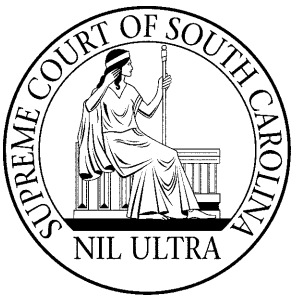

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

February 2, 2004

ADVANCE SHEET NO. 5

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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Baldwin Construction Company, Inc., Respondent,

v.

Barry P. Graham and Terry D. Graham d/b/a The Auto Tech and Centura Bank, Defendants,

of whom Barry P. Graham and Terry D. Graham d/b/a The Auto Tech, are the Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
John L. Breeden, Circuit Court Judge

Opinion No. 25781
Heard November 19, 2003 - Filed February 2, 2004

VACATED

Kevin Michael Hughes, of N. Myrtle Beach, for Petitioners.

J. Jackson Thomas and Mark A. Bruntey, both of Thompson & Henry, P.A., of Myrtle Beach, for Respondent.

JUSTICE PLEICONES: Baldwin Construction Company (respondent) filed suit against the Grahams (petitioners). Petitioners, after initially responding pro se, retained counsel and moved to be allowed to file an amended answer, set-offs, and counterclaims. In connection with this motion, counsel also moved for a jury trial. The motions were denied. The Court of Appeals affirmed this denial in an unpublished opinion. Baldwin Const. Co., Inc. v. Graham, Op. No. 2002-UP-509 (S.C. Ct. App. filed July 30, 2002). Petitioners sought a writ of certiorari, which we granted. We vacate the Court of Appeals' opinion because the interlocutory order is not immediately appealable.

FACTS

On September 2, 1998, respondent filed suit against petitioners alleging causes of action for foreclosure of a mechanic's lien, breach of contract, and quantum meruit. Petitioners wrote respondent a letter dated September 30, 1998, which was construed by respondent as a pro se answer to the summons and complaint. Petitioners did not appear for scheduled depositions that were to take place in December 1998. Respondent moved for sanctions pursuant to Rule 37, SCRCP. The petitioners were sanctioned in May 1999. Petitioners submitted to the taking of their depositions in June 1999, under threat of further sanctions.

Petitioners subsequently retained counsel and on October 1, 1999, their attorney moved to permit filing of an amended answer, set-offs, and counterclaims. In connection with this motion, counsel also moved for a jury trial. The motions were denied. In his order denying petitioners' motions, the judge stated:

> The [petitioners'] motions come over a year after the filing of the Summons and Complaint, after the failure of the [petitioners] to cooperate in discovery, after their sanction for such failure, and after their depositions were taken in the case only under threat of further sanction. Moreover, the requested pleading would assert counter-claims and set-offs on multiple theories not previously at issue, and

> would entitle [petitioners] to trial by jury on certain of the claims when request for jury trial had not been previously made. The interjection of the new matter would require additional discovery by [respondent] including the re-deposing of the [petitioners].
>
> Under the circumstances, I find the relief requested by [petitioners] to be unduly prejudicial to the [respondent], and that the [petitioners] simply are not entitled, as a matter of the Court's discretion to substantially change the parameters and issues involved in the lawsuit at this late date.

ISSUE

Is an order denying a motion to amend an answer directly appealable?

ANALYSIS

The Court of Appeals held the order denying the motion to amend an answer was immediately appealable. We disagree.

In this case, petitioners requested a jury trial based on allegations in their *proposed amended answer*. The Court of Appeals stated that petitioners' "amended answer asserted several counterclaims and set-offs including a cause of action for breach of contract, which is an action at law and petitioners were therefore entitled to a jury trial as a matter of right *pursuant to their amended answer*." (emphasis supplied). The Court of Appeals stated that "in order to preserve their right to a jury trial, [petitioners were] required to immediately appeal the order denying the motion to amend their answer and request for a jury trial *based on the claims asserted in this amended answer.*" (emphasis supplied). However, this reasoning "puts the cart before the horse." Instead of deciding whether an order denying a motion to amend an answer is appealable, the Court of Appeals focused on whether the not-yet-amended answer would ultimately lead to a jury trial.

"Absent some specialized statute, determining if an interlocutory order is immediately appealable depends on whether the order falls within one of the several categories of appealable judgments, decrees, or orders listed in

S.C. Code Ann. § 14-3-330 (1976 & Supp. [2002]).” Woodard v. Westvaco Corp., 319 S.C. 240, 242, 460 S.E.2d 392, 393 (1995), overruled on other grounds Sabb v. South Carolina State University, 350 S.C. 416, 567 S.E.2d 231 (2002). We decide, then, whether an order denying a motion to amend an answer is immediately appealable under S.C. Code Ann. § 14-3-330.

Under Section 14-3-330 (2), this Court may “review upon appeal (2) [a]n order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.” The only subsection that might conceivably be implicated by the order denying petitioners’ request to be allowed to file an amended answer is subsection (c). In Jefferson v. Gene’s Used Cars, Inc., 295 S.C. 317, 368 S.E.2d 456 (1988), this Court held that an order denying a party’s motion to file a late answer was a not directly appealable. The Court reached this conclusion because the trial judge did not rule on the substantive contents of the answer, nor did the order strike a pleading, *but refused to allow its filing*. This case is similar, as the judge did not strike a pleading but refused to allow its filing. Petitioners have not “arrived at the end of the road” and will be able to appeal the decision after the trial is finished. Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993).

We dismiss the appeal without prejudice to a right to appeal from a final judgment. The decision of the Court of Appeals is

VACATED.

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

The Supreme Court of South Carolina

In the Matter of Mark Alexander Pearson, Respondent.

ORDER

On August 25, 2003, Respondent was suspended for a period of 146 days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

BY s/Daniel E. Shearouse
Clerk

Columbia, South Carolina

January 29, 2004

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Vincent A. Vogt, Appellant,

v.

Murraywood Swim and Racquet Club, Respondent.

Appeal From Lexington County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 3729
Heard December 9, 2003 – Filed January 27, 2004

AFFIRMED

Frank Anthony Barton and H. Wayne Floyd, both of W. Columbia, for Appellant.

Thomas C. Salane and R. Hawthorne Barrett, both of Columbia, for Respondent.

KITTREDGE, J.: Vincent A. Vogt appeals from an adverse jury verdict in a personal injury action. The dispositive issue on appeal is Vogt's

status as a licensee or an invitee. The trial court ruled that Vogt was a mere social guest and hence a licensee. We affirm.

FACTS

Vogt was injured as a result of a diving board/swimming pool accident at the Murraywood Swim and Racket Club ("Murraywood"). He commenced this action asserting causes of action for negligence and strict liability.[1] Murraywood answered denying liability and alleging various defenses, including comparative negligence.

Murraywood is a private, nonprofit pool and tennis facility operated by and for a group of homeowners in Lexington County. The facility is equally co-owned by its members. The facility is not open to the public at large, for it only allows non-members to use the facilities in two situations. Non-members may either rent the facilities for private use, or attend as a guest of a member.

On June 28, 1998, Vogt was invited to Murraywood as a social guest of Don Pevey and Lynne Soobitsky. After consuming alcohol at the home of Pevey and Soobitsky, the group walked to the pool. Vogt decided to dive into the pool via Murraywood's three-meter high diving board. His first dive went without incident. Approximately thirty minutes later, Vogt decided to attempt a swan dive off the same diving board. After entering the water, Vogt struck his head on the bottom of the pool and was injured. This action followed.

The Murraywood pool was constructed in 1975. Before trial, Murraywood made a motion *in limine* seeking to establish that operation of the pool was controlled by regulations promulgated in 1971 by the South Carolina Department of Health and Environmental Control ("DHEC"). Vogt sought to introduce more recent DHEC standards as well as standards promulgated by other organizations as evidence of a common law standard of care. The trial court found that the 1971 DHEC regulations were the only

[1] The strict liability cause of action was withdrawn and Vogt proceeded on the negligence claim.

applicable regulations concerning the operation of the Murraywood pool. It nevertheless permitted Vogt's expert, in rendering his opinion, to rely on and reference the more recent DHEC regulations and industry standards.

Before instructing the jury, the trial judge ruled that Vogt was a licensee. As such, she declined to charge the jury with the law applicable to an invitee. The trial court further refused Vogt's request to specifically charge the DHEC standards other than those in effect at the time the pool was constructed in 1975, although the court expressly authorized the jury to consider the opinion testimony of expert witnesses. Vogt's expert witness relied on more recent DHEC regulations and current industry standards.

ISSUES

I. Did the trial court err in concluding as a matter of law that Vogt was a licensee?

II. Did the trial court err in refusing to charge certain "requests to charge," including the law relating to an invitee and post-1971 DHEC regulations?

LAW/ANALYSIS

I. Invitee/Licensee

Vogt argues it was error for the trial court to rule that he was a licensee as a matter of law. Acknowledging that the facts are not in dispute and that a question of law is presented, Vogt maintains he was an invitee. Specifically, Vogt contends that because Murraywood typically charged non-members a two-dollar admission fee, and limited the number of times a guest could visit, the operation of the Murraywood pool facility is analogous to a business charging admission. We disagree.

The South Carolina Supreme Court has defined a licensee as "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); see also Sims v. Giles, 343 S.C. 708, 720, 541 S.E.2d 857, 864 (Ct. App. 2001); and F.P.

Hubbard & R.L. Felix, The South Carolina Law of Torts 111 (2d ed.1997). When a licensee enters onto the property of another, it is for his or her benefit and not that of the landowner. Sims, 343 S.C. at 720, 541 S.E.2d at 863. The duties a landowner owes to a licensee are to use reasonable care to (a) "discover him and avoid injury to him in carrying on activities upon the land"; and (b) "warn him of any concealed dangerous conditions or activities which are known to the possessor." Neil, 288 S.C. at 473, 343 S.E.2d at 616 (citations ommitted).

By contrast, "[a]n invitee is a person who comes on the premises with express or implied permission and for the purpose of benefiting the owner/occupier." Hubbard & Felix at 112; Sims, 343 S.C. at 713, 541 S.E.2d at 860. A landowner owes an invitee a duty of due to care to discover risks and to warn of or make safe existing unreasonable risks. Hubbard & Felix at 114.

In Neil, the supreme court held that a social guest is a licensee. Neil, 288 S.C. at 473, 343 S.E.2d at 616 (citations omitted). Comment three to the RESTATEMENT (SECOND) OF TORTS § 330(h) (1965) further explains the distinction between social guests/licensees and invitees:

> Some confusion has resulted from the fact that, although a social guest normally is invited, and even urged to come, he is not an "invitee," within the legal meaning of that term, as stated in § 332. He does not come as a member of the public upon premises held open to the public for that purpose, and he does not enter for a purpose directly or indirectly connected with the business dealings of the possessor. The use of the premises is extended to him merely as a personal favor to him.

In Landry v. Hilton Head Prop. Owners Ass'n, 317 S.C. 200, 202, 452 S.E.2d 619, 620 (Ct. App. 1994), a homeowner was injured while walking in the common areas of her gated community. This court held that because Landry was a dues-paying member of the property owners' association, she had the *right* to use the common areas without the association's permission. Id. at 204, 452 S.E.2d at 621. As such, she was characterized as an invitee.

Id. Conversely, we believe that a guest of a dues-paying member enters not by right, but by the permission of the member.

By his own admission, Vogt entered the pool facilities as a social guest of club members Soobitsky and Peavy. Even assuming Murraywood did charge Vogt a two-dollar admission fee[2] and limited the number of times he could visit,[3] this does not affect the analysis of whether he was a licensee or invitee. The more appropriate issue is whether he had a right to use Murraywood's facilities. The obvious conclusion is that he did not. In fact, his presence was entirely permissive. Thus, it is clear that Vogt did not "enter for a purpose directly or indirectly connected with the business dealings of the possessor." RESTATEMENT (SECOND) OF TORTS § 330(h).

Ordinarily, when conflicting evidence is presented as to whether someone is a licensee or invitee, the question becomes one of fact and as such, is properly left to the jury. See Hoover v. Broome, 324 S.C. 531, 537-38, 479 S.E.2d 62, 66 (Ct. App. 1996). However, based on the record in this case, we find no conflict in the evidence regarding Vogt's status at the time of the incident. Moreover, it is undisputed that Vogt visited the pool only because members invited him and his presence at the pool was entirely permissive. Vogt concedes on appeal that the facts are undisputed, yet contends the facts compel a different conclusion as a matter of law. We disagree, and find the undisputed evidence supports the trial court's finding that Vogt was a licensee.[4]

---

[2] There is no evidence in the record to suggest the fee was paid.

[3] Murraywood's pool rules and regulations limited a local guest to "10 visits per swim season."

[4] We note that this issue reaches us in an unusual posture for the purposes of ascertaining the proper standard of review. At trial, Vogt made a motion for a directed verdict seeking a determination that he was an invitee. Murraywood opposed the motion, contending the facts compelled a finding that Vogt was a licensee. The trial judge denied Vogt's directed verdict motion and, in the course of the charge conference, ruled that Vogt was a licensee as a matter of law. During oral argument, Vogt rejected any suggestion that a factual dispute existed, necessitating submission of Vogt's status to the jury. Cf. Hoover v. Broome, 324 S.C. at 537-38, 479 S.E.2d at

II. Requests to Charge

Vogt next contends that the trial court erred in refusing to charge the jury with certain requests to charge. We find no reversible error.

The trial court judge must charge the current and correct law to the jury. McCourt ex rel. McCourt v. Abernathy, 318 S.C. 301, 306, 457 S.E.2d 603, 606 (1995); Cohens v. Atkins, 333 S.C. 345, 349, 509 S.E.2d 286, 289 (Ct. App. 1998). "When reviewing a jury charge for alleged error, an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial." Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000) (citing Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999)). A trial court's refusal to give a properly requested charge is reversible error only where the requesting party can demonstrate prejudice from the refusal. Cohens, 333 S.C. at 349, 509 S.E.2d at 289.

First, requests to charge A-1, 1, 2, 3, 4, 5, 6, and 7 are premised on Vogt's purported status as an invitee. Having concluded the trial court correctly determined Vogt was a licensee as a matter of law, these requests were properly denied.

Second, the failure to charge Vogt's request to charge 10-A was not error and, in any event, resulted in no prejudice. In his request to charge 10-A, Vogt asked the trial court to charge the jury with 1995 DHEC swimming pool regulations 24A S.C. Code Ann. Regs. 61-51(J)(11)(h) and 24A S.C. Code Ann. Regs. 61-51(27)(b), which were in effect at the time of Vogt's accident. The applicability of regulation 61-51(J)(11)(h), is controlled by paragraph one of that section, which provides in pertinent part that "[a]ll pools and pool equipment must be operated and maintained in accordance with the permitted plans and specifications or approved change order."

