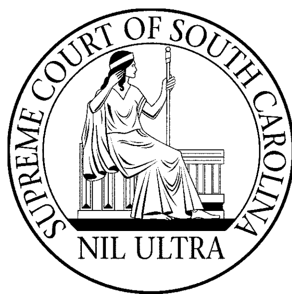

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

May 13, 2002

ADVANCE SHEET NO. 15

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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South Carolina Farm
Bureau Mutual Insurance
Company, Petitioner,

v.

William H. Courtney, III,
and Unisun Insurance
Company, Defendants,

Of whom
William H. Courtney is Respondent.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

____

Appeal From Sumter County
James E. Brogdon, Jr., Circuit Court Judge

____

Opinion No. 25464
Heard March 20, 2002 - Filed May 6, 2002

____

AFFIRMED IN RESULT

____

M.M. Weinberg, III, and M.M. Weinberg, Jr., both of Weinberg, Brown & Curtis, of Sumter, for petitioner.

William Ceth Land and John C. Land, III, both of Land, Parker & Welch, P.A., of Manning, for respondent.

____

JUSTICE MOORE: We granted a writ of certiorari in this case to review the Court of Appeals's decision[1] construing an automatic termination clause in an automobile insurance policy. We affirm in result.

FACTS

In 1997, respondent Courtney (Husband) owned two cars, a Chevrolet Camaro and Saturn, both insured with petitioner (Insurer). Both policies had underinsured motorist coverage (UIM).[2]

In September 1997, Husband's wife, Susan Courtney (Wife), was in an accident in the Camaro and the vehicle was a total loss. Insurer paid for the vehicle under Husband's collision coverage. On October 4, 1997, Wife purchased a Chevrolet pickup truck as a replacement vehicle and insured it with Unisun Insurance Company. The Unisun policy had no UIM coverage.

On October 27, 1997, Husband was in an accident in the Saturn and was seriously injured. He filed a claim with Insurer attempting to stack the UIM coverage from the two policies issued by Insurer covering the Camaro and the Saturn.

---

[1] South Carolina Farm Bureau Mut. Ins. Co. v. Courtney, 342 S.C. 271, 526 S.E.2d 689 (Ct. App. 2000).

[2] UIM coverage was: $100,000 bodily injury per person; $300,000 bodily injury per accident; and $25,000 property damage per accident.

Insurer brought this declaratory judgment action to determine whether the UIM coverage on both policies could be stacked or whether only the Saturn UIM coverage applied. Although the Camaro policy was not actually cancelled for non-payment of premiums until January 23, 1998, Insurer claimed it terminated on October 4, 1997, when Wife insured the replacement vehicle with Unisun. Insurer relied on an automatic termination clause in the policy which provides:

> If you obtain other insurance on your covered auto,[3] any similar insurance provided by this policy will terminate as to that auto on the effective date of the other insurance.

The trial court found the Camaro policy was not terminated for three reasons: 1) Wife had no authority to terminate the Camaro policy by buying insurance for the replacement vehicle without Husband's consent; 2) the automatic termination clause was not triggered because the insurance purchased for the replacement vehicle did not qualify as "similar insurance;" and 3) termination under the automatic termination clause did not comport with S.C. Code Ann. § 38-77-120(b)(2) (2002) which requires an overt act of the insured's intent to cancel the policy.

The Court of Appeals affirmed on the ground the insurance purchased on the replacement vehicle was not "similar insurance" and so the automatic termination clause was not triggered. It declined to address the alternative rulings of the trial court although Insurer appealed these rulings as well.

ISSUE

> Is an automatic termination clause valid under South Carolina law?

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[3]Under the policy, "covered auto" includes a replacement vehicle.

DISCUSSION

The Court of Appeals affirmed the trial court's finding that the Unisun policy purchased by Wife did not qualify as "similar insurance" because the Unisun policy did not include UIM coverage and it had different liability limits than the policy with Insurer.

While we agree with the Court of Appeals's construction of the policy, we find an automatic termination clause allowing unilateral cancellation by an insurer is invalid under our statutory scheme.[4] Section 38-77-120(b)(2), which was cited by the trial court in support of its decision, provides:

> § 38-77-120. **Requirements for notice of cancellation of or refusal to renew policy.**
>
> (a) No cancellation or refusal to renew by an insurer of a policy of automobile insurance is effective unless the insurer delivers or mails to the named insured at the address shown in the policy a written notice of the cancellation or refusal to renew.
>
> . . . .

---

[4]As noted by the Court of Appeals, the term "similar insurance" is not precisely defined in the policy; further, any ambiguity in an insurance policy must be construed liberally in favor of the insured. Diamond State Ins. Co. v. Homestead Indus., 318 S.C. 231, 456 S.E.2d 912 (1995). Construing the automatic termination clause in favor of the insured in this case, the Unisun policy does not qualify as similar insurance because it does not include the type of coverage (UIM) Husband is claiming under his policy with Insurer. This dissimilarity is enough in itself even without considering the different liability limits of the two policies. Other courts have reached the same conclusion based on different types of coverage and liability limits when construing automatic termination clauses referring to "similar insurance." *See, e.g.,* United Fire & Cas. Co. v. Victoria, 576 N.W.2d 118 (Iowa 1998); Employers Mut. Cas. Co. v. Martin, 671 A.2d 798 (R.I. 1996).

(b) Subsection (a) of this section does not apply if the:

. . . .

(2) named insured has demonstrated by some overt action to the insurer or its agent that he expressly intends that the policy be canceled or that it not be renewed.

Here, as found by the trial court, Insurer gave no notice of cancellation as required under subsection (a) to validate its cancellation based on the automatic termination clause. Further, there is no evidence Husband communicated to Insurer that he intended the Camaro policy be cancelled to trigger the exception to notice provided in subsection (b). The fact that a new insurance policy was obtained on the replacement vehicle does not in itself qualify as an overt act showing an insured's intent to cancel. *See* Tyner v. Cherokee Ins. Co., 262 S.C. 462, 205 S.E.2d 380 (1974) (the mere procuring of a policy of insurance with the intent that it should be substituted for an existing policy does not effect a cancellation of the existing policy unless such substitution is accepted by both the insured and the insurer); *see generally* T.B. Ector v. American Liberty Ins. Co., 226 S.E.2d 788 (Ga. App. 1976) (noting that vast majority of jurisdictions reject the so-called "substitution rule" and hold the mere procurement of additional insurance without notice of intent to cancel by the insured is not sufficient). Cancellation based solely on an automatic termination clause without notice to the insured violates § 38-77-120.

Moreover, even if notice were given, S.C. Code Ann. § 38-77-123 (2002) limits unilateral cancellation by an insurer. This section provides as follows in subsection (B):

(B) No insurer shall cancel a policy except for one or more of the following reasons:

(1) The named insured or any other operator who either resides in the same household or customarily operates a motor vehicle insured under the policy has had his driver's license suspended or revoked during the policy period or, if the policy is

> a renewal, during its policy period or the ninety days immediately preceding the last anniversary of the effective date.
>
> (2) The named insured fails to pay the premium for the policy or any installment of the premium, whether payable to the insurer or its agent either, directly or indirectly under any premium finance plan or extension of credit.

This section does not authorize unilateral cancellation by an insurer for any other reason.

Automobile insurance is a highly regulated area of the law. It is well-settled that an insurer has the right to impose only those conditions that do not conflict with a statutory mandate. Jordan v. Aetna Cas. & Sur. Co., 264 S.C. 294, 214 S.E.2d 818 (1975); Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984). Since the legislature has limited an insurer's unilateral right to cancel to two reasons – license suspension or revocation or an insured's failure to pay – an automatic termination clause for obtaining "similar insurance" is invalid.[5]

In conclusion, we agree with the Court of Appeals's construction of the automatic termination clause but conclude such a clause is not valid in any event.[6]

---

[5]We note there is no public policy reason to construe § 38-77-123(B) less restrictively since an insurer may prevent any windfall to the insured by including a pro rata "other insurance" clause in its policy. The policy in this case in fact includes such a clause, providing "if policies issued by other insurers apply, we are liable only for our share."

[6]As noted in the Court of Appeals's decision and Insurer's brief, we have recognized the validity of similar automatic termination clauses in the context of fire insurance. *See* Walker v. Queen Ins. Co., 136 S.C. 144, 134 S.E. 263 (1926); Camden Wholesale Grocery v. National Fire Ins. Co., 106

AFFIRMED IN RESULT.

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

S.C. 467, 91 S.E. 732 (1917). Until 1986, however, there was no statutory limitation on an insurer's right to unilateral cancellation of fire insurance and therefore these cases did not consider the validity of such clauses in the face of such a limitation. *See* S.C. Code Ann. § 38-75-730 (2002) (enacted by 1986 S.C. Act No. 338).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Stephen E. Swanson,

Respondent,

v.

John D. Stratos and Milton D. Stratos, Both Individually and as Personal Representatives of the Estate of Demetros J. Stratos, Deceased; Delores M. Stratos; Lois E. Stephenson; Mary Griffin; and Debie Misoyianis,

Defendants,

Of whom,

John D. Stratos, Individually and as Personal Representative of the Estate of Demetros J. Stratos, Deceased; Delores M. Stratos; Lois E. Stephenson; Mary Griffin; and Debie Misoyianis are,

Appellants.

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

Opinion No. 3487
Submitted April 8, 2002 - Filed May 13, 2002

———————

**REVERSED IN PART;
AFFIRMED IN PART**

———————

Paul Daniel Schwartz, of David & Schwartz, of Charleston, for appellants.

Philip G. Clarke, III, of Bleecker & Clarke, of Charleston, for respondent.

———————

HOWARD, J.: Stephen Swanson sued John D. Stratos, individually and as personal representative of the estate of Demetros J. Stratos; Delores M. Stratos; Lois E. Stephenson; Mary Griffin; and Debie Misoyianis (collectively, "the Stratos family") for breach of express contract, breach of implied contract, and quantum meruit seeking to recover $31,800 in commission on a sale of timber.[1] The master awarded Swanson $3,800 dollars on his quantum meruit claim against the Stratos family. Swanson filed a motion to alter and amend the judgment and was awarded $1,342.92 in costs. The Stratos family also moved to alter and amend the judgment asking the master to vacate the award to Swanson and enter judgment for them and to award attorney's fees and costs under the South Carolina Frivolous Civil Proceedings Sanctions Act. The master denied the motion. The Stratos family appeals. We reverse in part and affirm in part.

