shaped easement which, in this case, was to be located on the entrance road to the subdivision so as to allow drivers leaving the subdivision a clear view of the traffic on Hammett Road.

parties disagree as to whether the Hackworths accepted this proposal. Greywood contends the Hackworths agreed that Greywood would convey to the Hackworths a piece of property located next to the western boundary of the Hackworths' property line in exchange for two strips of land on the right side of the Hackworths' property. Greywood further contends it met with the Hackworths several times with contractors and other representatives to discuss plans for removing certain trees from the Hackworths' property and that Edwan Hackworth even assisted in selecting and marking trees for removal. In contrast, the Hackworths contend Greywood entered onto their property without permission and began cutting down trees and shrubs. Greywood claims to have prepared a written agreement to memorialize this proposed exchange of land, but no such agreement was ever signed.

The Hackworths filed suit on December 21, 2007, alleging causes of action against Greywood for trespass, violation of section 16-11-520 of the South Carolina Code (2008), commonly referred to as the Timber Statute, and breach of contract arising out of the Agreement. Greywood filed an answer with two counterclaims: one for breach of contract accompanied by a fraudulent act and one for civil conspiracy. In response, the Hackworths filed a motion to dismiss and/or strike, among other things, the cause of action for civil conspiracy on the grounds that Greywood failed to allege the required elements for a civil conspiracy claim.

After a hearing, the trial court granted the Hackworths' motion to dismiss and/or strike Greywood's civil conspiracy cause of action. The trial court held Greywood failed to properly plead its civil conspiracy cause of action because Greywood simply repeated verbatim the allegations and damages from its breach of contract claim in its civil conspiracy claim. Accordingly, the trial court dismissed the civil conspiracy claim. This appeal followed.

STANDARD OF REVIEW

Any objections to impertinent or scandalous matters in a pleading are properly raised by a party in a motion to strike. Doe v. Doe, 324 S.C. 492,

499, 478 S.E.2d 854, 857 (Ct. App. 1996). A motion to strike that challenges a theory of recovery in the pleading is in the nature of a motion to dismiss under Rule 12(b)(6), SCRCP. McCormack v. England, 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct. App. 1997). A ruling on a motion to dismiss a claim must be based solely on the allegations set forth on the face of the claim. Id. at 632-33, 494 S.E.2d at 433. The motion cannot be sustained if the acts alleged and the inferences reasonably deductible therefrom would entitle the plaintiff to any relief on any theory of the case. Id. at 633, 494 S.E.2d at 433.

LAW/ANALYSIS

The tort of civil conspiracy has three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage. Vaught v. Waites, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989). The difference between civil and criminal conspiracy is in criminal conspiracy, the gravamen of the offense is the agreement itself, whereas in civil conspiracy, the gravamen of the tort is the damage resulting to plaintiff from an overt act done pursuant to a common design. Id.; see also Pye v. Estate of Fox, 369 S.C. 555, 567-68, 633 S.E.2d 505, 511 (2006) ("The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se.").

A claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint. Todd v. S.C. Farm Bureau Mut. Ins. Co., 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981) rev'd on other grounds, 283 S.C. 155, 321 S.E.2d 602 (1984) quashed in part on other grounds, 287 S.C. 190, 336 S.E.2d 472 (1985). Moreover, because the quiddity of a civil conspiracy claim is the special damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action. Vaught, 300 S.C. at 209, 387 S.E.2d at 95.

1. Additional Acts in Furtherance of the Conspiracy

An unexecuted civil conspiracy is not actionable. Charles v. Tex. Co., 199 S.C. 156, 163, 18 S.E.2d 719, 727 (1942). The conspiracy becomes actionable, however, once overt acts occur which proximately cause damage to the plaintiff. Todd, 276 S.C. at 292, 278 S.E.2d at 611. In a civil conspiracy claim, one must plead additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim. See id. at 293, 278 S.E.2d at 611 (dismissing plaintiff's civil conspiracy claim because "the [civil conspiracy] action does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy and pray for damages resulting from the conspiracy. No additional acts in furtherance of the conspiracy [were] plead"); Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 611, 538 S.E.2d 15, 31 (Ct. App. 2000) ("Because [the third party plaintiff] . . . merely realleged the prior acts complained of in his other causes of action as a conspiracy action but failed to plead additional acts in furtherance of the conspiracy, he was not entitled to maintain his conspiracy cause of action."); Doe v. Erskine Coll., No. 8:04-23001RBH, 2006 WL 1473853, at *17 (D.S.C. May 25, 2006) (granting defendant's motion for summary judgment on plaintiff's civil conspiracy action because "the Complaint does not plead specific facts in furtherance of the conspiracy; instead the Complaint simply restates alleged wrongful acts pled in relation to the plaintiff's other claims for damages."); James v. Pratt & Whitney, 126 Fed. Appx. 607, 613 (D.S.C. 2005) ("If appellant failed to allege facts for his civil conspiracy claim separate and distinct from his other two claims, then his civil conspiracy claim would fail under Todd.").

In this case, Greywood has reiterated verbatim the allegations contained in its cause of action for breach of contract accompanied by fraudulent act in its civil conspiracy claim. Specifically, paragraph 46, which lists the fraudulent acts for the breach of contract action, contains the exact same acts alleged in paragraph 49, which is part of the civil conspiracy cause of action. As these two paragraphs and their subparts are identical, nothing in

the civil conspiracy claim informs the Hackworths what acts in furtherance of the alleged conspiracy they are being accused of. Accordingly, we do not believe Greywood has adequately alleged acts in furtherance of a civil conspiracy.