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66 (concluding that when conflicting evidence is presented as to whether someone is a licensee or invitee, the question becomes one of fact and as such, is properly left to the jury). The parties here stipulate a legal question is presented, and we follow their proposed standard of review.

(emphasis added). The plans and specifications for the Murraywood pool were approved by DHEC in 1975 when the pool was constructed. The pool has been inspected annually since then, and at all times its compliance has been determined under the DHEC regulations enacted in 1971.

Similarly, the applicability of regulation 61-51(C)(27)(b), is controlled by 61-51(C)(1), which reads "[r]equirements of this section are applicable to all new construction and alterations of existing swimming pools." Considering that this statute was enacted twenty years after the construction of the Murraywood pool, and that no alterations have ever been made to the pool, the regulation does not apply to the Murraywood pool. Accordingly, because we find that neither of the requested regulations applied to the Murraywood pool, we hold that the trial court was correct to deny Vogt's request to charge 10-A.

Moreover, Vogt was not prejudiced by the trial court's refusal to charge the requested instructions. The trial court extended wide latitude to Vogt, through expert testimony and otherwise, to establish negligence against Murraywood. For example, Robert Taylor, Vogt's expert, relied on the 1995 DHEC Regulations in rendering his opinion that the swimming pool lacked sufficient depth in the diving area. The trial court's charge clearly permitted the jury to weigh and consider such evidence in reaching its verdict.

CONCLUSION

We find that the trial court correctly determined as a matter of law that Vogt was a licensee. Similarly, we hold that the trial court was correct to refuse Vogt's requests to charge as they pertained to the duty owed to invitees and DHEC Regulations, which were inapplicable to the Murraywood pool.

AFFIRMED.

HEARN, C.J., and HOWARD, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Randy Wakefield Anderson, Appellant.

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

Opinion No. 3730
Heard December 10, 2003 – Filed February 2, 2004

REVERSED and REMANDED

Assistant Appellate Defender Robert M. Dudek, Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Derrick K. McFarland, all of Columbia; and Solicitor William Townes Jones, Greenwood, for Respondent.

HEARN, C.J.: Randy Wakefield Anderson was convicted of murder, armed robbery, and conspiracy to commit armed robbery. He appeals, arguing the trial court erred (1) in allowing the admission of hearsay evidence and (2) in admitting statements into evidence which were taken in violation of his Sixth Amendment right to counsel. We reverse and remand.

FACTS

Around midnight on May 10, 1998, Jamal Manick shot and killed Lamont Rappley in the parking lot of a restaurant. At trial, the State alleged that Appellant conspired with Manick and Fred Ross to rob the victim. Officer Shawn Fisher testified that upon arriving at the scene, he observed the victim lying face down on the pavement with Appellant kneeling beside him. Appellant told Officer Fisher: "My man's been shot." During this time, Kenneth Williams, a friend of the victim, arrived at the scene. Officer Fisher instructed Appellant to sit in his patrol car while he secured the scene.

After securing the scene, Officer Fisher returned to his patrol car to speak with Appellant. Anderson explained that he was walking with Williams through the restaurant's parking lot when a car approached, and a passenger got out, shot the victim, jumped back in the car, and left the scene. According to Appellant, he and Williams then left the scene to call 911.

Williams, a witness for the State, testified that on the evening of May 10, 1998, the victim asked Williams to accompany him to the restaurant to conduct a drug deal. When they arrived at the restaurant, Williams "hung back" as the victim met with Anderson to conduct the deal. Williams stated that about five or ten minutes later, it began raining and he and the victim began to leave the parking lot. As they were walking away, Williams saw headlights and turned around; he then saw a man jump from the car, and shoot the victim. After the shooting, he and Anderson ran to the victim's house, which was nearby, to call 911. Williams admitted that he initially lied to the police when questioned about the circumstances surrounding the shooting because he "didn't want it to look like a drug-crime."

Fred Ross also testified for the State. According to Ross, he was hanging out in an apartment with Manick on the day of the incident. Ross claimed that Appellant arrived at the apartment and told them "that he had a lick," indicating that the men could rob the victim. Ross testified that later in the evening, he drove Manick to the restaurant where Appellant had set up a drug deal with the victim. Ross stated that as they approached the restaurant, Manick jumped out of the car and shot the victim. On cross-examination, Ross acknowledged that he had a deal with the State allowing him to plead guilty to accessory after the fact of murder and accessory after the fact of armed robbery, charges which carry maximum ten-year prison sentences, in exchange for his testimony.

Bobby Lukie, who rode with Ross and Manick to the restaurant, also testified that Manick shot the victim. Lukie maintained that he was not involved in planning the robbery and that he merely ran into Ross and Manick at a convenience store that night and decided to accompany them to the restaurant. The defense's theory of the case, however, was that it was Lukie, not Appellant, who planned the robbery of the victim.

The jury found Appellant guilty of all charges and sentenced him to thirty years for murder, twenty years concurrent for armed robbery, and five years concurrent for conspiracy to commit armed robbery. This appeal follows.

LAW/ANALYSIS

I. Hearsay

Appellant argues the trial court erred in allowing Lukie to testify regarding statements allegedly made to him by Ross. Appellant asserts that this testimony constituted impermissible hearsay. We disagree.

At trial, Lukie testified that around 11:00 p.m. on the night of the murder, he drove by a convenience store and noticed Ross and Manick standing outside the store. Lukie stated that when he asked Ross and Manick what they were doing, Ross told him "they had a lick or something like that." Defense counsel objected, arguing this testimony was hearsay. The State

argued the testimony was admissible as non-hearsay because the statement was made in furtherance of the conspiracy. The trial court agreed and overruled the defense's objection.

Rule 801(d)(2)(E), SCRE, provides that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. See also State v. Gilchrist, 342 S.C. 369, 371, 536 S.E.2d 868, 869 (2000) (noting that Rule 801(d)(2)(E) allows for the admission of a coconspirator's statement where there is evidence of the conspiracy independent of the statement sought to be admitted). Here, there was evidence presented at trial that Ross and Manick conspired with Appellant to rob and murder the victim. The statements allegedly made to Lukie by Ross were sufficient to allow the jury to reasonably infer that the statements were made in furtherance of the conspiracy, especially in light of the fact that Lukie agreed to accompany Ross and Manick in their robbery of the victim. Accordingly, we find no error in the trial court's ruling that the statement was not hearsay.

II. Sixth Amendment

Appellant also argues the trial court erred in refusing to suppress a statement he made to police on June 16, 1998 because it was taken in violation of his Sixth Amendment right to counsel. We agree.

At trial, a Jackson v. Denno[1] hearing was held to determine the admissibility of statements Appellant made to police. Officer Fisher testified that, immediately following the shooting, Appellant agreed to accompany him to the police station, and a gunshot residue test was performed on Appellant. Officer Raczinsky went to Appellant's home on June 15, 1998 to discuss the positive results of the gunshot residue test. After this discussion, Appellant accompanied Raczinsky to the police station, and following a brief interview, he was arrested for murdering the victim. Raczinsky read Miranda warnings to Anderson and escorted him to jail.

[1] 378 U.S. 368 (1964).

At 11:30 the next morning, Appellant was arraigned for the murder, and he signed a form requesting the services of a public defender. Later that afternoon, Anderson's aunt visited with him at the police station. Raczinsky testified that after the visit, the aunt "suggested I go talk to [Anderson] again." Raczinsky testified that he then went in to talk with Anderson, read to him his Miranda warnings, and asked if "anything had changed since the last time [they] talked." Appellant then told Raczinsky that "he was at [the restaurant] in reference to a drug transaction." Appellant explained that he met the victim earlier in the day and had arranged to purchase crack cocaine from him around midnight. Defense counsel objected to the admission of this statement, arguing it was initiated by the police and was made after Appellant had invoked his Sixth Amendment right to counsel.

The Sixth Amendment guarantees that in all criminal prosecutions "the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "[O]nce a criminal defendant invokes his Sixth Amendment right to counsel, a subsequent waiver of that right—even if voluntary, knowing, and intelligent under traditional standards—is presumed invalid if secured pursuant to police-initiated conversation," and "statements obtained in violation of that rule may not be admitted as substantive evidence in the prosecution's case in chief." Michigan v. Harvey, 494 U.S. 344, 345 (1990) (stating the holding of Michigan v. Jackson, 475 U.S. 625, 106 S. Ct. 1404 (1986)). Likewise, the South Carolina Supreme Court has held:

> When the Sixth Amendment right to counsel has attached, if police initiate interrogation after a defendant's assertion, at an arraignment or other similar proceedings, of his right to counsel, any waiver of the defendant's right to counsel for that police initiated interrogation is invalid unless the defendant initiates the contact himself.

State v. Council, 335 S.C. 1, 15-16, 515 S.E.2d 508, 515 (1999).

Here, in ruling that Appellant's statement was admissible, the trial court first found that Officer Raczinsky "was not restrained in his questioning of [Appellant] by the existence of the document [requesting the services of a public defender] . . . because it was signed at a time different from and a place different from [where Appellant was questioned]." However, this very issue was considered by the United States Supreme Court in Michigan v. Jackson, 475 U.S. 625, 634 (1986) and was resolved in favor of the defendant because "Sixth Amendment principles require that we impute the State's knowledge from one state actor to another." Thus, the police (one state actor) may not claim to be ignorant of Appellant's request for counsel at his arraignment before the court (another state actor). Id.

As additional support for admitting Appellant's statement into evidence, the trial court found that Appellant's signing of the paperwork for a public defender was not enough to invoke his right to counsel. However, pursuant to State v. Council, 335 S.C. 1, 15-16, 515 S.E.2d 508, 515 (1999), we believe signing the paperwork requesting a public defender did invoke Appellant's Sixth Amendment right to counsel.

In Council, the defendant was arraigned on October 14, 1992, and requested the court appoint an attorney to represent him. Id. at 14, 515 S.E.2d at 514. An attorney was appointed to represent the defendant on October 16, 1992, and the defendant made inculpatory statements to the police on October 19, 1992. Id. In discussing the defendant's claim that the October 19th statements were obtained in violation of his Sixth Amendment right to counsel, the court found as follows: "Appellant's Sixth Amendment right to counsel attached on October 14, 1992, when he was arraigned. Further, appellant asserted his right to counsel on October 14, 1992, when he requested appointment of counsel." Id. As in Council, we find that Anderson's Sixth Amendment right to counsel attached at the time of his arraignment, and he invoked that right by requesting a public defender at 11:30 a.m. on June 16, 1998.

Accordingly, we find that Officer Raczinsky's contact with Appellant violated the protections afforded Appellant under the Sixth Amendment. Even if the police re-entered the room at the behest of

Appellant's aunt, Officer Raczinsky admitted that he initiated the conversation with Appellant by asking him if "anything had changed" since the last time the two had spoken. Thus, the trial court erred in admitting Appellant's statement about the "drug deal" because it was made after Appellant had invoked his Sixth Amendment right to counsel and was pursuant to a conversation he did not initiate. Therefore, Appellant's convictions are reversed and the case is remanded for a new trial.

REVERSED and REMANDED.

HOWARD and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Electro-Lab of Aiken, Inc., Appellant,

v.

Sharp Construction Co. of Sumter, Inc., Respondent.

Appeal From Sumter County
Clyde N. Davis, Jr., Special Circuit Court Judge

Opinion No. 3731
Heard December 9, 2003 – Filed February 2, 2004

AFFIRMED

Robert J. Harte and David W. Miller, of Aiken, for Appellant.

Thomas B. Jackson, III, of Columbia, for Respondent.

HEARN, C.J.: Electro-Lab of Aiken asserts that Sharp Construction Company breached the parties' contract by replacing Electro-Lab with a different subcontractor. The parties became contractually bound, Electro-Lab argues, by virtue of Sharp's use of Electro-Lab's subcontracting bid in its general contracting bid and by certain acts following the use of the bid. The trial court disagreed, concluding that no contract existed between the parties. We affirm.

FACTS

On April 24, 1997, bidding closed for all general contractors on two projects to build schools in York County, South Carolina. Before the bid deadline, Sharp Construction Co., a general contractor, received an oral bid by telephone from Electro-Lab pertaining to one of the school projects' electrical work. Electro-Lab's bid amount was $1,150,000. Sharp listed Electro-Lab in its overall general contractor's bid submitted to the project's owner. Sharp alleges this inclusion was actually a mistake because it had inadvertently overlooked a lower bid from another electrical subcontractor, Ind-Com Electric Company, Inc. for $1,140,000. However, this oversight was not discovered until after Sharp submitted its general contractor's bid. At the time Sharp submitted its general contractor's bid, the only information it had about Electro-Lab's bid was the dollar amount.

Sharp, as the low bidder for the project, was awarded the general contract and was required to provide payment and performance bonds. When Electro-Lab contacted Sharp to inquire about the project, Sharp notified Electro-Lab that its bid was the lowest and that it was listed as the electrical subcontractor in Sharp's successful bid. Sharp's project manager testified that during this telephone conversation, he told Electro-Lab that he would like to know what its bond rate was and asked Electro-Lab to fax its bid in writing. Shortly thereafter, Sharp discovered that Electro-Lab's subcontract bid was not the lowest bid received, and asked Electro-Lab if it could perform the work for $1,140,000. Electro-Lab agreed, and Sharp submitted the following confirmatory fax:

> Dear Michael:
>
> This letter is to confirm that we will be issuing a subcontract for the electrical work on the above referenced project for $1,140,000.00.
>
> Please proceed immediately with having shop drawing completed and performance and payment

bonds issued. A subcontract is forthcoming. We look forward to working with you.

Sincerely,

SHARP CONSTRUCTION CO.
OF SUMTER, INC.

HAL TURNER

Following receipt of this letter, Electro-Lab attended a pre-construction conference at Sharp's request and began gathering submittals for the project from suppliers. Approximately six weeks after bidding closed on the project, Electro-Lab informed Sharp that it had been unable to obtain the required bonds. According to Sharp, during this telephone conversation Electro-Lab requested that its name be withdrawn from further consideration as the electrical subcontractor for the project. Electro-Lab disputes this, maintaining that it never requested to be withdrawn from consideration.

After Electro-Lab informed Sharp that it could not obtain the bonds, Sharp entered into a subcontract for the same dollar amount with Ind-Com, which provided payment and performance bonds as required. By letter, Sharp confirmed that it would be switching to a different electrical subcontractor because of Electro-Lab's inability to obtain bonding.