FACTS AND PROCEDURAL HISTORY

In February 1996, John Stratos and Milton Stratos, as representatives for their father's estate, hired Swanson, a licensed forester, to inventory and

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[1] Swanson also sued Milton Stratos on these causes of action. The master granted Milton Stratos's motion for involuntary nonsuit on all causes against him. That ruling is unappealed, and he is not a party to this appeal.

appraise the value of timber on a 561 acre tract of land owned by the estate and located in Cordesville, South Carolina.

As he appraised the timber, Swanson noticed the presence of a red-cockaded woodpecker, an endangered species. Federal regulations require protection of this endangered species, which complicated the appraisal and future sale of the timber. On April 30, 1996, Swanson offered to market the timber to find a buyer at a suitable price, in return for which he was to receive a commission of ten percent of the gross proceeds of the sale, less the twenty-five hundred dollars he had already received for appraising the timber. Swanson informed the Stratos family about the endangered species and his ability to resolve the issue with regulatory agencies in order to sell the timber.

Although the Stratos family and Swanson came to an oral agreement on April 30, 1996, the agreement was not reduced to writing except in a letter written by Swanson to the Stratos family on November 11, 1996. The November 11 letter described the terms of the sale and the duties Swanson had undertaken in selling the timber as follows:

> From March until our last meeting on November 8, 1996, I have done considerable work for the family in the following area: a number of meetings and phone calls with Westvaco and U.S. Fish & Wildlife Service biologists to resolve the Red-Cockaded Woodpecker issue; development of the Timber Sale Prospectus, continuing talks with prospective buyers in on-going marketing of the timber specified for sale in the Prospectus, marketing of the timber specified for sale in the Prospectus, work in progress on the Habitat Conservation Plan (H.C.P.) to enable you to sell timber on the 66 acre Block in 1997, and also three meetings with you as a group at Mrs. Stratos's house to keep all of you informed and to answer questions concerning the sale of timber.
>
> My fee of ten (10%) percent of the total proceeds from the Timber Sale covers my time in the **above duties** as well as the following. 1) continued marketing of sale to assure best price, 2) when sale is consummated, I will assist in the development of the Timber Sales

> Contract to insure [sic] your interests are protected, 3) [l]ogging supervision to insure [sic] contract compliance, full accounting of tonnage cut and hauled, 4) inspections as necessary to determine the extent of natural regeneration, 5) coordination with various state and federal agencies to secure cost-share funds for replanting whatever portion of tract is necessary, 6) supervision and coordination of site-prep and planting contract crews until acreage cut is productive again, 7) completion of [the] H.C.P. in order to get the go-ahead for the sale of timber on the 66 acre tract, 8) any other family meetings or meetings with U.S. Fish & Wildlife personnel to complete [the] H.C.P.

(emphasis added).

Between April 30 and November 11, Swanson compiled a sales prospectus to market the timber. Included in the prospectus was a sixty-six acre area designated a reserved area for the red-cockaded woodpecker. At trial, Swanson presented records indicating the time he spent creating the set-aside. In support of his quantum meruit claim at trial, Swanson testified that he charged $100 an hour for these services if not included in a commission sales contract.

Although Swanson received several offers to purchase and log the timber, all fell short of Swanson's suggested selling price, and he advised the Stratos family to wait until they received an acceptable offer. When no adequate bids were received, the Stratos family declined to sign a portion of Swanson's letter that would have extended the listing past November 11. Subsequently, a timber buyer for Elliott Sawmilling Company purchased the timber for $318,000 in January 1997, after reviewing the paperwork involving the set-aside arranged by Swanson during his listing contract. Elliot's buyer learned of the timber from a friend of John Stratos and had neither received Swanson's prospectus nor had any contact with Swanson concerning the proposed sale during the listing period.

On October 7, 1997, Swanson filed his complaint, alleging breach of contract, breach of implied contract, and quantum meruit causes of action.

Swanson sought to obtain ten percent of the purchase price as his commission. The case was tried before a master-in-equity.

The master found an express contract was formed between the Stratos family and Swanson during the April 30 meeting and the terms of that contract were expressed in the November 11 letter. The master also found the contract terminated on November 11 and was not renewed. The master further found that Elliott Sawmilling relied upon Swanson's set-aside when purchasing the timber and awarded Swanson $3,800 in quantum meruit for his work.[2]

Swanson filed a motion to alter and amend the judgment and requested the award of court costs of $1,342.92. The Stratos family also filed a motion to alter and amend the judgment, asking the master to render judgment for them against Swanson and award them costs and attorney's fees under the Frivolous Civil Proceedings Sanctions Act. The master granted Swanson's motion and awarded costs of $1,342.92. The master denied the Stratos family's motions. The Stratos family appeals.

LAW/ANALYSIS

I. Quantum Meruit

The Stratos family argues the master erred when he awarded Swanson $3,800 in quantum meruit because the duties associated with the creation of the set-aside were included in the express contract. We agree.

To prevail on a quantum meruit claim the plaintiff must establish the following elements: 1) a benefit conferred by the plaintiff upon the defendant; 2) realization of that benefit by the defendant; and 3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it

---

[2]In arriving at this figure, the master multiplied the thirty-eight hours he found Swanson spent creating the set-aside by the $100 hourly rate Swanson testified he would have charged if not working for commission.

without paying its value. Myrtle Beach Hosp. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000).

If the tasks the plaintiff is seeking compensation for under a quantum meruit theory are encompassed within the terms of an express contract which has not been abandoned or rescinded, the plaintiff may not recover under quantum meruit. See 66 Am. Jur. 2d Restitution and Implied Contracts § 81 (2001) ("[I]t is a defense to an action in quantum meruit that there is an express contract covering the issue of compensation for services or materials furnished."); cf. Strickland v. Coastal Design Assocs., 294 S.C. 421, 424, 365 S.E.2d 226, 228 (Ct. App. 1987) ("The law is well settled in this nation that where an express contract has been rescinded or abandoned, one furnishing labor or materials in part performance may recover in quantum meruit unless the original contract remains in force."); Johnston v. Brown, 290 S.C. 141, 148, 348 S.E.2d 391, 395 (Ct. App. 1986), rev'd on other grounds, 392 S.C. 478, 357 S.E.2d 450 (1987) ("While a recovery may be had in quantum meruit for services fully performed under an express contract, the plaintiff's recovery is limited to the amount the parties agreed should be paid for the services." (footnote omitted)). Furthermore, brokers are not entitled to payment of commissions for the efforts taken to sell when their efforts do not result in a sale. Webb v. First Fed. Sav. & Loan Ass'n, 300 S.C. 507, 512, 388 S.E.2d 823, 826 (Ct. App. 1989), overruled in part on other grounds by Myrtle Beach Hosp., 314 S.C. at 1, 532 S.E.2d at 868.

> [A] broker is never entitled to commissions for unsuccessful efforts. The risk of failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor, and expend his money with ever so much devotion to the interests of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commissions. He loses the labor and effort which was staked upon success. And in such event it matters not that after his failure and the termination of his agency, what he has done proves of use and benefit to the principal.

Id. at 512, 388 S.E.2d at 826 (quoting Sibbald v. Bethlehem Iron Co., 83 N.Y. 378, 383 (1881).

Here, the master ruled that a contract was formed according to the terms set forth in Swanson's November 11 letter and that the contract ended and was not renewed. That ruling was not appealed and thus is the law of the case. Brading v. County of Georgetown, 327 S.C. 107, 113, 490 S.E.2d 4, 7 (1997). The efforts that Swanson undertook to delineate and mark the set-aside for the red-cockaded woodpecker were contained within the terms of the express agreement as reflected by the November 11 letter, in which Swanson acknowledged that his compensation was to come from the proceeds of the sale of the timber. Swanson failed to sell the timber and the contract terminated. Therefore, Swanson is not entitled to collect in quantum meruit.

The master also awarded Swanson $1,342.92 in costs on his motion to amend or alter the judgment. In light of our decision to reverse the award of damages to Swanson on his quantum meruit claim, Swanson has not succeeded in any part of his lawsuit. Moreover, Swanson concedes in his brief that costs were improperly awarded. Therefore, the award of costs to Swanson is reversed. See S.C. Code Ann. § 15-37-20 (1976).

II. Frivolous Lawsuit Claim

The Stratos family argues that the master erred when he denied their motion to impose costs and attorney's fees against Swanson under the South Carolina Frivolous Civil Proceedings Sanctions Act ("the Act"). The Act provides that

> [a]ny person who takes part in the procurement, initiation, continuation, or defense of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney's fees and court costs of the other party if:
>
> (1) he does so primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based; and

> (2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs.

S.C. Code Ann. § 15-36-10 (Supp. 2001). Section 15-36-20 provides that a party

> must be considered to have acted to secure a proper purpose . . . if he reasonably believes in the existence of the facts upon which his claim is based and
>
> (1) reasonably believes that under those facts his claim may be valid under the existing or developing law; or
>
> . . .
>
> (3) believes, as an attorney of record, in good faith that his procurement, initiation, continuation, or defense of a civil cause is not intended to merely harass or injure the other party.

S.C. Code Ann. § 15-36-20 (Supp. 2001).

A decision to award costs under the Act is one in equity. Hanahan v. Simpson, 326 S.C. 140, 156, 485 S.E.2d 903, 912 (1997). Accordingly, this Court may take its own view of the preponderance of the evidence. Id. Our supreme court has held that if a cause of action survives pre-trial motions to dismiss or a summary judgment motion and goes to the jury, the cause of action cannot be considered frivolous. Id. at 157, 485 S.E.2d at 912 ("Other courts . . . hold that a party who survives pre-trial motions to dismiss and for summary judgment are not subject to sanctions after a trial on the surviving claims. The theory behind these cases is that if a case is submitted to the jury, it cannot be deemed frivolous." (citations omitted)).

In this case, Swanson's quantum meruit action survived the Stratos family's motion for nonsuit based upon the insufficiency of the evidence and was resolved upon the merits by the master. Also, in viewing the factors listed in section 15-36-20, we find that Swanson reasonably believed he had a claim

against the Stratos family under existing case law. At the time Swanson filed the complaint, a legitimate question of fact existed as to whether the oral agreement between the parties on April 30 and the subsequent writing of those terms in the November 11 letter would be considered an express contract by the trial court. Therefore, the master's decision to deny the motion for costs and attorney's fees was proper.

CONCLUSION[3]

For the foregoing reasons, the master's decision is

REVERSED IN PART AND AFFIRMED IN PART.[4]

HEARN, C.J., and GOOLSBY, J., concur.