2. Special Damages

Special damages are those elements of damages that are the natural, but not the necessary or usual, consequence of the defendant's conduct. Loeb v. Mann, 39 S.C. 465, 469, 18 S.E. 1, 2 (1893). General damages are inferred by the law itself, as they are the immediate, direct, and proximate result of the act complained of. Sheek v. Lee, 289 S.C. 327, 328-29, 345 S.E.2d 496, 497 (1986). Special damages, on the other hand, are not implied at law because they do not necessarily result from the wrong. Id. at 329, 345 S.E.2d at 497. Special damages must, therefore, be specifically alleged in the complaint to avoid surprise to the other party. Id.

If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed. See Vaught, 300 S.C. at 209, 387 S.E.2d at 95 ("The damages sought in the conspiracy cause of action are the same as those sought in the breach of contract cause of action. Because no special damages are alleged aside from the breach of contract damages, we hold the conspiracy action is barred under Todd."); Charleston Aluminum, Inc. v. Samuel, Son & Co., Inc., No. 3:05-02337-MBS, 2006 WL 2370292, at *3 (D.S.C. Aug. 15, 2006) (granting defendant's motion to dismiss plaintiff's civil conspiracy claim because "the damages pleaded by [p]laintiff in the civil conspiracy cause of action are duplicative of the damages asserted with respect to the contract causes of action"); Doe, 2006 WL 1473853, at *17 (holding plaintiff's conspiracy claim failed as a matter of law because plaintiff failed to plead special damages; instead plaintiff's conspiracy count "merely realleged[d] the same damages [p]laintiff claim[ed] to have suffered in relation to her other claims").

In this case, Greywood has repeated verbatim the same damages in its civil conspiracy claim as are alleged in its claim for breach of contract accompanied by a fraudulent act. Nothing in the claim informs the Hackworths what special damages are alleged as part of Greywood's civil conspiracy claim. Accordingly, we believe under the case law cited above, Greywood failed to properly plead its civil conspiracy cause of action, and therefore, the trial court did not error in dismissing the claim.

3. Greywood's Arguments

Greywood first argues the C.J.S. excerpt relied on by the South Carolina Supreme Court in Todd was misconstrued. We disagree.

In Todd, the trial court overruled the defendant's demurrer to the plaintiff's civil conspiracy cause of action. Todd, 276 S.C. at 293, 278 S.E.2d at 611. In reversing the trial court, our supreme court relied on 15A C.J.S. *Conspiracy* § 33, at 718[2], holding "Where the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong." Id.

Greywood argues Todd should be overturned because the C.J.S. excerpt cited by our Supreme Court in that case does not stand for the proposition that a party cannot plead and prove alternative theories of recovery. Greywood reads this excerpt to mean only that a party cannot recover monetary damages for both the underlying wrong and the conspiracy to commit the wrong.

Even though Todd was decided before the South Carolina Rules of Civil Procedure (the Rules) were in effect, the holding in Todd does not prevent a party from pleading alternative theories in cases involving civil conspiracy. It simply requires that when a party wishes to assert multiple causes of action, including civil conspiracy, it must allege acts in furtherance

[2] The current citation for the quoted paragraph of Corpus Juris Secundum used in Todd is 15A C.J.S. *Conspiracy* § 44.

of the conspiracy and special damages that are separate and independent of the other acts and damages that underlie the other causes of action within the same complaint. See Todd, 276 S.C. at 293, 278 S.E.2d at 611 ("[T]he [civil conspiracy] action does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy and pray for damages resulting from the conspiracy. No additional acts in furtherance of the conspiracy are [pled]."); Vaught, 300 S.C. at 208, 387 S.E.2d at 94 (relying on Todd in affirming the trial court's holding no conspiracy existed "because Vaught could not predicate his conspiracy cause of action on the same facts as his breach of contract action").

Furthermore, the C.J.S. excerpt was not the only basis for our Supreme Court's ruling in Todd. The Court in Todd held because a conspiracy only becomes actionable "once overt acts occur which proximately cause damage to the [plaintiff]," it is necessary for the plaintiff to plead special damages apart from the damages listed as part of other claims in the complaint. Todd, 276 S.C. at 292-93, 278 S.E.2d at 611. In this case, Greywood's civil conspiracy action merely incorporated the same alleged acts as its breach of contract action.

Greywood also argues Todd and its progeny cannot be good law because Todd was decided prior to the adoption of the Rules in 1985. Specifically, Greywood argues because the use of the demurrer was abolished by Rule 7(c), SCRCP, and the demurrer was a "critical factor" in Todd, Todd is no longer good law. We disagree.

We do not believe the demurrer was critical in Todd such that Todd ceased to be good law after the abolition of the demurrer. In Todd, the use of the demurrer as an instrument was not critical to the Supreme Court's holding that special damages must arise from the conspiracy and be specifically pled. The validity of Todd does not depend on the viability of the demurrer because the demurrer was merely the proper instrument at the time for dismissing a claim for failure to properly plead the required elements.

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.

SHORT and LOCKEMY, JJ., concur