Electro-Lab did not protest the change until nine months later when it initiated the instant lawsuit, alleging that Sharp breached their contract by switching the subcontract for the project's electrical work to Ind-Com. After a full trial on the merits, the trial judge ruled in favor of Sharp, determining that no contract existed between the parties and that Electro-Lab's proof of damages was legally insufficient.

STANDARD OF REVIEW

An action for breach of contract is an action at law. Auto Owners Ins. Co. v. Langford, 330 S.C. 578, 581, 500 S.E.2d 496, 497 (Ct. App. 1998)

(citation omitted). In an action at law, on appeal of a case tried without a jury, the appellate court's standard of review extends only to the correction of errors of law. Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C., 353 S.C. 327, 334, 557 S.E.2d 468, 472 (Ct. App. 2003) (citation omitted). The trial judge's findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. King v. PYA/Monarch, Inc., 317 S.C. 385, 388, 453 S.E.2d 885, 888 (1995) (citation omitted).

ISSUES

1. Did the trial court err when it found no contract existed between the parties?

2. Did the trial court err when it found that Electro-Lab's proof of damages was legally insufficient?

LAW/ANALYSIS

Electro-Lab argues a contract existed between the parties by virtue of the use of Electro-Lab's bid in Sharp's successful general contracting bid, the parties' subsequent communications, and Electro-Lab's attendance at a pre-construction meeting and its gathering of submittals from suppliers. We disagree.

"A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, 439 (Ct. App. 2003) (citations omitted). The necessary elements of a contract are offer, acceptance, and valuable consideration. Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co., 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993). In this case, there was a valid oral offer to perform electrical subcontract work for $1,150,000 based on the telephone bid received by Sharp before Sharp furnished its general contractor's bid to the project owner. See id. (quoting RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981) ("'An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that

bargain is invited and will conclude it.'"). See also Klose v. Sequoia Union High Sch. Dist., 258 P.2d 515, 517 (Cal. Dist. Ct. App. 1953) ("A subcontractor bidder merely makes an offer that is converted into a contract by a regularly communicated acceptance conveyed to him by the general contractor."). As a result, the issue in this case turns on whether Sharp's conduct following Electro-Lab's bid amounted to acceptance of Electro-Lab's offer.

Jurisdictions outside of South Carolina have consistently held that a general contractor's use of a subcontractor's bid is not an acceptance that creates a contractual relationship between the general contractor and the subcontractor should the general contractor become the successful bidder. See, e.g., Elec. Constr. & Maint. Co. v. Maeda Pac. Corp., 764 F.2d 619, 621 (9th Cir. 1985); Merritt-Chapman & Scott Corp. v. Gunderson Bros. Eng'g Corp., 305 F.2d 659, 663 (9th Cir. 1962); Williams v. Favret, 161 F.2d 822, 824 (5th Cir. 1947); Finney Co. v. Monarch Constr. Co., 670 S.W.2d 857, 859 (Ky. 1984); Holman Erection Co. v. Orville E. Madsen & Sons, Inc., 330 N.W.2d 693, 696 (Minn. 1983); Mitchell v. Siqueiros, 582 P.2d 1074, 1077 (Idaho 1978); Corbin-Dykes Elec. Co. v. Burr, 500 P.2d 632, 634 (Ariz. Ct. App. 1972); K.L. House Constr. Co. v. Watson, 508 P.2d 592, 593 (N.M. 1973); Neptune Gunite Co. v. Monroe Enters., Inc., 40 Cal. Rptr. 367, 371 (Cal. Dist. Ct. App. 1964); Milone & Tucci, Inc. v. Bona Fide Builders, Inc., 301 P.2d 759, 763 (Wash. 1956).

In accordance with these jurisdictions and based on general contract law principles, we agree that a general contractor's mere use of a subcontractor's bid in a general contractor's successful overall bid does not constitute acceptance of an offer. "Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." RESTATEMENT (SECOND) OF CONTRACTS § 50 (1981). A typical contract contains mutual promises and is created by an acceptance constituting a return promise by the offeree. See RESTATEMENT (SECOND) OF CONTRACTS § 50 cmt. c (1981); Sauner v. Pub. Serv. Auth., 354 S.C. 397, 405, 581 S.E.2d 161, 166 (2003) ("A bilateral contract . . . exists when both parties exchange mutual promises."). Moreover, a contract only arises when there is an actual agreement by the parties in which the parties demonstrate a

mutual intent to be bound. Timmons v. McCutcheon, 284 S.C. 4, 9-10, 324 S.E.2d 319, 322 (Ct. App. 1984). Sharp's mere use of Electro-Lab's subcontractor's bid in its overall bid falls short of manifesting any assent to the terms of the bid or the required mutual intent to be bound. As a consequence, no contract existed between the parties by virtue of Sharp's use of Electro-Lab's bid.

Electro-Lab argues that even if the use of a bid by a general contractor from a subcontractor does not necessarily form a contract, such use is indicative of the formation of a contract between the two companies. Electro-Lab asserts, based on the totality of circumstances, that the culmination of Sharp's and Electro-Lab's actions formed an enforceable contract. We disagree. Following Sharp's use of Electro-Lab's bid, Sharp's project manager testified that he told Electro-Lab that its bid was low, inquired about Electro-Lab's bond rate and asked Electro-Lab to fax its bid in writing. This communication falls short of amounting to acceptance of the bid because it does not convey any assent to the terms of the bid by a return promise or any mutual intent to be bound. Such communications were merely preliminary negotiations between the parties and do not amount to an enforceable contact. See McLaurin v. Hamer, 165 S.C. 411, 420, 164 S.E. 2, 5 (1932) (stating that there is no meeting of the minds between the parties when they are merely negotiating the terms of an agreement to be entered into). Similarly, Sharp's discussions with Electro-Lab about performing the work for the $1,140,000 were also preliminary negotiations as evidenced by Sharp's confirmatory fax instructing Electro-Lab that "[a] subcontract is forthcoming." See Caulder v. Knox, 251 S.C. 337, 345, 162 S.E.2d 262, 266 (1968) ("The intention of the parties should be determined from the surrounding circumstances, as well as from the testimony of all witnesses; and subsequent acts are relevant to show whether a contract was intended."). See also Bugg v. Bugg, 272 S.C. 122, 125, 249 S.E.2d 505, 507 (1978) ("Where it is determined that the parties intended not to be bound until the written contract is executed, no valid and enforceable obligation will be held to arise."). Under the totality of the circumstances, the culmination of Sharp's actions does not evidence any assent to the terms of the Electro-Lab's bid or a mutual intent to be bound. Further, we do not find Electro-Lab, in attending the pre-construction meeting and gathering submittals,

established a mutual intent to be bound or any acceptance by Sharp. As a result, we find the conduct of Sharp and Electro-Lab following the bid did not amount to acceptance of Electro-Lab's bid and did not create an enforceable contract.

Electro-Lab also asserts that principles of mutuality of contract require we find the parties bound in contract. We do not find the principles of mutuality of contract to be invoked under these circumstances. In support of this argument, Electro-Lab relies on Powers Constr. Co. v. Salem Carpets, Inc., 283 S.C. 302, 322 S.E.2d 30 (Ct. App. 1984). This case noted the doctrine of promissory estoppel could support an action by a contractor who has submitted a prime bid in reliance upon a subcontractor's bid. Id. at 306, 322 S.E.2d at 33. Electro-Lab argues because, pursuant to Powers, a subcontractor could be liable for damages under the doctrine of promissory estoppel, principles of mutuality of contract require a general contractor to be bound to a subcontract, or in this case, Sharp to be bound to Electro-Lab. Electro-Lab's argument, however, is flawed for two significant reasons. First, the Powers case is premised on the doctrine of promissory estoppel and not breach of contract as asserted by Electro-Lab on appeal. Second, principles of mutuality of contract only arise between parties to a contract. Because we find no enforceable contract existed, the principles of mutuality of contract are neither invoked nor violated.

Because we agree with the conclusion of the trial court that no enforceable contract existed between the parties, we need not reach Electro-Lab's argument concerning the sufficiency of damages. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling that an appellate court need not review remaining issues when disposition of prior issues are dispositive). Accordingly, the trial court's decision is

AFFIRMED.

HOWARD and KITTRIDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ted Frame,
Claimant/Employee, Respondent,

v.

Resort Services Incorporated,
Employer, and Fireman's
Fund Insurance Company,
Carrier, Appellants.

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

Opinion No. 3732
Heard January 14, 2004 – Filed February 2, 2004

REVERSED AND REMANDED

Robert W. Achurch, III and Mary Bass Lohr, of Beaufort, for Appellants.

Coleman Hookaylo, Jr., of Hilton Head Island, for Respondent.

ANDERSON, J.: Resort Services Incorporated (RSI), employer, and Fireman's Fund Insurance Company, carrier, appeal an order by the circuit court which adopted the findings of the Workers' Compensation Commission and granted Ted Frame, employee, full benefits for mental illness under the South Carolina Workers' Compensation Act. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Ted Frame began his employment with RSI, a commercial laundry business, as a route sales driver in March 1985. After establishing himself as a "jack of all trades" and an "excellent employee," Frame was promoted to route sales manager sometime between 1991 and 1993 and again to production manager in 1997. By the time he ended his employment with RSI, a family owned business run by the five sons of founder Jerry Reeves, Frame was known within the company as the sixth Reeves brother, having many of the same responsibilities and ostensibly the authority of a co-owner.

Both Frame and RSI agree that he had a very difficult and stress inducing job throughout his employment with RSI. As a route sales driver, he would often work up to fourteen hours a day, and it was not uncommon to put in sixty to seventy hours a week. In both the route sales manager and production manager positions, his responsibilities were increased and the amount of time his job required remained around sixty to seventy-five hours a week, depending on the season, often working weekends. Furthermore, his level of job-related stress was aggravated by what he perceived to be management's continual incompetence, violations of law (Department of Transportation and environmental regulations), conflicting orders, disregard of proper chain of command, overt racism[1], and sexual misconduct on the part of some of his five bosses. Frame professed that many of the

[1] Frame, a Caucasian, was often troubled by the dishonorable treatment African-American employees under his charge received from upper management, exacerbated by comments by certain members of the Reeves family.

circumstances which eventually led to his heightened level of job-related stress, particularly racist remarks by management, reporting and receiving conflicting orders from multiple bosses and having to rush between several different areas of the business, had been present for about five years before the date he left the employ of the company.

Throughout his fifteen years of employment, especially in the last five years, Frame had feelings of frustration, helplessness and outrage at the practices of his supervisors. He testified to several instances where he fired employees for violations of the company's drug and alcohol policy, which he was charged to enforce, only to have the Reeves brothers rehire them a month later. There were occasions when truck maintenance, hauling practices, and the plant's compliance with environmental regulations were responded to with perceived apathy by the Reeves brothers. Frame believed this rose to the level of a violation of law. His dissatisfaction with his job was exacerbated throughout his employment by feelings that its demands were destroying his family life.

On September 9, 1999, an outside vendor of paper goods arrived at RSI with a delivery. Two boxes of paper towels, damaged during delivery, were deemed below the quality standards of the company and were removed from the bill. The driver of the truck, expressing his intention of throwing the products away, instead gave the products to the employees of RSI. One employee, driver Kevin Moore, an outstanding employee by RSI's own testimony, took some of the towels home with him at the end of his shift.

Frame arrived to work the following morning to find Michelle Johnson, a purchasing agent for the company and Frame's subordinate, loudly accusing Moore of being a thief. Frame attempted to explain to Johnson the situation, namely that the paper products were given free of charge from the vendor, but Johnson continued to accuse Moore and seek action from Frame. When Frame became annoyed by Johnson's continual finger pointing, he inquired into the cost of the paper towels had the company been charged by the vendor, wrote the company a check for that amount (about thirty-five dollars) and handed it to Johnson.

The Reeves brothers were conducting a family business meeting on the day in question. Johnson, alleged paramour of Michael Reeves, quickly approached him as he left the meeting and told him of the events of the day. [2] Michael Reeves, siding with his alleged girlfriend, sought out Frame and explained to him that it was a violation of company policy to allow an employee to receive free items. According to Frame, Michael Reeves expanded on the policy by adding, "[Kevin Moore] is a thief and liar. [A]ll black people are thieves and liars and . . . you've got to watch out for it."

Over Frame's assertions that Moore was innocent of any wrongdoing, Michael Reeves continued to state his position on the alleged towel theft until Frame suffered a complete mental breakdown. In his own words, "I think really what topped the notch was with Michelle and the paper products that said that Kevin stole and then Michael told me that blacks were all thieves and liars. I think that's what really snapped." Frame told his boss to leave Moore alone, placed his pager and phone down, went out to his truck and started crying. He never returned to work in his previous capacity.

After expressing to family and friends his breakdown and an onslaught of suicidal tendencies following the above incident, Frame was examined by a psychologist and a psychiatrist. The psychiatrist and psychologist agree: (1) that Frame suffers from a bipolar type of psychosis; (2) on the day in question he experienced what is known as a "decompensation" (a mental breakdown); (3) there is a certain genetic predisposition to this kind of psychosis; (4) this "decompensation" was the result of job-related stress; and (5) it was in no way certain that Frame would experience such a mental collapse regardless of exterior stimuli (i.e., his job). According to the psychiatrist and psychologist, Frame is not currently capable of full-time work.

[2] Although Frame asserted that the adulterous relationship between Michael Reeves and Michelle Johnson was common knowledge within the company, he offered no proof at the hearing and admitted to never actually witnessing intimate sexual relations.

Frame claimed entitlement to benefits under the Workers' Compensation Act. A hearing before a single commissioner resulted in an order granting Frame full benefits. The order of the single commissioner reads:

> 1. The Claimant was predisposed to mental illness, although it is unclear whether the predisposition was as a result of genetics or something else. The basis of the predisposition is not relevant.
> 2. The Claimant's work stress was a contributing factor to the decompensation and was the major contributing factor.
> 3. Particular stressors in the workplace included: answering to "five bosses"; the constant anxiety resulting from escalating pressure associated with being on call. Other examples were trying to cut costs without cooperation, insufficient fire extinguishers to put out fires in the plant, conflict with DOT standards or regulations, lack of cooperation from mechanics and drivers, etc.
>
> . . . .
>
> 2. Under Section 42-1-160, Claimant did sustain a mental injury by repeated stresses, and specific trigger event, arising out of and in the course of his employment within the meaning therein.