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[3] Because we reverse on the grounds above, we need not address the Stratos family's other issues on appeal.

[4] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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State Auto Property & Casualty Insurance Company,

Appellant/Respondent,

v.

David W. Raynolds, Sherry B. Raynolds, Harold Turner and Catherine Turner,

Defendants,

of whom

David W. Raynolds and Sherry B. Raynolds are,

Respondents/Appellants.

____

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

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Opinion No. 3488
Heard April 11, 2002 - Filed May 13, 2002

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AFFIRMED IN PART and REVERSED IN PART

____

C. Stuart Mauney and Jennifer D. Eubanks, both of Gallivan, White & Boyd, of Greenville, for appellant/respondent.

Robert C. Childs, III and Laura W. H. Teer, both of Mitchell, Bouton, Yokel & Childs, of Greenville, for respondents/appellants.

CURETON, J.: This is a declaratory judgment action to determine coverage under a homeowner's policy. The trial court found coverage existed under the policy but denied the insureds' request for attorney fees. Both parties appeal. We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

State Auto Insurance Company (State Auto) brought this declaratory judgment action alleging that the insureds, David W. and Sherry B. Raynolds, were not entitled to insurance coverage or a defense under their homeowner's policy for injuries that occurred on their property when their dog bit Harold Turner (Turner), a professional dog-handler. Turner filed suit against the Raynolds to recover for his injuries. State Auto defended the suit under a reservation of rights and sought to deny coverage based on the business pursuits exclusion of the Raynolds' homeowner's policy.

David Raynolds is a 70 year-old retired engineer with a Ph.D. in chemical engineering. He and his wife operate a retail business selling Merle Norman cosmetic products. They live in Spartanburg and have facilities for breeding and raising Akita show dogs at their home. Each dog has its own kennel with an 80 foot area for exercise. The kennel area is behind the Raynolds' home.

The Raynolds purchased their first Akita in 1989 after their son got an Akita. Soon thereafter, they purchased another Akita as a playmate for their first dog. They eventually purchased additional dogs. Their dogs have birthed

five litters of puppies. The Raynolds have kept, given away, and sold the puppies. The puppies sold for various amounts, ranging from $200 to $1500.

The Raynolds have traveled throughout several states to attend dog shows, while professional handlers showed their dogs. The Raynolds first met Harold Turner at a dog show in Atlanta. Turner came to South Carolina on an unrelated matter and arranged to visit the Raynolds to determine if he could show one of their dogs. Turner was bitten by one of the Akitas while working with it. Turner filed a claim with State Auto, the Raynolds' homeowner's insurance carrier. State Auto denied coverage pursuant to the business exclusions section of the policy and filed this declaratory judgment action. The trial court relied on the two-part test set forth in Fadden v. Cambridge Mutual Fire Insurance Co., 274 N.Y.S.2d 235 (N.Y. Sup. Ct. 1966), and found State Auto was required to defend the Raynolds and to provide insurance coverage under the homeowner's policy up to the policy limits. The trial court also denied the Raynolds' claim for attorney's fees. The Raynolds and State Auto appeal.

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue. An issue essentially one at law will not be transformed into one in equity simply because declaratory relief is sought." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). An insurance policy is a contract between the insured and the insurance company. Gordon v. Colonial Ins. Co., 342 S.C. 152, 155, 536 S.E.2d 376, 378 (Ct. App. 2000). Contract actions are actions at law. Hofer v. St. Clair, 298 S.C. 503, 508, 381 S.E.2d 736, 739 (1989). In an action at law, on appeal of a case tried without a jury, we may not disturb a trial court's findings of fact unless those findings are "wholly unsupported by the evidence or controlled by an erroneous conception or application of the law." Maddux Supply Co. v. Safhi, Inc., 316 S.C. 404, 406, 450 S.E.2d 101, 102 (Ct. App. 1994).

LAW/ANALYSIS

I. Business Pursuits Exclusion

State Auto argues the trial court erred in holding that the Raynolds' Akita activities do not constitute a business as defined in the homeowner's policy. We disagree.

Insurance policies are subject to general rules of contract construction. Fritz-Pontiac-Cadillac-Buick v. Goforth, 312 S.C. 315, 318, 440 S.E.2d 367, 369 (1994). This court must interpret the language in an insurance policy using its plain, ordinary, and popular meaning. Id. However, ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer. Diamond State Ins. Co. v. Homestead Indus., Inc., 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995).

The applicable language in the Raynolds' policy reads:

> Section II - EXCLUSIONS . . . .
>
> **Medical Payments to Others** do not apply to bodily injury or property damage . . . b.(1) arising out of or in connection with a **business** engaged in by an **insured.** This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the business. . . .

As defined in the main body of the policy, "**'business'** includes trade, profession, or occupation."

We agree with the trial court that the two-part test set forth in Fadden v. Cambridge Mutual Fire Insurance Co., 274 N.Y.S.2d 235 (N.Y. Sup. Ct. 1966), is an appropriate analysis for determining whether the Raynolds' activity constituted a business under the policy provisions. This test is as follows:

> To constitute a business pursuit, there must be two elements: first, continuity, and, secondly, the profit motive; as to the first, there must be a customary engagement or a stated occupation; and, as to the latter, there must be shown to be such activity as a means of livelihood, gainful employment, means of earning a living, procuring subsistence or profit, commercial transactions or engagements.

Id. at 241.

As to the continuity factor, the trial court stated, "I find that the Raynolds were not customarily engaged in the occupation, trade or profession of raising and showing purebred Akitas. This was a part-time activity on their part and they have other regular or continuous business engagements." We agree that this activity was a hobby and not a customary engagement or occupation for the Raynolds. The Raynolds bred and showed the Akitas as a part-time activity. They had other regular or continuous business engagements in connection with Merle Norman Cosmetics. Mr. Raynolds testified that his "trade" was not raising or showing dogs, but rather it was chemical engineering. He admitted he was retired, though he still does some chemical engineering consulting. He described his activities with the Akitas as "the sport of purebred dogs." The significant amount of time and money the Raynolds spent on the dogs does not automatically convert the activity to a business pursuit.

The second prong of the Fadden test requires a profit motive. The trial court found, "the Raynolds' activit[y] with their dogs was not intended to be, nor has it ever been, a means of livelihood, gainful employment, means of earning a living, procuring subsistence or profit."

We agree with the trial court that there was no profit motive in the Akita activities. Mr. Raynolds testified as follows:

> Q: Have you or will you ever expect to make money off the breeding of dogs?

A: It's almost inconceivable, unless a multi-millionaire decided he wanted to give me a big check. That is sort of like winning the lottery. I don't have any big hopes for winning the lottery.

The Raynolds generated income from the dogs during some years, but never greater than their expenses for the same years. The evidence does not indicate there was a profit motive in connection with the Akita dogs, and we find the trial court did not err in finding the show breeding activity was not a business pursuit.

II. Testimony of Fran Keys

State Auto argues the trial court erred in admitting the testimony of Fran Keys as an expert in the field of professional dog showing. We disagree.

The qualification of expert witnesses and the admissibility of their testimony is largely within the discretion of the trial court. Creed v. City of Columbia, 310 S.C. 342, 344-45, 426 S.E.2d 785, 786 (1993)). We will not disturb a trial court's ruling to exclude or admit expert testimony absent a clear abuse of discretion. Walker v. Bluffs Apartments, 324 S.C. 350, 353, 477 S.E.2d 472, 473 (Ct. App. 1996). A court may rule that an expert witness is competent if the witness has acquired through study or experience or both, such knowledge and skill in a business, profession, or science that she is more qualified than the jury to form an opinion on the subject of her testimony. Id.

Keys was offered as an expert capable of testifying "about primarily the distinction between the amateur show handling and the professional show handling involved in the dog business." The trial court limited her testimony to this specific area and did not allow questions about legal issues. The distinction between amateur and professional dog-handling is not common knowledge, and Keys had special knowledge to explain this distinction in connection with the Raynolds. We find the trial court did not abuse its discretion in admitting her testimony.

III. Attorney Fees

The Raynolds argue the trial court erred in denying their claim for attorney's fees in the declaratory judgment action. We agree.

Attorney's fees are generally not recoverable unless authorized by contract or statute. Keeney's Metal Roofing, Inc. v. Palmieri, 345 S.C. 550, 553, 548 S.E.2d 900, 902 (Ct. App. 2001). The Raynolds do not assert any statutory right to recover, so they must recover, if at all, upon a contractual right.

We find that Hegler v. Gulf Insurance Co., 270 S.C. 548, 243 S.E.2d 443 (1978) is controlling in the present case. In Hegler, the issue was whether an insured is entitled to recover attorney's fees incurred in the successful defense of a declaratory judgment action brought by the insurer in an effort to relieve itself of coverage under an insurance policy. Id. at 548, 243 S.E.2d at 443. In finding the insurer was required to pay attorney fees, the Hegler court held the following:

> There is no material difference in the legal effect between an outright refusal to defend and in undertaking the defense under a reservation of rights until a declaratory judgment is prosecuted to resolve the question of coverage. In either event, an insured must employ counsel to defend - in the first instance in the damage action and in the second in the declaratory judgment action to force the insurer to provide the defense. In both, the counsel fees are incurred because of the insurer's disclaimer of any obligation to defend.

Id. at 550, 243 S.E.2d at 444. In 1997, our supreme court expressly declined to overrule Hegler and upheld an award of attorney's fees. See First Fin. Ins. Co. v. Sea Island Sport Fishing Soc'y, Inc., 327 S.C. 12, 17, 490 S.E.2d 257, 259 (1997).

The legal fees incurred by the Raynolds in successfully asserting their rights against State Auto's declaratory judgment action were damages arising directly as a result of the breach of the contract. Based on our reading of Hegler, the Raynolds are entitled to attorney's fees.

Accordingly, based on the foregoing reasons, the decision of the trial court is

AFFIRMED IN PART and REVERSED IN PART.

GOOLSBY and ANDERSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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The State,
Respondent,

v.

Sharron Blasky Jarrell,
Appellant.

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Appeal From York County
John C. Hayes, III, Circuit Court Judge

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Opinion No. 3489
Heard February 5, 2002 - Filed May 13, 2002

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AFFIRMED

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James W. Boyd, of Rock Hill, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan and Assistant Attorney General Toyya Brawley Gray; all of Columbia; and Solicitor Thomas E. Pope, of York, for respondent.

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HEARN, C.J.: Sharron Jarrell was charged with homicide by child abuse, accessory before the fact of murder, accessory after the fact of murder,

first degree criminal sexual conduct, and three counts of unlawful conduct towards a child. A jury found Jarrell guilty of all charges except criminal sexual conduct first degree. She appeals her convictions alleging several errors occurred during the trial.[1] We affirm.

FACTS

On June 25, 1998, Jarrell called EMS and reported that her ten-month-old baby, Donald Jarrell Jr., was not breathing. When paramedics arrived, they found the baby was dead and rigor mortis had begun to set in. When the police arrived at the residence they observed that the trailer was filthy with animal feces, fly strips, baby bottles with clabbered milk, unwashed dishes, dirty diapers, and it smelled of urine. Residing at the trailer with Jarrell at the time of the baby's death were Donald Jarrell Sr. (Father), Jarrell's mother Grenetta Blaskey, and Jarrell's three other minor children. The Department of Social Services took temporary emergency custody of the three children due to the condition of the residence.

After an autopsy, the coroner found the baby had suffered severe repeated sexual abuse and determined that he died from suffocation and smothering the previous day. Investigators asked Jarrell about her whereabouts and activities on that date. She responded that she had been shopping with her mother and children. After receiving a page from her husband, she returned home around 9 P.M.

She initially stated that when she returned home she checked on the baby, kissed him goodnight, and he seemed fine. However, Jarrell later changed her story and stated that she thought Father smothered the baby because of his bad temper and he could not handle the baby's crying. Later, she changed her story again and said that she knew the baby was dead when she returned home that evening, but she did not call an ambulance that night because she did not

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[1]Jarrell does not appeal her convictions on three counts of unlawful conduct towards a child.

want to upset her mother and children. The next morning upon "discovering" her baby's death, Jarrell immediately called Father at work, and then called EMS. That same day, she reported the baby's death to the insurance company which had issued a $24,000 life insurance policy on the child.

Jarrell and Father were arrested for the death of her baby. After her arrest, she admitted to police that she knew Father was molesting the baby. While in jail, Jarrell discussed the abuse and death of her baby with several inmates: Mary Gillespy, Julie Williams, Angela Doctor, and Tracye Graves. In her conversations with these inmates, Jarrell admitted she used a dildo on the baby to prepare him for sex with Father. She also stated that she and Father planned to kill the baby by smothering him to make it appear to be a SIDS death because the baby had an upcoming doctor's appointment and the abuse would be readily apparent to anyone examining the baby. Jarrell and Father planned that he would kill the baby while Jarrell was out shopping and he would page her to return home when the baby was dead.

Father was charged with murder, to which he pled guilty but mentally ill. Jarrell was indicted for homicide by child abuse, accessory before the fact of murder, accessory after the fact of murder, and first degree criminal sexual conduct. Jarrell was convicted on all counts except criminal sexual conduct. She received life sentences for the homicide by child abuse and accessory before the fact convictions, and fifteen years for the accessory after the fact conviction, concurrent to her life sentences.

DISCUSSION

I. Directed Verdict on Homicide by Child Abuse Charge

Jarrell first claims the trial court erred by failing to grant her a directed verdict on the homicide by child abuse charge.[2] We disagree.

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[2]S.C. Code Ann. § 16-3-85 (Supp. 2001) defines the crime as follows:

(A) A person is guilty of homicide by child abuse if the

When considering the trial court's denial of a criminal defendant's motion for directed verdict, "[w]e must view the evidence in the light most favorable to the State and determine whether there is any direct or substantial circumstantial evidence that reasonably tends to prove the defendant's guilt or from which his guilt may be logically deduced." State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000). In ruling on a directed verdict motion, the trial court is concerned with the existence or non-existence of evidence, not its weight. Id. Furthermore, "[i]f the State presents any evidence which reasonably tends to prove the defendant's guilt or from which the defendant's guilt could be fairly and logically deduced, the case must go to the jury." State v. Harris, 342 S.C. 191, 203, 535 S.E.2d 652, 658 (Ct. App. 2000).

The jury found Jarrell guilty of homicide by child abuse "under circumstances manifesting an extreme indifference to human life." S.C. Code Ann. § 16-3-85(A)(1) (Supp. 2001). Jarrell argues the trial court erred in denying her motion for directed verdict because the State failed to prove the proper mental state. Specifically, she claims the evidence presented at trial showed she participated in planning the death of the baby which would constitute malice. She contends that because one cannot have both malice and indifference towards another person, she could not be guilty of homicide under circumstances manifesting an extreme indifference to human life.

Jarrell defines indifference as "impartial, unbiased, or disinterested."

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person:

> (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or
> (2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under eleven.

Under her definition, she contends that any action, or failure to act in the face of a duty, would negate her indifference, thus making it impossible for her to be guilty under this specific statute. Jarrell's definition, however, fails to focus on the term extreme indifference as it has historically been interpreted in a criminal context.

Extreme indifference is in the nature of "a culpable mental state . . . and therefore is akin to intent." State v. Vowell, 634 S.W.2d 118, 119 (Ark. 1982) (citation omitted). In this state, indifference in the context of criminal statutes has been compared to the conscious act of disregarding a risk which a person's conduct has created, or a failure to exercise ordinary or due care. See State v. Rowell, 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997) (discussing the requisite mental state for recklessness); see generally Hooper v. Rockwell, 334 S.C. 281, 297, 513 S.E.2d 358, 367 (1999) ("Conduct of the parent which evinces a settled purpose to forego parental duties may fairly be characterized as wilful because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent."). At least one other jurisdiction with a similar statute has found that "[a] person acts 'under circumstances manifesting extreme indifference to the value of human life' when he engages in deliberate conduct which culminates in the death of some person." Davis v. State, 925 S.W.2d 768, 773 (Ark. 1996). Therefore, we reject Jarrell's definition of the term indifference and hold that in the context of homicide by abuse statutes, extreme indifference is a mental state akin to intent characterized by a deliberate act culminating in death.

In light of this definition of extreme indifference, and after reviewing the record, we find that substantial evidence supports the denial of Jarrell's motion for directed verdict. The State presented evidence of Jarrell's actions in planning the murder both before it occurred, and also presented evidence of her actions on the day of the child's death. Two different levels of intent may be gleaned from her actions depending on the particular point in time. We find the events of the day of the baby's death to be the most significant to our analysis regarding Jarrell's extreme indifference. We agree with Jarrell that her conviction of accessory before the fact of murder indicated she acted with malice aforethought in planning the murder of her child. See

State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998) ("Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong."). However, Jarrell's affirmative act of leaving her home on the day of the murder operates as a separate and distinct event from the planning of the murder.[3] When she left home, Jarrell created a grave risk of death to her child, evidencing her extreme indifference to his life. She left home knowing her child would be killed while she was gone. Jarrell could have prevented the murder of her son merely by choosing to stay home. Her failure to protect her child is concrete evidence of her indifference towards his life.

A parent has a specific and undelegable duty to serve the best interests of her child and should make every effort not to knowingly place her child in harm's way. See generally Nash v. Byrd, 298 S.C. 530, 536, 381 S.E.2d 913, 916 (Ct. App. 1989) (stating parents have a duty to lend their aid in creating an atmosphere that will foster the best interests of their child). We can think of no better example of someone who is indifferent towards life than a mother who leaves her child knowing he will be killed in her absence. Therefore, in light of our holding as to the definition of "extreme indifference" in the context of S.C. Code Ann. § 16-3-85, we find there is ample evidence to support the trial court's denial of the motion for directed verdict.

II. Written Statement of Mary Gillespy

Mary Gillespy was an inmate incarcerated with Jarrell prior to trial. Jarrell discussed the circumstances of her case with Gillespy. Gillespy testified

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[3]Although some jurisdictions have held that premeditation is not required to show extreme indifference, other states have held that premeditation may coexist with extreme indifference towards human life. See Davis, 925 S.W.2d at 773; State v. Crowsbreast, 629 N.W.2d 433, 440 (Minn. 2001) ("It is possible for premeditation and extreme indifference to coexist."); State v. Russell, 848 P.2d 743, 748 (Wash. Ct. App. 1993) (stating neither premeditation nor intent is required under homicide by abuse statute in which death is caused under circumstances manifesting an extreme indifference to human life).

that Jarrell told her she was aware months before her son's death that her husband was sexually abusing their son. She further stated to Gillespy that she participated in the abuse and would often use a dildo on the baby while she and her husband were having sex. Jarrell told her that the baby had an enlarged rectum because of the abuse and she was concerned it would be discovered during an upcoming pediatrician's appointment. Gillespy made a written statement to police regarding the conversations she had with Jarrell. At trial, the State presented Gillespy as a witness and sought to introduce her prior written statement during her direct examination. The trial court admitted the statement over objection. Jarrell contends the trial court erred when it admitted the written statement because it improperly bolstered Gillespy's testimony to the jury. We agree but find the error harmless.

The South Carolina Rules of Evidence permit the admission of hearsay evidence of a prior consistent statement to rebut an allegation that the declarant recently fabricated the story or acted out of an improper influence or motive. Rule 801(d)(1)(B), SCRE. In State v. Saltz, 346 S.C. 114, 123-24, 551 S.E.2d 240, 245-46 (2001), our supreme court held that the admission of a witness's prior consistent statement was improper if the witness had not been accused of recent fabrication or improper influence or motive prior to the admission of the statement. The Saltz court further stated that any error in admitting the prior consistent statement, even though cumulative to the witness's testimony at trial, would not be considered harmless. "On the contrary, 'it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.'" Id. at 124, 551 S.E.2d at 246. The court found the witness's testimony weak and "not particularly credible," thus the improper corroboration could not have been harmless.

In this case, we agree that the admission of Gillespy's prior statement was improper because the admission occurred during the State's direct examination and was not admitted in response to any allegations of recent fabrication or improper influence or motive. Here, unlike Saltz, we find this error harmless. In Saltz, the court was concerned that the prior oral statement

would improperly bolster the credibility of the declarant's own oral testimony.[4] That concern is diminished in this case, however, because Gillespy's statement is cumulative not only to her own testimony, but to the testimony of three other witnesses. Doctor, Graves, and Williams all testified to the same information contained in Gillespy's written statement, i.e. that Jarrell participated in the sexual abuse of the baby and planned to kill the baby to hide the abuse from the doctor. If Gillespy's testimony was the only evidence of Jarrell's participation in the abuse and death of her child, we would be constrained to hold that the improper admission of the statement could not be harmless. However, because Gillespy's testimony was cumulative to three other witnesses who testified almost identically, we find the admission of Gillespy's statement harmless. Jarrell was not prejudiced by the admission of the written statement when its contents were corroborated by an abundance of properly admitted testimony from other witnesses. See State v. South, 285 S.C. 529, 535, 331 S.E.2d 775, 778 (1985) (stating court erred in admitting officer's notes because they were a prior consistent statement, but held "error was harmless beyond a reasonable doubt since [notes were] cumulative to the abundant amount of similar evidence admitted at trial"). Thus, because we find Gillespy's statement cumulative and substantially identical to other properly admitted evidence, any error caused by the admission of the prior consistent statement is harmless.