RSI appealed the order of the single commissioner to the Full Commission. The Full Commission adopted the order of the single commissioner. The order of the Full Commission states:

> In an Appellate Review, the Commission has the power to weigh the evidence as presented at the initial hearing and, after careful review in the instant case, the Commission, by majority vote, has determined that all of the Hearing Commissioner's Findings of Fact and Rulings of Law are correct as stated.

Accordingly, they shall become, and hereby are, the law of the case; and therefore, the Order is sustained in its entirety.

ORDER

The Order of the Single Commissioner filed in the above entitled matter on December 21, 2000, is hereby affirmed by the Panel and same shall constitute the Decision and Order of the Appellate Panel.

On appeal, the circuit court affirmed the findings of the Full Commission. The order of the circuit court provides:

> On appeal to the commission tribunal, the law of mental injury on the job, without accompanying physical injury, was extensively debated by both counsel in their briefs and in their argument.
>
> . . . .
>
> The tribunal's order was based on their detailed knowledge of the facts of this case and their intimate knowledge of the law as relates to mental injury on the job, but said order does not cite such specifics even while upholding the rulings of the single commissioner.
>
> . . . .
>
> The single commissioner's opinion noted a specific trigger event for Frame's mental injury, arising from the facts specified on the date in question, such substantial evidence leading one to reasonably conclude that such facts represent unusual and extraordinary conditions of the employment, notwithstanding any conflicting argument which reasonably could also be made.

STANDARD OF REVIEW

The substantial evidence rule of the Administrative Procedures Act governs the standard of review in a Workers' Compensation decision. Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002); Gray v. Club Group, Ltd., 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000); Lake v. Reeder Constr. Co., 330 S.C. 242, 498 S.E.2d 650 (Ct. App. 1998). In an appeal from the Commission, this court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E.2d 599 (Ct. App. 1999); Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. § 1-23-380(A)(6)(d) (Supp. 2001); see also Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002) (stating court may reverse or modify Commission's decision if substantial rights of appellant have been prejudiced because administrative findings, inferences, conclusions or decisions are affected by other error of law). This court's review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000); see also Lyles v. Quantum Chem. Co. (Emery), 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993) (in reviewing decision of Workers' Compensation Commission, Court of Appeals will not set aside its findings unless they are not supported by substantial evidence or they are controlled by error of law).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Etheredge, 349 S.C. at 456, 562 S.E.2d at 681-82; Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999). The Appellate Panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the Single Commissioner's findings of fact. Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). The final determination of witness credibility and the weight to be accorded evidence is reserved to the

Appellate Panel. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000); Parsons v. Georgetown Steel, 318 S.C. 63, 456 S.E.2d 366 (1995); Gibson, 338 S.C. at 517, 526 S.E.2d at 729. The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 541 S.E.2d 526 (2001); Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999). It is not within our province to reverse findings of the Commission which are supported by substantial evidence. Broughton, 336 S.C. at 496, 520 S.E.2d at 637.

LAW/ANALYSIS

Frame asserts that he has suffered an accidental injury within the scope and course of his employment with RSI pursuant to section 42-1-160 of the South Carolina Code, and is entitled to benefits under the South Carolina Workers' Compensation Act for his mental illness. RSI contends there is no "injury" as defined by the statute.

Mental injuries are compensable if they are induced either by physical injury or by unusual or extraordinary conditions of employment. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 493, 541 S.E.2d 526, 528 (2001); Getsinger v. Owens-Corning Fiberglas Corp., 335 S.C. 77, 80, 515 S.E.2d 104, 106 (Ct. App. 1999); Stokes v. First Nat'l Bank, 298 S.C. 13, 21, 377 S.E.2d 922, 926 (Ct. App. 1988). A mental-mental injury is a purely mental injury resulting from emotional stimuli. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000).

> Mental or nervous disorders are compensable accidental injuries under the statute when "the emotional stimuli or stressors are incident to or arise from unusual or extraordinary conditions of employment." Powell v. Vulcan Materials, Co., 299 S.C. 325, 384 S.E.2d 725 (1989). In Powell, this Court held that courts should use the "heart attack standard" to determine when a mental-mental injury is compensable. A heart attack suffered by an employee constitutes a compensable accident if it is induced by unexpected strain or overexertion in the performance of his

> duties of employment, or by unusual and extraordinary conditions in employment. Bridges v. Housing Auth., City of Charleston, 278 S.C. 342, 295 S.E.2d 872 (1982). However, if a heart attack results as a consequence of ordinary exertion that is required in performance of employment duties in an ordinary and usual manner, and without any untoward event, it is not compensable as an accident. Fulmer v. South Carolina Elec. & Gas Co., 306 S.C. 34, 410 S.E.2d 25 (Ct. App. 1991). According to this Court in Powell, the heart attack standard applies to mental-mental injuries:
>
> > Mental or nervous disorders resulting from either physical or emotional stimuli are equally compensable provided the emotional stimuli or stressors are incident to or arise from unusual or extraordinary conditions of employment. Powell, 299 S.C. at 327, 384 S.E.2d at 726; see also, Stokes v. First Nat'l Bank, 306 S.C. 46, 410 S.E.2d 248 (1991).

Shealy, 341 S.C. at 457, 535 S.E.2d at 443. The requirement of "unusual or extraordinary conditions in employment" for a claimant to recover for a mental-mental injury refers to conditions to the particular job in which the injury occurs, not to conditions of employment in general. Id. at 456, 535 S.E.2d at 442.

> In order for [a claimant] to recover workers' compensation benefits, he must prove both: (1) that he was exposed to unusual and extraordinary conditions in his employment; and (2) that these unusual and extraordinary conditions were the proximate cause of his mental breakdown. See generally Powell, supra; Gambrell v. Burleson, 252 S.C. 98, 165 S.E.2d 622 (1969) (must prove causal connection between injury and subsequent condition in workers' compensation cases).

Id. at 459, 535 S.E.2d at 444.

We find the Full Commission, as the ultimate fact finder in Workers' Compensation cases, failed to sufficiently specify its factual findings to the degree required by the amended statute. See Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000) (holding the Workers' Compensation Commission is the ultimate finder of fact). Specifically, by simply adopting the order of the single commissioner, **no finding of "extraordinary or unusual circumstances" leading to the injury was articulated**.

Frame relies on Powell v. Vulcan Materials Co., 299 S.C. 325, 384 S.E.2d 725 (1989), for the proposition that a work-related altercation could legally amount to an "unusual and extraordinary" condition of employment notwithstanding the lack of any specific stated finding on the issue. Frame's reading of the case is misguided.

In 1996, partially in response to Powell, the legislature amended section 42-1-160 of the South Carolina Code to include the following provisions:

> Stress arising out of and in the course of employment unaccompanied by physical injury and resulting in mental illness or injury is not a personal injury **unless it is established** that the stressful employment conditions causing the mental injury were **extraordinary and unusual** to the normal conditions of the employment.
>
> [A mental injury] is not considered compensable if it results from any event or series of events which is **incidental to normal employer/employee relations** such as… [nonexclusive list]… except when these actions are taken in an **extraordinary and unusual** manner.

S.C. Code Ann. § 42-1-160 (Supp. 2002) (emphasis added).

While this amendment maintains the part of Powell that held a purely mental injury compensable under the statute, it adds the requirement, non-

existent when the court decided Powell, that the finder of fact make a specific finding that such an injury arose from "extraordinary and unusual" circumstances. The circumstances must be "extraordinary and unusual" in regard to the particular employment in question and not as applied to some general notion of the average reasonable employment. See Shealy, 341 S.C. at 457, 535 S.E.2d at 443.

Frame argues, per the "substantial evidence" rule and this court's standard of review, that the record provides a significant number of facts to allow a reasonable person to conclude his injury was a result of unusual and extraordinary conditions. We agree that a reasonable mind could possibly make such a finding based on the evidence of this case. The issue here, however, is not whether such conclusion could be reached as an issue of fact, but rather, was such conclusion reached as required by law.

The findings of fact made by the Full Commission must be sufficiently detailed to enable the reviewing court to determine whether the evidence supports the findings. Parsons v. Georgetown Steel, 318 S.C. 63, 66, 456 S.E.2d 366, 368 (1995). The mere mention of a "specific trigger event" by the single commissioner, later cited by the circuit court as proof that this required finding was made, is not a satisfactory showing that the Full Commission found the conditions on the date of Frame's decompensation "extraordinary and unusual to the normal conditions of the employment." Although evidence on record indicates that this may very well have been the case, "the reviewing court may not make findings of fact as to basic issues of liability for compensation, where, to do so, would impose upon the court the function of determining such facts from conflicting evidence." Fox v. Newberry County Mem'l Hosp., 319 S.C. 278, 280, 461 S.E.2d 392, 394 (1995). When an administrative agency acts without first making the proper factual findings required by law, the proper procedure is to remand the case and allow the agency the opportunity to make those findings. See id.

CONCLUSION

We reverse the order of the circuit court and remand this case to the Workers' Compensation Commission to make the appropriate findings of fact

on the issue of whether the stressful employment conditions causing the mental injury were extraordinary and unusual to the normal conditions of employment of Frame. Accordingly, the case is

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ernest J. Smith, Sr., Respondent,

v.

Joanne Rucker, Appellant.

Appeal From Orangeburg County
Olin D. Burgdorf, Master-In-Equity

Opinion No. 3733
Heard December 9, 2003 – Filed February 2, 2004

AFFIRMED

Thomas B. Bryant, III, of Orangeburg, for Appellant.

S. Jahue Moore and M. Ronald McMahan, Jr., of West Columbia, for Respondent.

HEARN, C.J.: This case asks us to determine whether an estate owned by Ernest Smith and his wife, Joanne Rucker, is subject to partition. The case was heard by a master-in-equity, who partitioned the property after finding that the parties owned it as joint tenants with rights of survivorship, a cotenancy subject to partition. Wife appeals, arguing the property is not

subject to partition because she and her Husband own the property as tenants in common for life with indestructible survivorship rights. We affirm.

FACTS

Husband and Wife married in June 2000. On August 17, 2000, Wife deeded Husband a one-half interest in her home and land. The deed contained a granting clause that gave the property to Husband and Wife "for and during their joint lives and upon the death of either of them, then to the survivor of them, his or her heirs and assigns forever in fee simple, together with every contingent remainder and right of reversion." The habendum clause used similar language, providing Husband and Wife owned the property, "for and during their joint lives and upon the death of either of them, then to the survivor of them, his or her heirs and assigns whomever lawfully claiming, or to claim the same, or any party thereof."

Husband filed a complaint in the court of common pleas seeking partition of the subject property, and the case was referred to a master-in-equity. The master granted Husband's motion for summary judgment, finding the parties owned the real property at issue as joint tenants with rights of survivorship. As such, the master held the property could be partitioned pursuant to section 15-61-10 of the South Carolina Code.[1] Wife appeals, arguing the parties owned the property as tenants in common for life with indestructible survivorship rights.

LAW/ANALYSIS

The deed at hand unquestionably creates survivorship rights. The crux of this case is whether those survivorship rights are paired with a tenancy in common and therefore indestructible or whether they are paired with a joint tenancy, in which case the property would be subject to partition

[1] Section 15-61-10 states: "All joint tenants and tenants in common who hold, jointly or in common, for a term of life or years or of whom one has an estate for a term of life or years with the other that has an estate of inheritance or freehold in any land, tenements or hereditaments shall be compelled to make severance and partition of all such lands, tenements and hereditaments."

at the whim of either party. See S.C. Code Ann. § 27-7-40 (Supp. 2002); Davis v. Davis, 223 S.C. 182, 75 S.E.2d 46 (1953). We find that the deed created a joint tenancy with rights of survivorship and affirm the master's decision to partition the property.

Section 27-7-40 of the South Carolina Code provides that a joint tenancy with rights of survivorship is conclusively established when a deed grants land to two or more persons "as joint tenants with rights of survivorship, and not as tenants in common." However, this language is not the only means by which joint tenancies are created, but rather is "[i]n addition to any other methods for the creation of a joint tenancy in real estate which may exist by law . . . ." S.C. Code Ann. § 27-7-40 (Supp. 2002).

The common law method of creating a joint tenancy requires a conveyance to have four unities: unity of interest, unity of title, unity of time, and unity of possession. Jenkins v. Jenkins, 8 S.C.L. (1 Mill) 48 (1817). When a joint tenancy is coupled with a right of survivorship, the right of survivorship can, under certain circumstances, be destroyed by one party acting alone. See S.C. Code Ann. § 27-7-40 (Supp. 2002). Because survivorship rights often encumber land, our courts require clear, unambiguous, and express language to create a joint tenancy with rights of survivorship and will construe instruments in favor of tenancies in common whenever possible. Herbemont v. Thomas, Chev.Eq. 21 (S.C. 1839). The reason South Carolina courts favor tenancies in common over joint tenancies is due to "the harsh results of survivorship rights incident to joint tenanc[ies] [which] usually defeated the intention of the grantor." 6 S.C. JUR. *Cotenancies* § 18 (1991). We do not believe this general rule favoring tenancies in common is applicable to cases involving deeds that unequivocally grant rights of survivorship because construing a deed to convey a tenancy in common with a right of survivorship would result in finding an estate that has indestructible survivorship rights and would thereby render the land less rather than more marketable. See, e.g., Harold W. Jacobs, *Cotenancies, Estates of in South Carolina*, 11 S.C.L.Q. 520, 523 (1958) (explaining that South Carolina courts favor estates that do not have harsh survivorship rules).

Although the deed in the instant case does not contain the language suggested by section 27-7-40, it does satisfy the four unities required to create a joint tenancy: both Husband and Wife have the same interest, created by the same conveyance, which commenced at the same time, and they hold the property in undivided possession. Furthermore, the deed clearly and unambiguously grants the right of survivorship, a distinguishing characteristic of joint tenancies. 6 S.C. JUR. *Cotenancies* § 17 (1991) ("The distinguishing characteristic of joint estates is survivorship."). Thus, we find the language of the deed unambiguously created a joint tenancy with rights of survivorship. See Lake View Acres Development Co. v. Tindal, 306 S.C. 477, 479, 412 S.E.2d 457, 458 (Ct. App. 1991) ("The main object in construing a deed is to ascertain the intention of the grantor from the language used in the deed.").[2]

In support of her position that the property is not subject to partition, Wife relies on Davis v. Davis, 223 S.C. 182, 75 S.E.2d 46 (1953), in which our supreme court recognized indestructible survivorship rights attaching to a tenancy in common. However, in that case, the court was called upon to determine what quantum of estate was created by a deed that purported to create a tenancy by the entirety[3] after such estates were no

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[2] When the language in a deed is ambiguous, extrinsic evidence is admissible to aid the court in determining the grantor's intentions. See Bellamy v. Bellamy, 292 S.C. 107, 111, 355 S.E.2d 1, 3 (Ct. App. 1987). Here, extrinsic evidence was unnecessary because we find the language of the deed sufficiently clear to create a joint tenancy with rights of survivorship.