III. Expert Witness Testimony

Jarrell next argues the trial court erred by not admitting the testimony of two expert witnesses, Dr. Pamela Crawford and Dr. Geoffrey McKee. We disagree.

Rule 702, SCRE, allows the testimony of an expert witness qualified by knowledge, experience, skill, training, or education to assist the jury to understand the evidence or determine an issue. However, even if evidence is

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[4]We note that unlike the present case, the prior consistent statement in Saltz was admitted during the testimony of another witness who was not the declarant of the prior consistent statement.

admissible under Rule 702, SCRE, it may still be excluded under Rule 403, SCRE, if its probative value is outweighed by its prejudicial effect. State v. McHoney, 344 S.C. 85, 96, 544 S.E.2d 30, 35 (2001). "The question of whether to admit or exclude testimony of an expert witness is within the discretion of the trial court. Absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal." State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (1999).

A. Dr. Crawford's Testimony

Jarrell proffered the testimony and written report of Dr. Pamela Crawford, a forensic psychiatrist, who examined Father to determine his mental competency to stand trial. Jarrell contends the trial court erred in excluding Dr. Crawford's testimony because it was relevant and would have shown that Jarrell and Father were incapable of planning the murder.[5] Jarrell argues this evidence could have affected the jury's deliberations on both the homicide by child abuse and accessory before the fact charges.

Dr. Crawford testified that "insofar as the murder charge" against him, Father lacked the capacity to conform his behavior to the requirements of the law at the time the murder occurred. She stated that she based her opinion "on my understanding that he had done this act in an impulsive way without planning when he was . . . experiencing symptoms that are consistent with hypomania." However, she did not exclude the possibility that Father could have planned the baby's death with his wife prior to the event, but at the actual time of the event of death the act was impulsive. She went on to testify that her opinion was based on an "assumption that it was an impulsive not planned act,"

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[5]Jarrell also claims Dr. Crawford should have been admitted to testify as to the definition of guilty but mentally ill. However, because Jarrell failed to raise this issue at trial, the issue is not preserved for our review. See Holy Loch Distrib., Inc., v. Hitchcock, 340 S.C. 20, 24, 531 S.E2d 282, 284 (2000) (stating that issues not raised and ruled upon in the trial court will not be considered on appeal).

and further stated that she "would have a different opinion if, if I were to know that they had planned this act, he would have had the capacity to conform if that were the case." The trial court granted the State's motion to exclude Dr. Crawford's testimony stating that "her testimony as I understand it to be his lack of ability to conform does not negate [Father's] ability to plan and . . . so I find that it's not relevant to the issues before the court."

We agree with the trial judge that Father's state of mind when he committed the murder has no probative bearing on his capacity to plan. Father's mental state at the time he committed the act is irrelevant to whether Jarrell was an accessory before the fact. An accessory is "[a] person who aids in the commission of a felony or is an accessory before the fact in a commission of a felony by counseling, hiring, or otherwise procuring the felony to be committed. . ." S.C. Code Ann. § 16-1-40 (Supp. 2001). The important inquiry is whether Jarrell helped to plan, counsel, aid, or procure the crime. Jarrell's argument that because the murder was an impulsive act it is unlikely the parties planned the murder is without merit because the two are not mutually exclusive. Dr. Crawford could not state unequivocally that the murder was impulsive, nor could she state that even if it was an impulsive act at the time, that Father and Jarrell could not have planned the murder beforehand. Moreover, Crawford admitted her opinion was based on an "assumption" that the act was impulsive. This assumption is not probative of whether or not Father and Jarrell planned to kill the child. Therefore, because the testimony was not relevant to the issue of whether Jarrell and Father could have planned the death of their child, we find no error in the trial court's exclusion of Crawford's testimony.

B. Dr. McKee's Testimony

Jarrell next proffered the testimony of Dr. Geoffrey McKee, a forsenic psychologist, who examined her to see if she fit the profile of a pedophile. McKee testified that Jarrell did not fit the "diagnostic qualifications for pedophilia"; however, the trial court refused to allow his testimony. Jarrell argues this testimony should have been admitted because it was relevant to show that she would be unlikely to engage in the sexual abuse and, therefore, would not have been involved in a plan with Father to kill their baby to cover up the

sexual abuse. We disagree.

Initially, we note that the jury failed to convict Jarrell on the CSC charge. As a result, Jarrell's argument that she was prejudiced by the exclusion of McKee's testimony, showing she was less likely to engage in the sexual abuse of a child, is without merit. Jarrell cannot claim to be prejudiced by the exclusion of evidence as it relates to a particular charge when she was not convicted of that charge.[6] See McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (stating that this court has long recognized an overriding rule of civil procedure that "whatever doesn't make any difference, doesn't matter").

We further find that McKee's testimony has no relevance to this case. Rule 401, SCRE, allows the admission of evidence which has a tendency to make any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. State v. Hamilton, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct. App. 2001). In this case, Jarrell was alleged to have participated in the sexual abuse of her son. If true, these allegations would have classified Jarrell not as a pedophile, but as an incest abuser. These are two different classifications which require two different sets of proof. "Pedophilia has been defined as 'sexual perversion in which children [in general] are the preferred sex object.'" State v. Nelson, 331 S.C. 1, 19, 501 S.E.2d 716, 725, n.5 (1998) (citation omitted). Incest, however, is sexual abuse

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[6]Although Jarrell was acquitted of CSC conduct charge, she claims the exclusion of Dr. McKee's testimony was still prejudicial because it would have diminished the credibility of the witnesses who testified that Jarrell told them she was involved in the sexual abuse and planning to kill her baby. We do not find this argument persuasive. An expert is not necessary for the jury to determine the credibility and truthfulness of the witnesses. See Duncan v. State, 500 S.E.2d 603, 608 (Ga. Ct. App. 1998) (finding profile testimony defendant sought to introduce at trial went to credibility of his own testimony and that jury, without help of expert, could have determined the credibility and truthfulness of all the witnesses and could have formed independent opinions as to defendant's capability to commit acts).

relating to kinship between abuser and victim. See S.C. Code Ann. § 16-15-20 (Supp. 2001). "At least one modern commentator takes the view that the incest offender's chief aberrancy is incest and that, usually, there is no history of other sexually related problems occurring outside the family." State v. Person, 564 A.2d 626, 632 (Conn. App. Ct. 1989).

The Fourth Circuit has recognized the differences in these classifications and how they impact expert testimony. In U.S. v. Powers, 59 F.3d 1460 (4th Cir. 1995), the court upheld the district court's exclusion of expert testimony claiming to prove the defendant did not fit the "psychological profile of a fixated pedophile," based on the expert's failure to establish relevance to the facts in the case. Powers was charged with statutory rape of his minor daughter, i.e., incest abuse, not with being a fixated pedophile. The court held that "[t]o be relevant, [the expert's] testimony must show, in a very real way, that because Powers did not share a characteristic common to . . . incest perpetrators, he was less likely to be an incest perpetrator himself." Id. at 1472. The court noted, however, that had Powers offered evidence showing that those who are not fixated pedophiles are less likely to commit incest abuse, the expert's testimony might have been relevant. Accordingly, the Fourth Circuit found no abuse of discretion in the exclusion of this testimony, finding Powers failed to prove "relevancy 'or a valid scientific connection to the pertinent inquiry' of whether he committed incest." Id. at 1472-73; see also State v. Person, 564 A.2d at 632 ("Because the defendant never established that his expert witnesses had expertise in areas directly related to intrafamily sexual abuse, the trial court could reasonably have concluded that it was unlikely that their testimony would be of help to the jury."). Because there are significant differences in the identification and diagnosis of incest abusers and pedophiles, we do not feel that McKee's testimony was relevant.

IV. Admission of the Dildo Into Evidence

At trial, a dildo found in Grenata Blaskey's room during a search of

the trailer, was admitted into evidence.[7] At trial, Jarrell objected to the admission of the dildo into evidence on "relevance grounds." On appeal, however, Jarrell argues (1) that pursuant to Rule 403, SCRE, the prejudicial impact of admission of the dildo outweighed its probative value because there was no connection between the dildo and the crime committed, and (2) the admission of the dildo impugned the character and credibility of her mother's testimony. Because Jarrell failed to make these arguments at trial, this issue is not preserved for our review. See State v. Taylor, 333 S.C. 159, 174, 508 S.E.2d 870, 877 (1998) (stating an objection which does not specify the particular ground on which the objection is based is insufficient to preserve the question for appellate review); Holy Loch Distrib., Inc., v. Hitchcock, 340 S.C. 20, 24, 531 S.E2d 282, 284 (2000).

V. Autopsy Photographs

Jarrell contends the trial court should have excluded autopsy photographs pursuant to Rule 403, SCRE, because their prejudicial impact substantially outweighed their probative value. Specifically, she claims it was not necessary to admit the photographs because the pathologist testified about the cause of death and sexual abuse, and because she offered to stipulate that the baby had been sexually abused. We disagree.

"The relevance, materiality, and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of abuse of discretion." State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589-90 (1999). A test to determine whether the trial court abused its discretion is whether the photographic evidence serves to corroborate the testimony of witnesses offered at trial. "If the photograph serves to corroborate testimony, it is not abuse of discretion to admit it." Id. at 597, 518 S.E.2d at 590.

The State offered several autopsy photographs arguing the

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[7] No blood or fingerprints were found on the dildo.

photographs were necessary to corroborate the testimony of the pathologist and show the extent of the baby's sexual abuse. We agree that the photographs were necessary to corroborate the testimony presented at trial. A photograph displaying the anal injuries due to the sexual abuse corroborated both the pathologist's testimony regarding the extent of those injuries and the witnesses' testimony that Jarrell's motive for planning to kill the baby was because the sexual abuse was readily apparent. Significantly, the trial court did not admit all the photographs, giving the State a choice between two photographs depicting the same injury. We find the trial court's exclusion of photographs demonstrates it exercised its discretion. Furthermore, the autopsy photographs corroborated the testimony about the condition of the child. The photographs showed the baby in a state of rigor and in the beginning stages of decomposition and corroborated the pathologist's testimony about the time of death. These photos support the charge against Jarrell of accessory after the fact. We agree with the trial judge, that while some of "the photograph[s] are graphic, the facts of the case are very graphic" and the photos helped the jury understand the pathologist's testimony. Therefore, under these circumstances, we find the trial court did not abuse its discretion in admitting the autopsy photographs.

VI. Exculpatory Evidence

Finally, Jarrell argues the trial court erred in failing to find that a pending investigation for armed robbery against a State's witness was exculpatory evidence which should have been disclosed to the defense pursuant to Brady v. Maryland, 373 U.S. 83 (1963). We disagree.

Angela Doctor was one of four women incarcerated with Jarrell who testified against her. After Doctor was released from prison, she became a suspect in an armed robbery case. However, at the time of Jarrell's trial, no charges were pending against her and she was unaware that she was a suspect. The State and defense agreed to a hearing in chambers to determine whether the

State should have disclosed this information to the defense prior to trial.[8] The trial court found that this information did not need to be disclosed to the defense, ruling it was not exculpatory and could not be used for impeachment purposes.

"A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999) (citations omitted). "Exculpatory evidence is that which creates a reasonable doubt about the defendant's guilt." State v. Forney, 321 S.C. 353, 360, 468 S.E.2d 641, 645 (1996). Exculpatory evidence is material only if there is a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different. Fradella v. Town of Mount Pleasant, 325 S.C. 469, 479, 482 S.E.2d 53, 58 (Ct. App. 1997). A Brady violation occurs if a defendant can demonstrate "that favorable evidence could [have been presented] to put the whole case in such a different light as to undermine confidence in the verdict." Id. (citation omitted).

In this case, we do not believe an investigation of a witness for an uncharged offense creates a reasonable probability that the outcome of the proceeding would have been different had the information been disclosed. Looking at the evidence as a whole, Doctor was one of four women who testified almost identically against Jarrell. Doctor's alleged involvement in an uncharged crime simply has no bearing on Jarrell's guilt. Moreover, the information could not be used for impeachment purposes since an uncharged offense is not probative of the truthfulness of the witness. Thus, we find no error in the trial court's ruling that the State was not required to disclose this information to the defense.

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[8]We note that the record indicates the hearing was instigated at the State's request out of concern of a possible appearance that Doctor may have testified with an expectation of leniency if subsequently charged with armed robbery.

AFFIRMED.

CONNOR and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Beaufort County, South Carolina and Dorothy Gnann,

Appellants,

v.

Flora G. Trask; the City of Beaufort, South Carolina; the State of South Carolina; and the Town of Port Royal, South Carolina,

Respondents.

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Appeal From Beaufort County
Thomas Kemmerlin, Jr., Special Circuit Judge

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Opinion No. 3490
Heard April 9, 2002 - Filed May 13, 2002

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AFFIRMED

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Jack M. Scoville, Jr., of Georgetown; and Frederick M. Corley, of Beaufort, for appellants.

William B. Harvey, III, of Harvey & Battey; Scott W. Lee, both of Beaufort; and Attorney General Charles

M. Condon and Senior Assistant Attorney General C. Havird Jones, Jr., both of Columbia, for respondents.

GOOLSBY, J.: Appellants Beaufort County and Dorothy Gnann brought this action seeking a declaratory judgment invalidating an annexation ordinance enacted by the City of Beaufort (the City). The trial court held the annexation was proper and Appellants lacked standing to challenge the ordinance. We affirm.

FACTS

On January 11, 1999, Flora G. Trask petitioned to have the City annex both her property on Upper Cane Island and the portion of the Beaufort River located between the City and Trask's property. Trask made her request using the "100-per cent" method under South Carolina Code section 5-3-150.[1] On February 9, 1999, the Beaufort City Council granted the petition and enacted an ordinance providing for the City's annexation of both Trask's property and the waters and marshes of the Beaufort River between that property and the previous city limits.

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[1] S.C. Code Ann. § 5-3-150(3) (Supp. 2001). This paragraph provides in pertinent part as follows:

> [A]ny area or property which is contiguous to a municipality may be annexed to the municipality by filing with the municipal governing body a petition signed by all persons owning real estate in the area requesting annexation. Upon the agreement of the governing body to accept the petition and annex the area, and the enactment of an ordinance declaring the area annexed to the municipality, the annexation is complete.

The legislature made several revisions to this paragraph in 2000, none of which are at issue in this appeal.

On April 7, 1999, Appellants filed a notice of intention to contest the annexation ordinance. On May 6, 1999, Appellants filed their summons and complaint in the present case.

On May 7, 1999, the Town of Port Royal sued the City, alleging that the Town's municipal boundaries extended to the eastern marsh of the Beaufort River and that the City, in enacting the ordinance, had crossed those water boundaries to gain contiguity to Trask's property on Upper Cane Island. The action was dismissed in September 1999 pursuant to an agreement between the Town and the City that devised a clear line of delineation between the two municipalities. The agreement provided the City would modify the water boundaries in the ordinance and the Town would acknowledge the annexation ordinance, as modified, was "legal and valid."

On December 17, 1999, Appellants amended their pleadings to join Trask, the State of South Carolina, and the Town as defendants. In their amended complaint, Appellants alleged three grounds for invalidating the ordinance: (1) the property sought to be annexed was not contiguous to the City; (2) the City Council's actions were "arbitrary, irrational and capricious"; and (3) no one owning an interest in the waters and marshes of the Beaufort River had consented to the annexation of that property.

A full merits hearing took place on June 7, 2000.[2] On July 21, 2000, the trial court granted judgment to the defendants, holding (1) contiguity was not destroyed by the waters and marshlands separating the Trask property from the city limits; (2) Appellants lacked standing to attack the annexation ordinance; (3) Appellants nevertheless failed to meet their burden of proof to show that the City Council's actions were arbitrary, irrational, and capricious; and (4) the allegation that the State of South Carolina, as purported owner of the waters and

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[2] The master-in-equity for Beaufort County heard the case in his capacity as special circuit judge under a standing order from the South Carolina Supreme Court.

marshlands annexed by the City, did not consent to the annexation was insufficient to invalidate the annexation petition.

DISCUSSION

1. Appellants first argue the trial court, in holding they lacked standing to pursue their action, improperly discredited this court's opinion in St. Andrews Public Service District v. City of Charleston[3] as "not yet final" and being in conflict with two supreme court decisions.[4] Notwithstanding the trial court's remarks, we hold the present case is distinguishable from St. Andrews.

St. Andrews involved the dismissal of a lawsuit brought by the St. Andrews Public Service District challenging two annexation ordinances enacted by the City of Charleston.[5] The trial court dismissed the action on the ground that, because the Public Service District did not own real property in the area and had no proprietary interest or statutory rights in the annexed area, it lacked standing to pursue the challenge.[6] This court reversed, observing that "the Charleston City Council attempt[ed] to establish contiguity, not by merely crossing a roadway to annex an adjacent property, but by annexing the length of a road to establish a common boundary"[7] and further noting that "[t]hat kind of

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[3] 339 S.C. 320, 529 S.E.2d 64 (Ct. App. 2000), cert. granted, (Feb. 21, 2001).

[4] The two supreme court decisions cited by the trial court were State ex rel Condon v. City of Columbia, 339 S.C. 8, 528 S.E.2d 408 (2000), and State Budget and Control Board v. City of Columbia, 308 S.C. 487, 419 S.E.2d 229 (1992).

[5] St. Andrews, 339 S.C. at 322, 529 S.E.2d at 65.

[6] Id. at 323-24, 529 S.E.2d at 66.

[7] Id. at 326, 529 S.E.2d at 67 (emphasis added).

annexation is not authorized by the laws of this state."[8] Based on the supreme court's recognition that private individuals have standing to attack a void annexation, that is, one not authorized by law,[9] this court concluded the Public Service District, even though without either proprietary interests or statutory rights in the annexed area, had standing to challenge the validity of the annexation ordinances at issue. In other words, if a municipality annexes property that is beyond its reach, the annexation must fail as a matter of law, even when there was compliance with the statutory requirements to effect the annexation. It follows, then, that if an annexation is void as a matter of law, a plaintiff need not "assert an infringement of its own proprietary interests or statutory rights in order to establish standing" to challenge it.[10]

On appeal, Appellants appear to assert the annexation was void because of (1) a lack of contiguity, and (2) the failure of the owner of the intervening property to join in the annexation petition. They further argue that, because of the absence of consent from one of the purported owners of the annexed properties, the annexation is necessarily defective under the 100-per cent method and therefore must fail as a matter of law. We find these arguments unavailing.

As to the alleged lack of contiguity, Appellants argue, "The law authorizes the City to annex only contiguous territory, and since the property purportedly annexed is not contiguous because the owner of the intervening property has not petitioned for its annexation, the annexation is void." We interpret this argument to mean that the requirement of contiguity was not met because of the presence of the waters and marshes of the Beaufort River between the Trask property and the City. We agree with the trial court, however, that the separation between the

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[8] Id.

[9] Quinn v. City of Columbia, 303 S.C. 405, 401 S.E.2d 165 (1991).

[10] State Budget and Control Bd. v. City of Columbia, 308 S.C. at 489, 419 S.E.2d at 230.

City and the Trask property by the waters and marshes of the Beaufort River did not destroy contiguity.[11]

As to the failure of the owner of the intervening property to sign the annexation petition, Appellants argue the absence of consent by the State of South Carolina, which owned the area of the Beaufort River annexed by the City, made the annexation void under the 100-per cent method.[12] We agree with the

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[11] See Bryant v. City of Charleston, 295 S.C. 408, 411, 368 S.E.2d 899, 901 (1988) ("[C]ontiguity is not destroyed by water or marshland within either the annexing municipality's existing boundaries or those of the property to be annexed merely because it separates the parcels of highland involved.").

After the opinion in St. Andrews was filed, the legislature enacted South Carolina Code section 5-3-305, which defines "contiguous" as the term applies to annexation and further states:

> Contiguity is not established by a road, waterway, right-of-way, easement, railroad track, marshland, or utility line which connects one property to another; however, if the connecting road, waterway, easement, railroad track, marshland, or utility line intervenes between two properties, which but for the intervening connector would be adjacent and share a continuous border, the intervening connector does not destroy contiguity.