[3] Tenancies by the entirety, which were premised on the common law fiction that a man and woman merged into one person upon marriage, were recognized as valid estates in South Carolina until 1907. Green v. Cannady, 77 S.C. 193, 57 S.E. 832 (1907). Because of the "unity of person" notion, property conveyed to spouses was automatically deemed a tenancy by the entirety, and as such, neither Husband nor Wife could convey or alienate the property without the other's permission and the surviving spouse was entitled to the entire estate upon the other's death. In Green v. Cannady, the supreme court abolished tenancies by the entirety, finding that the Married Woman's

longer recognized in South Carolina.[4] Here, the deed did not purport to create a tenancy by the entirety. Instead, as explained above, Wife's deed created a joint tenancy by satisfying the four unities required under common law and by unambiguously creating a right of survivorship.

CONCLUSION

Based on the language of the deed and South Carolina's penchant for construing deeds in favor of marketability, we find Wife's deed created a joint tenancy with rights of survivorship. As a joint tenancy, the property is subject to partition pursuant to section 15-61-10 of the South Carolina Code. Accordingly, the master's decision to partition the property is

AFFIRMED.

HOWARD and KITTREDGE, JJ., concur.

Separate Property Acts and the state constitutions of 1868 and 1895 effectively destroyed the fiction that, upon marriage, a couple merged into one, unified person. Instead, the Green court held that property titled to both Husband and Wife created a tenancy in common. Id. at 197, 57 S.E. at 834.

[4] When called upon to determine what quantum of estate the deed actually created, the Davis court held that a tenancy in common with indestructible survivorship rights was created either because the cotenants had "(1) a tenancy in common for life with a contingent remainder in favor of the survivor" or "(2) a tenancy in common in fee simple with an executory limitation in favor of the survivor." Davis v. Davis, 223 S.C. 182, 192, 75 S.E.2d 46, 50 (1953). In reaching its decision, the court "approached the question . . . by first undertaking to ascertain the intention of the parties . . . ." Id. at 185, 75 S.E.2d at 47.In doing this, the court found that the purported creation of a tenancy by the entirety "[threw] some light on the intention to create an indestructible right of survivorship" and that "by adding the phrase 'and the survivor of them,' the parties . . . clearly indicated the nature of the estate intended to be created, namely that upon the death of either of the grantees the absolute estate should vest in the survivor." Id. at 191-192, 75 S.E.2d at 50.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services,	Plaintiff,
v.	
Carolina Ledford, James P. Berlin, and Leigha Berlin, DOB 02/02/93,	Defendants.
Of Whom South Carolina Department of Social Services is,	Respondent,
And, James P. Berlin is,	Appellant.

Appeal From Aiken County
Peter R. Nuessle, Family Court Judge

Opinion No. 3734
Heard December 9, 2003 – Filed February 2, 2004

AFFIRMED

Ziva Peleg Bruckner, of Augusta, for Appellant.

Dennis M. Gmerek, of Aiken, for Respondent.

Lark W. Jones, of N. Augusta, for Guardian Ad Litem

HEARN, C.J.: The South Carolina Department of Social Services (DSS) brought this termination of parental rights (TPR) action against Carolina Ledford (Mother) and James Berlin (Father). The family court terminated the parental rights of both parties, and Father appeals.

FACTS

In 1993, the parties' daughter, Leigha, was born. Three years later, Father was convicted of first-degree forgery and incarcerated in Georgia. Shortly thereafter, Father was paroled, and he received permission to work in South Carolina. At some point during 1998, that permission was revoked, and Father knew that if he continued to work outside the State of Georgia, he would be in violation of his parole. Despite this knowledge, Father continued working in South Carolina, and he was incarcerated for violating his parole. While Father was in prison, he and Mother divorced.

Once divorced, Father lost contact with both Mother and Leigha. In 1999, Leigha was taken into emergency protective custody after Mother left her with friends in Hilton Head, supposedly for a day, and did not return after two weeks. Mother had a serious drug problem, and her whereabouts were unknown at the time of the TPR hearing.

At the hearing, Father testified that during the time he and Mother were together, she did not have a drug problem and was a good mother. He further testified that he was very active in his daughter's life, though he offered very few details.

Father admitted that while he was in prison, he attempted to contact Leigha on only two occasions. According to his testimony, his first attempt occurred when he asked prison officials to help him locate his daughter. When they did not help him, Father became frustrated and did nothing else. His second attempt occurred when he sent Leigha a birthday

card by way of her older half-sister,[1] but the card was returned as undeliverable. According to Father's own testimony, no other attempts were made to contact his daughter.

DSS attempted to locate Father, but the only information it received from Mother was that he was incarcerated in Georgia. When asked if he did anything to aid in DSS's search for him, Father stated: "I remained breathing oxygen." Eventually, a caseworker found him through the Internet listings of the Georgia Department of Corrections, and in January of 2001, he was served with a summons and complaint to terminate his parental rights.

Even after learning of the TPR, Father failed to establish any contact with the caseworker or DSS. The caseworker testified that Father knew or should have known how to contact her or DSS from the time he received the summons and complaint in January of 2001. Father also made no attempt to contact the guardian for the minor child until after he was released from prison, about one week prior to the TPR hearing.

DSS sought to terminate Father's parental rights on the grounds that he abandoned his daughter, he willfully failed to visit within the previous six months, and he willfully failed to provide support during the previous six months. Father denied the allegations.

The family court found that Father abandoned his daughter and that TPR was in the child's best interest. In making this finding, the family court explicitly stated that Father's testimony was without credibility and was completely self-serving. Father appeals.

STANDARD OF REVIEW

"A ground for termination of parental rights must be proved by clear and convincing evidence." Richland County Dep't of Soc. Servs. v. Earles, 330 S.C. 24, 32, 496 S.E.2d 864, 868 (1998) (citing Greenville County Dep't of Soc. Servs. v. Bowes, 313 S.C. 188, 437 S.E.2d 107 (1993)).

[1] Leigha's half-sister is Mother's daughter from a previous relationship.

"In reviewing a termination of parental rights, the appellate court has the authority to review the record and make its own findings of whether clear and convincing evidence supports the termination." Earles, 330 S.C. at 24, 496 S.E.2d at 868 (citing S.C. Dep't of Soc. Servs. v. Brown, 317 S.C. 332, 454 S.E.2d 335 (Ct. App. 1995)).

LAW/ANALYSIS

Father maintains the family court erred both in finding that he had abandoned daughter and in finding that termination of his parental rights would serve her best interests. We disagree.

Pursuant to section 20-7-1572(7) of the South Carolina Code, the court can terminate the rights of a parent who abandons his or her child if termination of those rights is in the child's best interest. Abandonment occurs when "a parent or guardian willfully deserts a child or willfully surrenders physical possession of a child without making adequate arrangements for the child's needs or the continuing care of the child." S.C. Code Ann. § 20-7-490(19) (Supp. 2002).

Willfulness is "a question of intent to be determined by the facts and circumstances of each case." S.C. Dep't of Soc. Servs. v. Wilson, 344 S.C. 332, 336, 543 S.E.2d 580, 582 (Ct. App. 2001) (citing S.C. Dep't of Soc. Servs. v. Broome, 307 S.C. 48, 52, 413 S.E.2d 835, 838 (1992)). "Our supreme court has defined willfulness as '[c]onduct of the parent which evinces a settled purpose to forego parental duties . . . because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent.'" Id. (quoting Broome, 307 S.C. at 53, 413 S.E.2d at 839). "Generally, the family court is given wide discretion in making this determination. However, the element of willfulness must be established by clear and convincing evidence." Id.

Father argues that the only evidence of abandonment was his incarceration and that incarceration alone is insufficient to terminate his parental rights. We agree that pursuant to South Carolina Department of Social Services v. Wilson, incarceration alone is insufficient to justify

termination. However, in Wilson, the incarcerated father made extensive efforts to maintain contact with his children, but DSS prevented the visitation. The Wilson court held: "The record contains overwhelming evidence that SCDSS not only refused to facilitate visitation, it actually took an active role in preventing the father from visiting his children. Despite the father's repeated requests, the caseworkers refused to allow visitation both at the correctional facility and after the review hearings." 344 S.C. at 338, 543 S.E.2d at 583.

In the instant case, aside from unsuccessfully sending Leigha a birthday card via her older half-sister, Father admitted he only attempted to locate his daughter one time and that his effort to find her ended when prison officials were unhelpful. Even after learning Leigha was in DSS's custody, Father made no attempt to inquire about her health and wellbeing. Father neither made arrangements for his child's care nor showed concern for the status of her current arrangements. Unlike the father in Wilson, Father made only a miniscule attempt to remain a part of his daughter's life while in prison. In addition to "breathing oxygen," Father was required to take the necessary steps to assure that his daughter was being continually cared for, and because he failed to do this, we find he effectively abandoned her. See S.C. Code Ann. § 20-7-490(19) (defining abandonment as the willful surrender of a child by a parent without making adequate arrangements for the child's continuing care).

Father asserts that he did not abandon his daughter because he left her in Mother's care when he was initially incarcerated. However, based on the language of section 20-7-490(19), a parent's responsibility extends beyond making initial arrangements for his or her child while the parent is away; the statute requires that the parent make adequate arrangements for the child's *continuing care*. Thus, even if we believe Father's testimony that Mother had been a qualified caregiver at the time of his incarceration,[2] he had an ongoing responsibility to make efforts to ensure that his daughter was continually cared for while he was serving his sentence. Because Father

[2] The family court judge discounted Father's testimony regarding whether Mother was a qualified caregiver at the time of Father's incarceration.

willfully failed to either inquire about his daughter or verify that Mother was indeed taking care of her, we find no error in the family court's determination that Father abandoned his child. Furthermore, based on the lack of recent contact between Father and Leigha, the guardian ad litem's testimony that termination is in Leigha's best interest, and the foster mother's testimony about Leigha's current living situation, we agree with the family court that termination of Father's parental rights is in Leigha's best interest.

Father next argues that the family court judge's questions of him displayed bias. After having been examined and cross-examined by his attorney and the attorney for DSS, Father then fielded over thirty questions from the family court judge. While we believe this questioning was certainly excessive and unnecessarily harsh, we find that, ultimately, it did not adversely affect the outcome of the proceedings.

In Fowler v. Laney Tank Lines, Inc., 263 S.C. 422, 211 S.E.2d 231 (1975), the court reiterated "the sound and long established rule that 'the trial judge, of course, has the right, in his discretion, and in a proper manner, to question witnesses during a trial, in order to elicit the truth.'" Id. at 425, 211 at 232 (quoting Williams v. S.C. Farm Bureau Mut. Ins. Co., 251 S.C. 464, 163 S.E.2d 212 (1968)). The foremost danger in a judge asking a witness questions is that the nature of the questioning might indicate to the jury how the judge feels about a particular witness's testimony or how the case itself should be resolved. See, e.g., Williams v. S.C. Farm Bureau Mut. Ins. Co., 251 S.C. 464, 472, 163 S.E.2d 212, 216 (1968) ("If a trial judge in the exercise of his discretion feels called upon . . . to question witnesses to elicit the truth, he should be cautious to see that such questions are propounded in a fair and impartial manner, and should not express or indicate to the jury the judge's opinion . . . .").

In this case, the family court judge questioned Father at length about his incarceration and whether he accepted any responsibility for his daughter being in foster care. The judge repeated many questions even after receiving answers from Father. Although we believe the form of the judge's questions was adversarial and the number of questions was excessive, we also acknowledge that the family court judge was the fact-finder at this

hearing; thus, the "foremost danger" of judicial questioning, i.e., tainting the jury, is not present in this case. Moreover, we find ample evidence in the trial record to support the family court judge's decision to terminate Father's rights. Accordingly, the family court's decision is

AFFIRMED.

HOWARD and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Alvin Simuel, Appellant.

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

Opinion No. 3735
Submitted December 8, 2003 – Filed February 2, 2004

REVERSED and REMANDED

Assistant Appellate Defender Eleanor Duffy Cleary, of Columbia; for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General W. Rutledge Martin, of Columbia; Solicitor Warren Blair Giese, of Columbia; for Respondent.

HEARN, C.J.: Alvin Simuel was convicted and sentenced to

thirty months imprisonment for escaping from the Kirkland Correctional Center. He appeals, asserting the trial judge erred in sentencing him to an enhanced penalty when the enhancement element was neither charged in the indictment nor submitted to the jury. We reverse and remand.

FACTS

While serving a fifteen-year sentence for armed robbery, Simuel escaped from the Kirkland Correctional Center in January 1976. In 1999, he was apprehended by authorities in Massachusetts. After extradition to South Carolina, Simuel was indicted for escape. The body of the indictment read: "That Alvin Simuel did in Richland County on or about January 25, 1976, unlawfully escape or attempt to escape from lawful confinement or custody, to wit: escape while serving time for armed robbery at the Kirkland Correctional Center on 4344 Broad River Road."

The statutory section in effect in January 1976 regarding escape read, in relevant part, as follows:

> It shall be unlawful for any person, being lawfully confined in any prison . . . to escape . . . and any person so doing . . . shall be guilty of a misdemeanor and punished by a sentence of not less than six months nor more than two years, such sentence to be consecutive to the original sentence and to any other sentences theretofore imposed upon such escapee by any court of this State . . . . *Provided however*, that should the escapee be recaptured elsewhere than in this State the sentence to be imposed in addition to any remaining unserved portion of the original sentence shall be not less than one year nor more than three years, such sentence to be consecutive to any other sentences theretofore imposed upon such escapee by any court of this State.

S.C. Code Ann. § 55-6 (1962 & Supp. 1975) (italics in original, emphasis

added).[1]

During sentencing, defense counsel objected, arguing the indictment did not specify Simuel was taken into custody outside of South Carolina.[2] Counsel argued the trial court could not sentence him to an enhanced penalty because the indictment failed to allege this element. The trial judge denied Simuel's motion, stating: "Enhancement of penalty is not an element of the crime." Simuel was sentenced to thirty months imprisonment, to be served consecutively with Simuel's underlying sentence of fifteen years for armed robbery.

LAW/ANALYSIS

Simuel argues the trial court erred in sentencing him to an enhanced penalty when the enhancement element of being apprehended in another state was not charged in the indictment or submitted to the jury. We agree.