S.C. Code Ann. § 5-3-305 (Supp. 2001) (emphases added). This section took effect May 1, 2000, which was after the reading of the annexation ordinance, but before the trial court held the merits hearing. 2000 S.C. Acts 250, § 3. Although the trial court did not mention this section in the appealed order, we cite it as additional support for our holding that the body of water between the Trask property and the City did not destroy contiguity.

[12] Although the State was named as a defendant in this action, it filed no responsive pleadings and was thus in default. Furthermore, although the State is listed as a party in this appeal, no brief has been filed on the State's behalf.

trial court, however, that this challenge concerned only the method of the annexation rather than the annexation itself. The alleged defect went to only the issue of compliance with the statutory requirements for annexation. It would not preclude the City from annexing the property if the required statutory procedures had been followed. Appellants, then, have shown that the ordinance was merely voidable rather than void.[13]

2. Appellants further contend that, because the County alleged infringement of its statutory rights and proprietary interests, it had standing to maintain this action. We find no reversible error.

The trial court held that the County "cannot show that there has been an infringement of its own proprietary interests or statutory rights." In so holding, the trial court focused on the proof adduced at the merits hearing of such an infringement rather than on the allegations in the complaint.

Assuming without deciding that the complaint contained allegations sufficient to give the County standing to challenge the annexation ordinance, we nevertheless hold there is ample authority to affirm the trial court's determination that the County's failure to prove these allegations at the merits hearing ultimately defeated its claim to standing.[14] Moreover, Appellants have not

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[13] See Quinn, 303 S.C. at 407, 401 S.E.2d at 167 (holding opponents to an annexation failed to establish standing in that they challenged only "the annexation method in seeking to have the annexation declared void and "raise[d] no claim that it was unauthorized by law"); St. Andrews, 320 S.C. at 323, 529 S.E.2d at 65 ("One cannot merely challenge the methods by which the annexation occurred, but must allege the annexation is unauthorized by the laws of this State.").

[14] See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (stating elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case"; therefore, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the

argued in their brief that the trial court erred in finding they made an insufficient showing at the merits hearing that the County had standing to pursue this action.[15]

3. Gnann argues she has standing to pursue this action by virtue of the South Carolina Uniform Declaratory Judgments Act[16] and her status as a taxpayer. We disagree.

In support of her argument, Gnann cites Sloan v. School District of Greenville County[17] for the proposition that to establish standing she need only demonstrate a justiciable controversy. The presence of a justiciable controversy, however, does not by itself give a litigant standing to sue. As the supreme court has stated, standing requires "a personal stake in the subject matter of the lawsuit, i.e., one must be a real party in interest."[18] With regard to taxpayer standing,

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successive stages of the litigation"), cited in Beaufort Realty Co. v. Beaufort County, 346 S.C. 298, 301 and 303, 551 S.E.2d 588, 589 and 590 (Ct. App. 2000), cert. denied, (March 6, 2002); Shillito v. City of Spartanburg, 214 S.C. 11, 22, 51 S.E.2d 95, 99 (1948) ("As a rule, private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally.") (emphasis added).

[15] See Rule 207(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994) (deeming an issue abandoned because the appellant failed to provide pertinent argument or supporting authority); Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993) (stating the appellate court will affirm a ruling if the complaining party does not challenge that ruling).

[16] S.C. Code Ann. §§ 15-53-10 through -140 (1976 & Supp. 2001).

[17] 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000).

[18] Evins v. Richland County Hist. Pres. Comm'n, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000).

"[t]he general rule is that a taxpayer may not maintain a suit to enjoin the action of State officers when he has no special interest and his only standing is the exceedingly small interest of a general taxpayer."[19] Stated another way, absent a truly individual injury, Gnann, as a taxpayer plaintiff, must demonstrate some overriding public purpose or concern to confer standing to sue on behalf of her fellow taxpayers.[20]

On appeal, Appellants argue only that Gnann had taxpayer standing because of the allegations in the complaint that "the actions of the city in annexing the subject property are void and were done without lawful authority" and would therefore result in the expenditure of municipal funds to provide services to the annexed territory. It would appear to us, then, that Gnann has not alleged any injury unique to her as a taxpayer. Also, given our determination

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[19] Crews v. Beattie, 197 S.C. 32, 49, 14 S.E.2d 351, 357-58 (1941).

[20] The prerequisites for challenging a municipal ordinance based on taxpayer standing has been generally described as follows:

> [T]axpayers are not authorized to maintain a suit to test the validity of an ordinance simply because they are taxpayers. They must show that the effect of the ordinance will be to increase their burden of taxation, to divert a fund from a purpose intended by law, or to affect them differently from other citizens in a similar position. It is not sufficient that they maintain the proceeding merely as a citizen to protect abstract rights. Nor does mere difference in degree of interest of one taxpayer from that of another in itself entitle the former to maintain a suit to test the validity of the ordinance. A taxpayer, at large, of a municipality, having no private interest in the question any more than other taxpayers, cannot maintain a suit in equity, as against the public authorities, to set aside or prevent illegal acts.

6 Eugene McQuillin, The Law of Municipal Corporations § 20.19 (1998) (emphasis added).

that the annexation was voidable rather than void, we agree with the trial court that Gnann failed to demonstrate an overriding public purpose or concern that would give her taxpayer standing to challenge the annexation.[21]

AFFIRMED.

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

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[21] See Quinn, 303 S.C. at 407, 401 S.E.2d at 166-67 ("Generally, unless an annexation ordinance is 'absolutely void', i.e., not authorized by law, private individuals may not challenge its validity.") (emphasis in original).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Willie Robertson, Raymond Brown and Richard Pinckney, individually, and d/b/a Hollywood Financial Enterprises, Inc.,
Appellants,

v.

First Union National Bank, formerly known as First Union National Bank of South Carolina, and Atlantic Appraisals,
Respondents,

v.

United States of America by and through its agency, The Department of Treasury-Internal Revenue Service, South Carolina Department of Revenue and Taxation and Charleston County Business License User Fees Department,
Respondents.

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Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

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Opinion No. 3491
Submitted April 8, 2002 - Filed May 13, 2002

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AFFIRMED

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Edward M. Brown, of Charleston, for appellant.

W. Andrew Gowder, Jr., of Pratt-Thomas, Pearce, Epting & Walker, of Charleston, for respondent First Union National Bank.

Stephen P. Groves, Sr., H. Michael Bowers and Stephen L. Brown, all of Young, Clement, Rivers & Tisdale, of Charleston, for respondent Atlantic Appraisals.

LaVerne H. Manning, of US Attorney's Office, of Columbia, for respondent United States of America.

Joe S. Dusenbury, Jr., of SC Department of Revenue, of Columbia, for respondent SC Department of Revenue and Taxation.

Samuel W. Howell, IV, of Howell & Linkous, of Mt. Pleasant, for respondent Charleston County Business License User Fees Department.

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HEARN, C.J.: Willie Robertson, Raymond Brown, and Richard Pinckney (Appellants) brought an action against First Union National Bank (Bank) and Atlantic Appraisals (Atlantic) claiming they were harmed by entering into a mortgage agreement secured by property with an over-estimated appraisal value and alleging various causes of action. Bank and Atlantic filed motions for summary judgment on all causes of action. The trial judge granted the motions. We affirm.

FACTS

In 1993, Appellants entered into an agreement with Robert P.

Chaplin, III, to purchase a piece of commercial property located in Hollywood, South Carolina. The parties agreed upon a purchase price of $200,000, and Appellants made no attempt to negotiate for a lower price.

After agreeing to purchase the property, Appellants approached Bank to obtain financing. Bank executed a commitment letter of intent to loan Appellants the purchase money "not to exceed $160,000.00 or 80% of the appraised value, whichever is less," to be secured by the real estate. Bank then requested that Atlantic prepare a written appraisal of the property. The appraisal showed the market value of the property in November 1993 was $200,000. Both Robertson and Brown testified they did not see the 1993 appraisal until 1998.

Appellants executed a note and mortgage in favor of Bank for the principal loan amount of $160,000.00. The mortgage provided that Appellants would be responsible for paying off the balance of the debt in five years. At the end of the mortgage period, a balloon payment was due and Bank again hired Atlantic to appraise the property.

G. Hammond Bamberg, III, performed the 1998 appraisal and testified that in 1993, "the building was in good condition and in the photographs it was all painted up and nice looking and really did look good and apparently it was a hundred percent occupied at the time." Bamberg testified that the Hollywood rental market had declined since 1993. Moreover, Bamberg noted that "paint was peeling off" the building, "shrubs were growing through the compressor," and the building "appeared to be about half vacant." Atlantic found the 1998 fair market value of the property was only $80,000. In Bamberg's opinion, the difference in the appraised values resulted from the "condition of the improvements" to the property and the lack of any documentation regarding the leases and the income for the property.

When the final $133,000 payment was due, Appellants defaulted, and Bank commenced foreclosure proceedings. However, before the property could be sold, Appellants filed a complaint against Bank alleging six causes of action for: (1) fraud, (2) civil conspiracy, (3) breach of implied covenant of

good faith and fair dealing, (4) negligent misrepresentation, (5) breach of contract, and (6) violation of the South Carolina Unfair Trade Practices Act. Bank answered and counterclaimed for foreclosure. Appellants later amended their complaint to add Atlantic as a party defendant to the causes of action for civil conspiracy, negligent misrepresentation, and unfair trade practices.

Both Bank and Atlantic filed motions for summary judgment. At the summary judgment hearing, Appellants argued the discovery process was not yet complete. They also produced an unsigned "Appraisal Review" document dated July 26, 1999, prepared by Fred J. Attaway, Jr., as the opinion of an expert witness questioning the 1993 appraisal performed by Atlantic. Appellants requested the court to "keep the record open" so that they could provide the court with a copy of Attaway's statement. Respondents objected to the introduction of the document as being untimely presented. The trial judge excluded Attaway's Appraisal Review and granted summary judgement on all of Appellants' causes of action.

STANDARD OF REVIEW

"Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Toomer v. Norfolk So. Ry. Co., 344 S.C. 486, 489, 544 S.E.2d 634, 635 (Ct. App. 2001); see also Rule 56(c) SCRCP. Summary judgment is not appropriate, however, where further inquiry into the facts of the case is desirable to clarify the application of the law. Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing & Regulation, 337 S.C. 476, 484, 523 S.E.2d 795, 799 (Ct. App. 1999). In determining whether any triable issue of fact exists as will preclude summary judgment, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998). If triable issues exist, those issues must go to the jury. Rothrock v. Copeland, 305 S.C. 402, 405, 409 S.E.2d 366, 367 (1991).