The United States Supreme Court addressed the issue of sentence enhancement in Apprendi v. New Jersey, 530 U.S. 466 (2000). In Apprendi, the defendant fired several shots into the home of an African-American family. The defendant was indicted on a weapons charge, but not under the hate crime statute, which provided for an enhanced sentence. After pleading guilty, the trial judge granted the State's motion to enhance the defendant's sentence under the hate crime statute. The Supreme Court reversed, holding: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[3] Id. at 490. The Court noted

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[1] The current statutory section is S.C. Code Ann. § 24-13-410 (1976 & Supp. 2002).

[2] Further, the jury instructions did not include any mention of a statutory sentence enhancement provision.

[3] We note the Fourth Circuit has found that Apprendi is not implicated when the trial judge makes factual findings increasing the sentencing range; however, such analysis is not applicable here, as the trial judge did not make factual findings. See United States v. Photogrammetric Data Servs., 259 F.3d

the Fourteenth Amendment "commands the same answer" in cases concerning state statutes. Id. at 476.

In the instant case, Simuel's indictment did not mention the sentence enhancement incurred when an escapee is recaptured outside the state of South Carolina. Nor did Simuel's indictment allege that he was recaptured in Massachusetts. Additionally, the enhancement provision of section 24-13-410 was not submitted to the jury. As such, under the holding of Apprendi, the trial judge erred in enhancing Simuel's sentence in excess of the maximum two-year sentence provided for by section 24-13-410.

CONCLUSION

Because Simuel's enhanced thirty-month sentence for escape violated the holding in Apprendi, we reverse and remand for sentencing consistent with our holding in this case.

REVERSED and REMANDED.

HOWARD and KITTREDGE, JJ., concur.

229, 257-59 (4th Cir. 2001); United States v. Kinter, 235 F.3d 192, 199-202 (4th Cir. 2000).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael Laquincy Higgins, Appellant.

Appeal From Laurens County
Honorable James W. Johnson, Jr., Circuit Court Judge

Opinion No. 3736
Heard December 10, 2003 – Filed February 2, 2004

AFFIRMED

Assistant Appellate Defender Robert M. Pachak, of S.C. Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General Deborah R.J. Shupe, of Columbia; and Solicitor W. Townes Jones, IV, of Greenwood, for Respondent.

HEARN, C.J.: During the sentencing phase of his guilty plea, Michael Higgins asked the trial court to be credited for time served while he was released on bond but placed on house arrest. The trial court denied this request, and Higgins appeals. We affirm.

FACTS/PROCEDURAL HISTORY

Higgins was arrested and indicted for accessory after the fact to murder. He was released on a $50,000 bond, which contained the following conditions:

> [N]o contact with the victim or the victim's family in any manner either directly or indirectly; The Defendant must remain on House Arrest and reside with his grandmother [in] … Laurens, South Carolina and may not leave the residence except for medical appointments or treatment, consultations with his attorney, or for employment reasons.

Higgins remained under house arrest from the date of his release, July 24, 2001, until August 13, 2002. There is no evidence that Higgins violated the conditions imposed in the release order. On August 13, Higgins entered a negotiated Alford[1] plea to misprision of a felony, a lesser included offense of accessory after the fact to murder.

During sentencing, defense counsel argued that Higgins should be given credit for time served on house arrest. The trial court disagreed, and held that credit would only be given for the seven months and eleven days Higgins actually spent in jail.

LAW/ANALYSIS

On appeal, Higgins contends that under section 24-13-40 of the South Carolina Code (1989 & Supp. 2002), the applicable

[1] North Carolina v. Alford, 400 U.S. 25 (1970).

sentencing statute, he was entitled to receive credit for the time he spent under house arrest prior to sentencing. Section 24-13-40 provides, in pertinent part:

> In every case in computing the time served by a prisoner, full credit against the sentence shall be given for time served prior to trial and sentencing. *Provided, however*, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in reduction of his sentence for the second offense.

(emphasis in original). In support of his argument, Higgins asserts that because house arrest is not specifically excluded by the statute, the legislature intended to give credit for the time a defendant serves on house arrest. We disagree.

Our supreme court has defined "time served," as it is used in section 24-13-40, as "the time during which a defendant is in pre-trial confinement *and* charged with the offense for which he is sentenced (so long as he is not serving time for a prior conviction)." Blakeney v. State, 339 S.C. 86, 88, 529 S.E.2d 9, 10-11 (2000) (emphasis in original). However, whether time served includes time spent under house arrest is an issue of first impression in South Carolina. Generally, penal statutes are to be construed "strictly against the State and in favor of the defendant." Williams v. State, 306 S.C. 89, 91, 410 S.E.2d 563, 564 (1991) (citation omitted). "Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." State v. Leopard, 349 S.C. 467, 471, 563 S.E.2d 342, 344 (Ct. App. 2002). However, "'[a]ll rules of

statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.'" Id. (citations omitted).

Initially, we find it important to note that Higgins was placed on house arrest as a condition of his release on bond. Any person charged with a noncapital offense may, in the court's discretion, be released pending trial. S.C. Code Ann. § 17-15-10 (2003). The court may impose certain "conditions of release," including, but not limited to, requiring an appearance bond, placing the person in the custody of another, or other conditions reasonably necessary to assure appearance as required. Id. Because Higgins was on house arrest as a condition of his release, we believe it would be illogical to credit him for the time he served while he was "released" on bond.

Furthermore, section 24-13-40 consistently uses the language "time served by a prisoner." A prisoner is defined as "[a] person who is serving time in prison." BLACK'S LAW DICTIONARY 1213 (7th ed. 1999).[2] Further, a prison is defined as "[a] state or federal facility of confinement for convicted criminals . . . ." Id. Our statutes have also used the term prisoner to refer to persons confined in a county jail. See, e.g., S.C. Code Ann. § 24-13-10 et seq. (1989 & Supp. 2002); S.C. Code Ann. § 24-5-10 et seq. (1989 & Supp. 2002). Based on the plain and ordinary meaning of the term prisoner, we believe the legislature only intended to award sentencing credit to those who actually spend time confined in a penal institution. Accordingly, we find the trial court did not err in concluding Higgins was not entitled to credit for time served on house arrest while released on bond.

This view is in accord with that taken by other jurisdictions interpreting similar statutes. See State v. Jarman, 535 S.E.2d 875, 880 (N.C. Ct. App. 2000) (holding that "confinement" as contemplated by a similar statute did not include time spent before trial on house arrest or electronic surveillance); Licata v. State, 788 So.2d 1063, 1064 (Fla.

Dist. Ct. App. 2001) (finding house arrest is not the equivalent of incarceration in the "county jail" as required by the Florida statute); People v. Ramos, 561 N.E.2d 643, 648 (Ill. 1990) (holding the Illinois legislature did not intend the term "custody" to apply to the period of time the defendant was released on bail for pretrial home confinement). But cf. Commonwealth v. Chiappini, 782 A.2d 490, 497, 501 (Pa. 2001) (stating house arrest could be the equivalent of time spent in an institution when the program was run by the local prison system, and participants were considered inmates who were required to wear electronic devices and submit to constant monitoring).

Because we find our legislature only intended to allow credit for time served in a penal institution, we find no error in the trial court's refusal to afford credit to Higgins for the time he served on house arrest while he was released on bond. Accordingly, the trial court's decision is

AFFIRMED.

HOWARD and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Billye L. West, Misty M. West, Brandy B. West, Billye L. West, II, Tiffany T. West and Sabin S. West and The Heritage of Newberry, Inc., Respondents,

v.

Newberry Electric Cooperative, Inc., and Daniel P. Murphy, Appellants.

Appeal From Newberry County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 3737
Heard October 8, 2003 – Filed February 2, 2004

AFFIRMED

Thomas H. Pope, III, of Newberry, for Appellants.

James L. Bruner, of Columbia, for Respondents.

Beatty, J.: Newberry Electric Cooperative (NEC) appeals from the trial court's finding that Billye West, his children, and their family corporation (collectively, the Wests) were entitled to declaratory relief

and ordering NEC to relocate a power line on the Wests' property. We affirm.

FACTS

W.E. and Edith Matthews owned a 98-acre tract of land in Newberry County. In June 1955, they entered into a written agreement with NEC concerning the construction, operation, and maintenance of a power line on their property. The easement contained several restrictive covenants, including, NEC would not place more than four poles on the property, each pole were to be at least 45 feet tall, and the wires at least 35 feet from the ground "at the lowest point of sag." The easement also stated

> should the premises over which these lines pass be developed by cutting into streets or lots or otherwise, then and in that event, with a reasonable time after notice and upon same conditions, [NEC] does hereby agree to remove its lines along a location along said street or streets or elsewhere to be designated by [the Matthews] but at no time shall [NEC] be deprived of the privilege of crossing said property at the general proximity of the same location and in case said line is moved, [NEC] shall have a right to use approved methods of construction in re-locating said line.

(emphasis added).

The easement concludes with a habendum clause which states "TO HAVE AND TO HOLD the privileges herein granted unto [NEC], its successors and assigns forever." The document was never recorded, but rather was maintained on file at NEC. In 1989, NEC placed additional poles on the property, in essence violating the covenant, but the Matthews did not complain.

The Wests purchased the property from the Matthews estate in 1996. While unaware of the unrecorded 1955 easement, the Wests were aware of the NEC power line on the property. Indeed, Billy West spoke with Larry Longshore, the CEO of NEC, before acquiring the property. West wanted to know whether the line could be relocated. West testified Longshore assured

him the line would be moved. Longshore admitted to only speaking with West about a possible relocation and maintained that he made no firm commitment to moving the line. However, both an NEC employee and a consulting engineer testified that Longshore indicated a desire to move the line and asked that plans be drawn up for relocation.

In 1999, the Wests decided to develop the property for commercial use, prompting the need for water and sewer service. The City of Newberry (the City) could provide these utilities, but only if the Wests agreed to (1) annex the property into the City limits and (2) receive electric service from the City instead of NEC. The Wests agreed and the City annexed the property in January 2000. After the annexation, the Wests asked NEC to relocate the line, and NEC refused. The Wests then learned about the 1955 easement. They reiterated their request to move the line – this time arguing that NEC had violated the covenants of the 1955 easement. NEC again refused to relocate the line.

The Wests filed a complaint seeking the relocation of the power line, claiming trespass and promissory estoppel. They also sought a declaration that the 1955 easement was a real covenant that touched and concerned the subject property. The trial court found for the Wests on all three issues and ordered NEC to move the line.

ISSUES

I. Did the trial court err in concluding that the 1955 easement on the property was a real covenant?

II. Did the trial court err in finding that the Wests had not waived their rights to complain to NEC under the 1955 easement?

III. Did the trial court err in finding that the Wests had met their burden of proving promissory estoppel?

IV. Did the trial court err in finding that NEC had trespassed upon the property?

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." Slear v. Hanna, 329 S.C. 407, 410, 496 S.E.2d 533, 535 (1998). The doctrine of promissory estoppel is equitable in nature. See 28 Am. Jur. 2d Estoppel and Waiver §§ 1, 55 (2000). "When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." Kiriakides v. Atlas Food Systems & Services, Inc., 338 S.C. 572, 580, 527 S.E.2d 371, 375 (Ct. App. 2000) (citation omitted). In an action at equity, this court can find facts in accordance with its view of the preponderance of the evidence. Doe v. Clark, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995).

LAW/ANALYSIS

I. 1955 Easement

NEC argues the trial judge erred in finding the 1955 easement was a real covenant that ran with the land. We disagree.

"A restrictive covenant runs with the land, and is thus enforceable by a successor-in-interest, if the covenanting parties intended that the covenant run with the land, and the covenant touches and concerns the land." Marathon Fin. Co. v. HHC Liquidation Corp., 325 S.C. 589, 604, 483 S.E.2d 757, 765 (Ct. App. 1997) (citations omitted). "[A] party seeking to enforce a covenant must show the covenant applies to the property either by its express language or by a plain and unmistakable implication." Charping v. J.P. Scurry & Co., Inc., 296 S.C. 312, 314, 372 S.E.2d 120, 121 (Ct. App. 1988) (citations omitted).

The very language of the 1955 easement reveals it to be a restrictive covenant that runs with the land. In the agreement, NEC promises to relocate the power line should the property ever "be developed." That agreement applies to the land. While the agreement does not specify whether this promise was to be honored only with respect to the Matthews, it does envision the future of the land and thus applies to the Wests. See Marathon, 325 S.C. at 604, 483 S.E.2d at 765 (explaining that a "restrictive covenant

runs with the land, and is thus enforceable by a successor-in-interest, if the covenanting parties intended that the covenant run with the land, and the covenant touches and concerns the land") (citation omitted).

Moreover, the restrictive covenants in the 1955 easement touch and concern the subject property. The Matthews insisted upon several conditions in order to maintain the safety and value of the property. The subject of the covenants is a power line connected to and crossing over the land. Adherence to the covenants by NEC directly affects the nature and value of the easement to both NEC and the Wests. The covenants in the easement also restrict the manner in which NEC can use the easement. The exact location of the easement on the property is not described in the easement, but its possible relocation is contemplated. The covenants were obviously intended to touch and concern the subject property. See id. While the language of the easement does not expressly state the covenants were intended to touch and concern the subject property, that is clearly implied. See Charping, 296 S.C. at 314, 372 S.E.2d at 121.

Accordingly, the trial judge did not err in holding the 1955 easement was a real covenant that ran with the land.

II. Waiver

NEC argues the trial judge erred in failing to apply the doctrine of waiver. Specifically, NEC argues that, as neither the Matthews nor the Wests ever enforced several covenants in the 1955 easement, the right to file a complaint to NEC under the easement was waived.

This issue was neither addressed by the trial judge in the final order nor mentioned in the subsequent Rule 59(e), SCACR, motion. As such, it is not preserved for review by this court. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); see also Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (finding issue was not preserved where the trial judge did not explicitly rule on the appellant's argument and the appellant did not raise the issue in a Rule 59(e), SCRCP, motion to alter or amend the judgment).

III. Promissory Estoppel

Since we have found that the 1955 easement is valid as to the Wests, we need not address the issue of promissory estoppel.

IV. Trespass

NEC argues the trial judge erred in finding NEC had committed a trespass upon the property.

"Trespass is any intentional invasion of the plaintiff's interest in the exclusive possession of his property." Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 357, 559 S.E.2d 327, 337 (Ct. App. 2001) (citing Silvester v. Spring Valley Country Club, 344 S.C. 280, 286, 543 S.E.2d 563, 566 (Ct. App. 2001)); see also Ravan v. Greenville County, 315 S.C. 447, 463, 434 S.E.2d 296, 306 (Ct. App. 1993) ("a trespass is any interference with one's right to the exclusive peaceable possession of his property.").

In the final order, the trial judge found, "the facts demonstrate that the NEC has violated the covenants in several ways, has technically forfeited its rights by reason of its violation and has committed trespass on the Property." This is the only mention of trespass in the final order. Assuming, without deciding, that the trial judge erred in finding NEC guilty of trespass without conducting a more thorough analysis, we conclude this was harmless error. The record supports both the trial judge's substantive findings and his ultimate conclusion that NEC violated the terms of the 1955 easement. See, e.g., Brown v. Allstate Ins. Co., 344 S.C. 21, 25, 542 S.E.2d 723, 725 (2001) (reinstating a trial court's decision though the trial court had erred since the error was harmless); 5 Am. Jur. 2d Appellate Review § 711 (1995) ("Harmless error provisions are designed to eliminate reversals on purely formal and technical grounds, and to assure that substantial justice has been done.").

Based on the foregoing, the trial court's order is

AFFIRMED.

GOOLSBY and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert E. Rumpf, Alice Rumpf Easton, and Theresa Horton as Personal Representative for the Estate of Marvin G. Rumpf, individually and as shareholders in the former Rumpf Truck Line, Inc., a Michigan corporation; Diane Rumpf Ketring, John Rumpf, Philip Rumpf and Keye Rumpf Hennessey as heirs to and beneficiaries of the Estate of Marvin G. Rumpf, **Appellants,**

v.

Massachusetts Mutual Life Insurance Co., The Palmetto Bank, Phillip Betette, individually and as agent for The Palmetto Bank, and DOES 1-5, inclusive, Defendants,

of whom Massachusetts Mutual Life Insurance Co., The Palmetto Bank, and Phillip Betette, are **Respondents.**

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

Opinion No. 3738
Heard January 14, 2004 – Filed February 2, 2004

AFFIRMED

Marjorie T. Simmons, of Bellingham, Washington; and Rodney F. Pillsbury, of Greenville, for Appellants.

Grady L. Patterson, III, of Columbia, for Respondent Massachusetts Mutual Life Insurance Co.

James Theodore Gentry, of Greenville, for Respondents The Palmetto Bank and Phillip Betette.

ANDERSON, J.: Appellants brought this action against Massachusetts Mutual Life Insurance Company ("Mass Mutual") and The Palmetto Bank ("Palmetto Bank") asserting causes of action for fraud and breach of fiduciary duty relating to the payment of dividends that accrued under an annuity contract with Mass Mutual. The trial court found these claims failed on their merits and were barred by the applicable statute of limitations. We affirm.

FACTS/PROCEDURAL BACKGROUND

This case has its origins with a company that no longer exists, Rumpf Truck Line, Inc. ("RTL"). RTL was a family-owned business with three

shareholders: siblings Marvin G. Rumpf, Robert E. Rumpf, and Alice Rumpf Easton. Marvin Rumpf served as president of the company.

In 1966, RTL and Mass Mutual entered into a contract containing a pension plan for the non-union employees of RTL. The contract gave retirement benefits to RTL employees in the form of annuities having defined benefit schedules. Marvin Rumpf served as the pension plan administrator.

In 1975, RTL merged with Duff Truck Line, Inc. Duff decided to discontinue the pension plan. The contract with Mass Mutual was amended so that all of the RTL employees who had participated in the pension plan—including Marvin Rumpf—were given paid-up annuities in the value of their pension plan balances.

It was anticipated, however, that the investment returns Mass Mutual received under the contract would sometimes exceed the amount needed to pay the benefits under the individual annuity contracts. When those circumstances arose, the amended contract provided that any dividends declared by Mass Mutual after the commencement of the paid-up term would be "paid in cash to the Contractholder or such person, persons, firm or corporation as the Contractholder may designate."

On August 7, 1979, Denise A. Wilson, with Mass Mutual's Group Pension Consulting Department, wrote to Marvin Rumpf as plan administrator informing him that dividends had accrued under the contract that Mass Mutual wished to pay. The letter noted that Mass Mutual did not know to whom it should send the dividends—advising Rumpf that it could not determine whether the contractholder was RTL or Duff. Mass Mutual wrote Duff notifying it of the same information.

Marvin Rumpf replied by letter, dated August 25, 1979, that all dividends should be sent to him and that he would ensure they were distributed among the three stockholders. Duff responded to Mass Mutual claiming it was the proper contractholder. Mass Mutual replied to both Marvin Rumpf and Duff informing them of the dispute.

On September 16, 1980, Marvin Rumpf again inquired with Mass Mutual regarding the status of the dividend payment. Mass Mutual advised Marvin Rumpf and Duff by letter dated November 3, 1980 that it could not pay dividends until the parties determined which was the contractholder.

Marvin Rumpf took no further action to claim or ascertain his entitlement to any dividends. He died in South Carolina in 1989, survived by his four children who were the beneficiaries of his estate.

As directed in his will, Palmetto Bank was appointed personal representative of Rumpf's estate. Phillip Betette, a senior trust officer for Palmetto Bank, carried out much of the bank's work on the estate, but was not himself named personal representative. The estate was closed after a hearing before the probate court.

In 1993, Duff Truck Lines dissolved. Mass Mutual later escheated the accumulated dividends for the period 1979 through 1989 to the State of South Carolina. Throughout the balance of the 1990's, dividends continued to accrue under the contract and were held by Mass Mutual.

No one inquired regarding the status or ownership of these funds until "late April, 1999." That year, one of Marvin Rumpf's surviving daughters discovered the escheated dividend payments "while browsing the Internet." The surviving shareholders and other beneficiaries of Marvin Rumpf confronted Palmetto Bank and Mass Mutual as to why they had not been informed of the accumulated dividends at the time of the distribution of Marvin Rumpf's estate a decade earlier.

Upon demand from the beneficiaries, Mass Mutual, on October 6, 1999, paid them accumulated dividends, in the amount of $169,873.45, for the period 1990 through 1999. The shareholders and heirs obtained the escheated funds from the State in the sum of $186,394.04 by check dated December 13, 1999. Accordingly, all dividends under the contract have been paid.

This Action

Though all of the accrued dividends were ultimately paid, the beneficiaries believed Mass Mutual and Palmetto Bank acted wrongfully by failing to discover or actively concealing their entitlement to the dividend funds. Thus, they brought the present action. Against Mass Mutual, they asserted multiple claims for breach of contract, fraud, breach of fiduciary duty, insurance bad-faith, conversion, and unfair trade practices. They alleged breach of fiduciary duty and fraud against Palmetto Bank.

The trial court granted summary judgment in favor of both defendants on all of the causes of action. Though the court addressed the merits of the individual claims, it found the entire case against Mass Mutual was barred by the applicable statute of limitations. Likewise, in a separate order addressing the claims against Palmetto Bank, the trial court held that action was barred because the statute of limitations had expired. The court further ruled the action was barred because the probate court overseeing the administration of Marvin Rumpf's estate had discharged Palmetto Bank from all liability as personal representative, and the beneficiaries of Marvin Rumpf's estate had signed a full release in favor of Palmetto Bank upon distribution of property from the estate.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 584 S.E.2d 375 (2003); Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002); Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003); Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Sauner v. Public Serv. Auth., 354 S.C. 397, 581 S.E.2d 161 (2003); Hendricks v. Clemson Univ., 353 S.C. 449, 578 S.E.2d 711 (2003); McNair

v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998); see also Laurens Emergency Med. Specialists, 355 S.C. at 108, 584 S.E.2d at 377 (stating that in reviewing summary judgment motion, facts and circumstances must be viewed in light most favorable to non-moving party). If triable issues exist, those issues must go to the jury. Baril v. Aiken Reg'l Med. Ctrs., 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Russell v. Wachovia Bank, N.A., 353 S.C. 208, 578 S.E.2d 329 (2003); Regions Bank, 354 S.C. at 659, 582 S.E.2d at 438; Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001); Rule 56(c), SCRCP. All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Schmidt v. Courtney, Op. No. 3719 (S.C. Ct. App. filed December 22, 2003) (Shearouse Adv. Sh. No. 1 at 66); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); see also Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) ("On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.").

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000); Bayle, 344 S.C. at 120, 542 S.E.2d at 738. Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Hedgepath, 348 S.C. at 355, 559 S.E.2d at 336; Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997).

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

LAW/ANALYSIS

I. Claims Against Mass Mutual

Appellants argue the trial court erred in ruling their claims against Mass Mutual were barred by the statute of limitations. We disagree.

Under the former South Carolina Code section 15-3-530, plaintiffs alleging an action in contract or tort were required to bring suit within six years of the time the cause of action arose. In 1988, this time period was shortened to three years for causes of action arising on or after April 5, 1988. See Annotation, S.C. Code Ann. § 15-3-530 (Supp. 2003) (referencing 1988 Act No. 432).

In determining when a cause of action arose under section 15-3-530, we apply the "discovery rule." See Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989), overruled on other grounds by Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div., 319 S.C. 556, 462 S.E.2d 858 (1995). According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 559

S.E.2d 327 (Ct. App. 2001); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001). Under this rule, a cause of action accrues for purposes of the statute of limitations when a plaintiff has notice that he might have a remedy for a harm. Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996). The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. Hedgepath, 348 S.C. at 355-56, 559 S.E.2d at 336; Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999). In explaining the discovery rule, our Supreme Court held:

> We have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist. Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial.

Dean, 321 S.C. at 363-64, 468 S.E.2d at 647 (citation and emphasis omitted); see also Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994) (stating exercise of reasonable diligence means simply that injured party must act with some promptness where facts and circumstances of injury would put person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist; statute of limitations begins to run from this point and not when advice of counsel is sought or full-blown theory of recovery is developed); Burgess v. American Cancer Soc'y, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989) (noting that statute starts to run upon discovery of such facts as would have led to knowledge thereof if pursued with reasonable diligence). Reasonable diligence is intrinsically tied to the issue of notice. Hedgepath, 348 S.C. at 356, 559 S.E.2d at 336; Bayle, 344 S.C. at 126, 542 S.E.2d at 741.

The date on which discovery of the cause of action should have been made is an objective, rather than a subjective, question. Hedgepath, 348 S.C. at 356, 559 S.E.2d at 336; Joubert v. South Carolina Dep't of Soc. Servs., 341 S.C. 176, 534 S.E.2d 1 (Ct. App. 2000). In other words, whether the

particular plaintiff actually knew he had a claim is not the test. Young, 333 S.C. at 719, 511 S.E.2d at 416. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist. Id.

In this case, we look to whether Marvin Rumpf knew or should have known that he, along with other shareholders, were entitled to receive the dividend payments from Mass Mutual. It is undisputed that the claims of Marvin Rumpf's four children as beneficiaries of his estate are derivative only and rest upon the knowledge of Marvin Rumpf as to when the causes of action arose. Appellants contend the trial court erred in finding Marvin Rumpf acted as the agent of his sibling shareholders, and that his knowledge should be imputed to them. We disagree.

Marvin Rumpf was the plan administrator when the pension plan was discontinued and the individual, fully-paid annuities were purchased. All contact with Mass Mutual was handled by Marvin Rumpf or his attorney.

Appellants claim that Marvin Rumpf notified Mass Mutual that he was not acting on behalf of the other shareholders. Specifically, Appellants rely upon a letter dated March 22, 1976, from Marvin Rumpf to Mass Mutual in which Marvin Rumpf indicates that Mass Mutual should correspond with fellow shareholders Robert Rumpf and Alice Easton regarding the pension. Yet, at all times following this letter, Marvin Rumpf continued to handle all pension-related affairs on behalf of his two co-shareholders.

For example, Mass Mutual sent annuity information to Robert Rumpf on May 21, 1976. The reply to Mass Mutual, however, came from Marvin Rumpf's attorney and contained the Plan Administrator's Certification of Sufficiency required to close out the pension plan which was signed by Marvin Rumpf.

There is no proof that anyone other than Marvin Rumpf and his attorney were involved with the pension plan and subsequent annuity contract.

The evidence establishes that Marvin Rumpf knew or should have known that he and his fellow shareholders were entitled to payment of the dividends received under the annuity contract. Mass Mutual wrote to Marvin Rumpf on August 7, 1979, and advised him that dividends had accrued under the contract with Mass Mutual. He was later informed by Mass Mutual on November 3, 1980, that there was a dispute regarding who should receive the dividends—RTL or Duff Truck Lines. At that time, Mass Mutual explicitly advised Marvin Rumpf that:

> We have taken this matter up with our law department and it is our position that Massachusetts Mutual is not the party to determine to whom the dividend is to be paid. May we ask that you contact Mr. Keenan of Duff Truck Line, Inc. and resolve this matter.

We find that any cause of action against Mass Mutual accrued no later than 1980. Instead of pursuing his claim to the dividend payments, Marvin Rumpf permitted the then-existing six year statute of limitations to lapse. Concomitantly, we affirm the trial court's ruling that the entire action against Mass Mutual is barred by the statute of limitations.

II. Claims Against Palmetto Bank

A. Applicable Statute of Limitations

We do not reach the merits of Appellants' claims against Palmetto Bank because their action is barred by the statute of limitations. As with the claims against Mass Mutual, the action against Palmetto Bank rests on the fact that Palmetto Bank failed to secure ownership of the disputed funds for the estate of Marvin Rumpf. At the time of Marvin Rumpf's death, his right to bring suit to obtain the dividend funds from Mass Mutual had already expired. Consequently, Appellants' derivative claims through the Estate are barred by S.C. Code Ann. § 15-3-530.

B. S.C. Code Ann. § 62-3-1001

Furthermore, Appellants' claims are barred because the probate court overseeing the administration of Marvin Rumpf's estate discharged the

personal representative from any liability for the estate. South Carolina Code section 62-3-1001 reads:

> [T]he court may enter an order or orders, on appropriate conditions, determining testacy, determining the persons entitled to distribution of the estate, and, as circumstances require, approving settlement and directing or approving distribution of the estate, terminating the appointment of the personal representative, and discharging the personal representative from further claim or demand of any interested person.

S.C. Code Ann. § 62-3-1001 (Supp. 2003) (emphasis added).

Palmetto Bank petitioned the probate court for an order of discharge. Notice of the petition was served on all of the parties, and a hearing was held in November 1990. None of the Appellants appeared at the hearing. After the hearing, Probate Judge Ralph Drake signed a form discharge order. Judge Drake, however, did not check any of the boxes on the preprinted form order indicating the action the court intended to take.

In order to clear up the ambiguity surrounding the effect of the probate court's order, Palmetto Bank submitted an affidavit of Judge Drake as evidence of his intent in signing the order. In the affidavit, Judge Drake declared that his failure to check any of the boxes on the form was an oversight. He further stated that his intention was to check Box 3 on the form, which provides: "[T]he Personal Representative is released and discharged as the Personal Representative, and any and all liability arising in connection with the performance of the Representative's duties and the administration of the estate be closed."

We first note that Appellants failed to appeal the trial court's findings with regard to the probate court's discharge of liability. Any unappealed portion of the trial court's judgment is the law of the case, and must therefore be affirmed. See Greenville County v. Kenwood Enters., Inc., 353 S.C. 157, 577 S.E.2d 428 (2003); Douglass v. Boyce, 344 S.C. 5, 542 S.E.2d 715 (2001); National Grange Mut. Ins. Co. v. Firemen's Ins. Co., 310 S.C. 116, 425 S.E.2d 754 (Ct. App. 1992); see also ML-Lee Acquisition Fund, L.P. v.

Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (emphasizing that unappealed rulings become law of case and should not be reconsidered by this Court). A challenge to the Circuit Court's ruling on this point is not properly before this Court.

CONCLUSION

We conclude the trial court correctly found that all of Appellants' claims against Mass Mutual are barred by the statute of limitations. Similarly, the claims against Palmetto Bank are barred by the statute of limitations as well as the discharge of liability entered by the probate court. Accordingly, the judgment of the trial court is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Nicholas N. Trivelas and Peggy Trivelas, Respondents,

v.

South Carolina Dept. of Transportation, Appellant.

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

Opinion No. 3739
Heard November 4, 2003 – Filed February 2, 2004

AFFIRMED

William H. Davidson II, Andrew F. Lindemann and James M. Davis, Jr., all of Columbia; for Appellant.

Leigh James Leventis, and Richard A. Harpootlian, both of Columbia; for Respondents.

HOWARD, J.: Nicholas and Peggy Trivelas brought this action against the South Carolina Department of Transportation ("DOT") for damages arising from an automobile collision involving a

DOT truck. The case was tried before a jury, resulting in a verdict for DOT. DOT appeals the circuit court's grant of a new trial absolute to the Trivelases, arguing the circuit court erred because: 1) as a matter of law, Trivelas was more than fifty percent negligent, and thus, the Trivelases should be barred from recovery by the doctrine of comparative negligence; 2) the court applied the incorrect legal standard for granting a new trial absolute based on the thirteenth juror doctrine; and 3) it failed to consider explanatory and excusatory circumstances while sitting as the thirteenth juror. We affirm.

FACTS/PROCEDURAL HISTORY

A truck hauling lumber in an easterly direction on Interstate 20 spilled its load in the roadway, blocking the eastbound lanes of traffic. In response to a request from police, DOT dispatched a dump truck pulling a trailer and backhoe to assist with the cleanup.

The dump truck approached the spill from the inside, westbound lane of traffic and attempted to cross the median at the location of the spill. In order to do so, the dump truck slowed to approximately ten miles per hour. The dump truck did not have emergency signals or lights and did not cross the median in an area designated for turning.

At the same time, Nicholas Trivelas drove his van in the westbound lane of Interstate 20, and when DOT's dump truck slowed to turn, Trivelas' car collided with the dump truck and trailer. Trivelas sustained severe personal injuries, as well as property damage.

Thereafter, Nicholas Trivelas sued DOT for negligence, and Peggy Trivelas sued DOT for loss of consortium. Prior to trial, the Trivelases moved for partial summary judgment on the issue of negligence, asserting that under any view of the facts, DOT was negligent as a matter of law pursuant to South Carolina Code Annotated sections 56-5-1560(a) (Supp. 2002)[1] and 56-5-1920 (1991).[2]

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[1] Section 56-5-1560(a) provides: "No person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable

The circuit court granted the Trivelases' motion for partial summary judgment, holding by any view of the evidence, DOT was negligent as a matter of law.

On appeal, this Court reversed and remanded,[3] ruling that in a light most favorable to DOT, evidence existed within the record by which the jury could find DOT was acting under explanatory or excusatory circumstances, and thus, a violation of the statutes was not negligence as a matter of law.

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movement of traffic except when reduced speed is necessary for safe operation or in compliance with law."

[2] Section 56-5-1920 provides:

> Whenever any highway has been divided into two or more roadways by leaving an intervening space or by a physical barrier or clearly indicated dividing section so constructed as to impede vehicular traffic, every vehicle shall be driven only upon the right-hand roadway unless directed or permitted to use another roadway by official traffic-control devices or police officers. No vehicle shall be driven over, across or within any such dividing space, barrier or section except through an opening in such physical barrier or dividing section or space or at a crossover or intersection as established, unless specifically prohibited by public authority. For clarification, a left turn across a painted median is authorized unless prohibited by an official traffic-control device.

[3] Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 133, 558 S.E.2d 271, 275 (Ct. App. 2001).

On remand, the case was tried to a jury. At the close of the trial, DOT moved for a directed verdict, arguing under any view of the evidence, Nicholas Trivelas' negligence was greater than DOT's negligence, and thus, the Trivelases' claims were barred by the doctrine of comparative negligence. The circuit court denied the motion.

DOT then requested the circuit court charge the jury that explanatory and excusatory circumstances could justify operating the DOT truck in derogation of the aforementioned statutes. The circuit court declined, ruling explanatory or excusatory circumstances did not apply to the facts of the case.

Subsequently, the jury returned a verdict in favor of DOT, and the Trivelases moved for a new trial absolute, arguing the evidence presented did not sustain the jury verdict. The circuit court agreed and granted the motion pursuant to the thirteenth juror doctrine. DOT appeals.

LAW/ANALYSIS

I. Comparative Negligence

DOT argues the circuit court erred by granting a new trial absolute pursuant to the thirteenth juror doctrine because, as asserted in its motion for directed verdict, a reasonable jury could not find Trivelas was less than fifty-one percent negligent. Thus, DOT contends the Trivelases' claims were barred by the doctrine of comparative negligence. We disagree.

Under the comparative negligence doctrine, a plaintiff may only recover damages if his own negligence is not greater than that of the defendant. Thomasko v. Poole, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002); Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 712-13 (2000). Generally, "under a 'less than or equal to' comparative negligence rule, determination of respective degrees of negligence attributable to the plaintiff and the defendant presents a question of fact

for the jury, at least where conflicting inferences may be drawn." Brown v. Smalls, 325 S.C. 547, 559, 481 S.E.2d 444, 451 (Ct. App. 1997); see also Creech v. South Carolina Wildlife and Marine Res. Dep't, 328 S.C. 24, 32, 491 S.E.2d 571, 575 (1997) (holding comparison of a plaintiff's negligence with that of the defendant is a question of fact for the jury to decide).

"In a comparative negligence case, the trial court should only determine judgment as a matter of law if the sole reasonable inference which may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent." Bloom, 339 S.C. at 422, 529 S.E.2d at 713.

In a light most favorable to the Trivelases, the evidence within the record indicates Trivelas was traveling westbound on Interstate 20, during rush hour, at approximately sixty-five miles per hour. There is no indication Trivelas was speeding. Rather, the evidence indicates Trivelas was within the flow of traffic traveling at the posted speed limit.

According to Trivelas, he noticed a brown van immediately in front of his vehicle. The van appeared to be a van he once owned, and for several seconds, Trivelas attempted to determine if the van was his old van. Trivelas determined it was not his old van.

Thereafter, the van abruptly switched from the left lane to the right lane, and, for the first time having an unobstructed view of the road in front of him, Trivelas saw the DOT dump truck and trailer attempting to cross the median of the Interstate, without emergency signals or lights, in a non-designated area. Trivelas applied his brakes but was unable to stop his vehicle before it collided with the dump truck and trailer.

Trivelas testified he was traveling at a safe distance from the van at all times, and he could not see past the van until the van moved from the left to the right lane. Additionally both Trivelas and an accident reconstructionist testified Trivelas could not have done anything to avoid the accident. A human factors analyst also testified people in

Trivelas' situation would not have sufficient time to react and avoid the accident. However, if the dump truck had been using emergency signals or lights, Trivelas would have had more time to analyze the situation and perhaps avoid the accident.

Viewing the evidence in the record in a light most favorable to Trivelas, we do not believe the sole reasonable inference was that Trivelas was more than fifty percent negligent. See Bloom, 339 S.C. at 422, 529 S.E.2d at 713 ("In a comparative negligence case, the trial court should only determine judgment as a matter of law if the sole reasonable inference which may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent."). Rather, the jury could reasonably have found the accident was predominantly caused by the actions of DOT's dump truck driver. Thus, we hold the evidence was conflicting on this point, providing a legal basis for the circuit court's grant of a new trial absolute pursuant to the thirteenth juror doctrine.

II. The Thirteenth Juror Doctrine

DOT argues the circuit court erred by granting a new trial pursuant to the thirteenth juror doctrine because the circuit court applied an incorrect legal standard. We disagree.

South Carolina's thirteenth juror doctrine allows the circuit court judge to grant a new trial absolute when the judge finds the evidence does not justify the verdict. Norton v. Norfold S. Ry. Co., 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002).

During the hearing on the motion for a new trial absolute, the circuit court stated,

> AS CHIEF JUSTICE TOAL WROTE IN THE BAILEY V. PEACOCK CASE, WHICH WAS TRIED HERE IN AIKEN COUNTY CIRCUIT COURT, AND I QUOTE, 'THE THIRTEENTH JUROR DOCTRINE IS A VEHICLE BY WHICH THE TRIAL COURT

> MAY GRANT A NEW TRIAL ABSOLUTE WHEN HE FINDS THE EVIDENCE DOES NOT JUSTIFY THE VERDICT,' AND THEY CITE FOLKENS V. HUNT. THE COURT IS CONVINCED THAT THE EVIDENCE DID NOT JUSTIFY THE VERDICT AND THE COURT DOES GRANT A NEW TRIAL ABSOLUTE IN THIS CASE.

(emphasis in original). Furthermore, the circuit court's subsequent order states in pertinent part:

> In view of the facts introduced at trial, and after due consideration of all factual evidence and testimony offered at trial, this Court is of the opinion that conflicting evidence was presented on the issues of liability and, therefore, evidence existed from which the jury might reasonably have inferred that the Plaintiffs' injuries were proximately caused by the negligence of the Defendant. THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that, based upon the factual evidence, this Court finds that justice was not done by the jury's verdict, and in the exercise of the discretionary powers of this Court . . . the Plaintiffs . . . are . . . granted a new trial absolute.

(emphasis in original).

DOT contends the language in the circuit court's order indicates the circuit court granted the new trial absolute merely because conflicting evidence existed within the record. However, viewing the circuit court's order as a whole, coupled with the court's statements during the hearing, it is clear the circuit court granted the Trivelases' motion for a new trial absolute because it believed "THE EVIDENCE

DID NOT JUSTIFY THE VERDICT[,]" and thus, "justice was not done by the jury's verdict . . ." (emphasis as in original). See State v. Evans, 354 S.C. 579, 584, 582 S.E.2d 407, 410 (2003) (holding an appellate court must view the circuit court's statements as a whole to determine its reasoning); Dibble v. Sumter Ice & Fuel Co., 283 S.C. 278, 282, 322 S.E.2d 674, 677 (Ct. App. 1984) ("An order should be construed within the context of the proceeding in which it is rendered."); see also Eddins v. Eddins, 304 S.C. 133, 135, 403 S.E.2d 164, 166 (Ct. App. 1991) (holding judgments are to be construed as other instruments, and the determinative factor is the intention of the court, considering the judgment in its entirety). This is the appropriate legal standard for granting a new trial absolute based on the thirteenth juror doctrine. See Norton, 350 S.C. at 478, 567 S.E.2d at 854. Thus, we hold the circuit court did not err.

DOT next argues the circuit court erroneously refused to charge explanatory or excusatory circumstances, and thus, when the circuit court granted DOT's motion for a new trial absolute pursuant to the thirteenth juror doctrine, it based its decision on an error of law.

The thirteenth juror doctrine is a vehicle by which the circuit court may grant a new trial absolute when it finds the evidence does not justify the verdict. Norton, 350 S.C. at 478, 567 S.E.2d at 854. The effect is the same as if the jury failed to reach a verdict, and thus, the circuit court is not required to give any reason for granting the new trial. Folkens v. Hunt, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). Rather, assuming evidence exists to support the circuit court's order, the circuit court "judge . . . [, sitting as] the thirteenth juror, possess[es] the veto power to the Nth degree . . ." Worrell v. South Carolina Power Co., 186 S.C. 306, 313-14, 195 S.E. 638, 641 (1938). Therefore, a circuit court's order granting or denying a new trial upon the facts will not be disturbed unless its decision is wholly unsupported by the evidence or the conclusion reached was controlled by an error of law. South Carolina State Highway Dep't v. Clarkson, 267 S.C. 121, 126-27, 226 S.E.2d 696, 697 (1976).

The DOT's argument presumes the circuit court premised its decision to grant a new trial absolute on an earlier legal conclusion that explanatory and excusatory circumstances should not be charged. However, other than the statement, "justice was not done by the jury's verdict," the circuit court did not state its reasons for granting the new trial absolute. Furthermore, the circuit court is not required to do so. See Folkens, 300 S.C. at 254, 387 S.E.2d at 267 (holding a circuit court is not required to give any reason for granting a new trial absolute based on the thirteenth juror doctrine).

Thus, we decline to speculate on the significance of the court's prior rulings as the underlying basis for the decision to grant a new trial absolute. Rather, where, as here, the circuit court applied the correct legal standard for granting a new trial, and conflicting evidence exists on the contested issues, a circuit court's decision to sit as a thirteenth juror and grant a new trial absolute is inviolable. See Worrell, 186 S.C. at 313-14, 195 S.E. at 641 (holding a "judge . . . [, sitting as] the thirteenth juror, possess[es] the veto power to the Nth degree . . ."); see also South Carolina State Highway Dep't, 267 S.C. at 126-27, 226 S.E.2d at 697 (holding an appellate court may not disturb a circuit court's decision to grant or deny a motion for new trial absolute based on the thirteenth juror doctrine unless the decision is wholly without evidentiary support or is the result of an error of law).

CONCLUSION

For the foregoing reasons, the decisions of the circuit court are

AFFIRMED.

HEARN, C.J., and KITTREDGE, J., concur.