DISCUSSION

I. Ongoing Discovery

Appellants first argue that summary judgment was premature because they did not have a chance to finish discovery. We disagree.

Appellants' original complaint against Bank was filed on January 25, 1999, and their amended complaint adding Atlantic as a defendant was filed more than a year later on May 23, 2000. Bank answered the original complaint in March 1999 and Atlantic answered the amended complaint in May 2000. However, before Atlantic was added as a party, Charles Middleton, owner of Atlantic, was deposed on December 21, 1999 and April 25, 2000. Atlantic did not file its motion for summary judgment until August 1, 2000.

Under these facts, Bank and Atlantic were clearly authorized under our rules of procedure to file their summary judgment motion. "A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, **at any time after the expiration of 30 days from the commencement of the action** . . . move . . . for a summary judgment in his favor upon all or any part thereof." Rule 56(a), SCRCP (emphasis added).

In this case, although Respondents' motions for summary judgment were filed less than three months after Atlantic was made a party, the motions were filed more than a year after Appellants initiated the action and more than eight months after Middleton's initial deposition. We agree with the trial court that any further depositions would not have assisted Appellants. Generally, it is not premature for the trial court to grant summary judgment after all relevant parties have been deposed because the litigants have had a full and fair opportunity to develop the record in the case. See George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 594, 545 S.E.2d 500, 506 (2001) (finding summary judgment was not premature because defendant "had a full and fair opportunity to develop the record on this issue, but failed to do so."); see also Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 128-29, 542 S.E.2d 736, 742-43 (Ct. App. 2001) (stating it was not error to grant summary judgment

because no further discovery would have contributed to the resolution of the case).

Additionally, it appears that Appellants did protect their interests regarding their notices to take the depositions of several bank employees. Although these notices were sent before Respondents' motions, Appellants did not request protection from the court. Rather, at the summary judgment hearing, Appellants only asked that the trial judge hold the record open so that they could supplement it with their purported expert's opinion. Moreover, the existence of these notices does not make the motions for summary judgment premature. See Degenhart v. Knights of Columbus, 309 S.C. 114, 118, 420 S.E.2d 495, 497 (1992) (finding that summary judgement was not premature when the Degenharts did not seek a continuance or ask the master-in-equity to hold his decision in abeyance pending the outcome of their motion to compel discovery). Thus, we find no abuse of discretion in the trial court's finding that discovery was complete for purposes of summary judgment. See Bayle, 344 S.C. at 128, 542 S.E.2d at 742 ("The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion.").

II. Summary Judgment on each Cause of Action

Appellants next claim that the trial judge erred in granting Bank's and Atlantic's motion for summary judgment on each cause of action. We disagree.

A. Fraud

Appellants claim Bank and Atlantic committed fraud by pre-determining the amount of the appraisal based on the amount Bank wanted to loan.

> To establish fraud, a party must prove: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or reckless disregard of its truth or falsity; (5) intent that the

> representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

Sorin Equip. Co., v. The Firm, Inc., 323 S.C. 359, 365-366, 474 S.E.2d 819, 823 (Ct. App. 1996). Failure to prove any element of fraud is fatal to the action. Id. Furthermore, "[f]raud cannot be presumed; it must be proved by clear, cogent, and convincing evidence." Foxfire Village, Inc. v. Black & Veatch, Inc., 304 S.C. 366, 374, 404 S.E.2d 912, 917 (Ct. App. 1991).

Here, it is clear that Appellants have not established the requisite elements for fraud. Appellants' lack of reliance is glaringly absent. The purchase price for the commercial property was already agreed upon before Appellants approached Bank for a loan. Significantly, Appellants did not receive a copy of the 1993 appraisal until 1998. Even if they had received a copy of this appraisal, both Robertson and Brown testified that they did not actually rely on it in purchasing the property. Therefore, Appellants could not have relied upon the appraisal in purchasing the property. Moreover, "[t]here [can] be no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence." West v. Gladney, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000) (citations and internal quotations omitted). Here, the price for the property was not negotiated and Appellants made no effort to independently ascertain its value before purchase. Because Appellants accepted the seller's representation of the value of the property without question or confirmation and have not presented any evidence that the property was not worth $200,000 at the time of the 1993 appraisal, we find no evidence of fraud.

B. Civil Conspiracy

Appellants claim Bank and Atlantic conspired with each other for the purpose of having them buy the property at an inflated value. We disagree.

A civil conspiracy exists when there is (1) a combination of two or

more persons, (2) for the purpose of injuring the plaintiff, (3) which causes the plaintiff special damage. Island Car Wash, Inc. v. Norris, 292 S.C. 595, 600, 358 S.E.2d 150, 152 (Ct.App. 1987). "Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence. . . ." Id., 292 S.C. at 601, 358 S.E.2d at 153. Thus, "[i]n order to establish a conspiracy, evidence, either direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." First Union Nat'l Bank of South Carolina v. Soden, 333 S.C. 554, 575, 511 S.E.2d 372, 383 (Ct.App. 1998).

Here, Atlantic was employed by Bank and acting as the agent of only Bank. Bank retained Atlantic merely to appraise the property in 1993 and 1998. Significantly, Atlantic's appraiser testified that he was never told why the property was being appraised in the first place. Similarly, a loan officer at Bank testified that it was Bank's practice to appraise properties when new or re-financed loans were contemplated. Thus, because Appellants' have not presented any evidence of a concerted effort by Bank and Atlantic to harm Appellants, we find no proof of civil conspiracy.

C. Negligent Misrepresentation

Appellants next assert they were the victims of a negligent misrepresentation resulting from the 1993 appraisal. In a claim for negligent misrepresentation, a plaintiff must prove that:

> (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.

deBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 266-67, 536 S.E.2d 399, 405

(Ct. App. 2000) (citation omitted). For purposes of proving negligent misrepresentation, evidence that a statement was made in the course of the defendant's business, profession, or employment is sufficient to prove the defendant's pecuniary interest in making the statement, even if the defendant received no consideration for it. AMA Mgmt. Corp. v. Strasburger, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App.1992).

Appellants' negligent misrepresentation claim fails because they have failed to prove reliance on the 1993 appraisal. It is undisputed that the parties agreed to a contract price without seeing an appraisal. Additionally, Atlantic was employed by and acting as an agent for Bank; thus, it had no independent duty to Appellants. Furthermore, we do not read Bank's commitment letter written before the appraisal was made as anything other than a promise to finance up to $160,000. Had the property been appraised at a value of $80,000 in 1993, then bank was committed to loaning no more than 80% of the market value, or $64,000.

Moreover, there is no evidence that the subject property was worth less than $200,000 in 1993. At that time, the property was in good repair and fully occupied. Unfortunately, the property did not retain its value. Bamberg testified that the property appeared to be in a very different state of repair and occupancy in 1998. We find no evidence in the record to refute this testimony and thus find no evidence of negligent misrepresentation.

D. South Carolina's Unfair Trade Practices Act

Under South Carolina's Unfair Trade Practices Act (UTPA),[1] unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are deemed unlawful. S.C. Code Ann. § 39-5-20 (1985). A plaintiff bringing a private cause of action under the UTPA must allege and prove the defendant's actions adversely affected the public interest. Daisy Outdoor Adver. Co. v. Abbott, 322 S.C. 489, 493, 473 S.E.2d 47, 49

[1]S.C. Code Ann. §§ 39-5-10 through -350 (1985 & Supp. 2001).

(1996). "Therefore, conduct which only affects the parties to the transaction provides no basis for a UTPA claim." Jefferies v. Phillips, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994).

The trial judge found that "there is no evidence of an act or practice that is unfair or one that affects the public interest." We agree. Bank loans money based on the appraised value of the secured property. In its commitment letter, Bank limited the promised loan amount to Appellants as "not to exceed $160,000 or 80% of the appraised value, whichever is less." Bank then had the property appraised for its own benefit. Had the property been appraised for less than $200,000, Bank would have adjusted the loan amount accordingly. We find nothing in the record, other than Appellants' unproven allegations and inferences of impropriety and coincidences, to suggest that Bank deliberately set out to loan Appellants $160,000 secured by insufficient collateral. Additionally, we can think of no logical reason why Bank would make it a practice to intentionally make loans for an amount in excess of the collateral's value and risk substantial losses in the event of default. Therefore, summary judgment on this issue was proper.[2]

III. Supplementing the Record

Finally, Appellants argue they should be able to supplement the record with the opinion of their expert, Fred J. Attaway, Jr., regarding the propriety of the 1993 appraisal. They claim his opinion would prove "that fraud is in the appraisal itself" and present an issue of fact warranting the continuation of this action beyond summary judgment. We disagree.

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[2]Appellants also assert that Bank failed to follow its own procedures established for its loan transactions. For example, Appellants state that Bank committed to a loan before having an appraisal of the property done and that Bank apparently never collected the 1993 appraisal fee from Appellants. Nonetheless, even if such violations did occur, we fail to see how they assist Appellants' position. These alleged violations would only cause harm to Bank, for it could find itself potentially obligated on a loan it would otherwise make.

Our rules of civil procedure required Appellants to present admissible evidence to the trial judge in the form of affidavits or other "pleadings, depositions, answers to interrogatories, and admissions on file." Rule 56(c), SCRCP. "Affidavits are the principal means of bringing information before the court in a motion for summary judgment." James F. Flanagan, South Carolina Civil Procedure 454 (2nd ed. 1996). Such "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e), SCRCP. Moreover, the party opposing the motion for summary judgment "may serve opposing affidavits not later than two days before the hearing." Id.

Here, Attaway's opinion was in the form of a three page unsigned statement dated July 26, 1999. To be admissible, Attaway's opinion should have been signed and submitted at least two days before the hearing. Attaway's "Appraisal Review" failed to conform in both respects and thus was properly excluded.

Moreover, after reviewing Attaway's "Appraisal Review" we are unable to discern if he is familiar with the the 1993 appraisal or if he applied or is familiar with the Standards of Professional Appraisal Practice. See Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 303, 433 S.E.2d 871, 873 (Ct. App. 1993) (finding affidavit inadmissible because it failed to assert that the affiant knew or believed the materials were defective, or assert the basis for any such belief or knowledge). The only indication of Attaway's expertise is in the suffixes "MAI" and "SRA" following his name and identifying him as the reviewer of the prior appraisal.

CONCLUSION

For the foregoing reasons, the final order of the trial judge is

AFFIRMED.

GOOLSBY and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Eric A. Smith,

Appellant,

v.

South Carolina Insurance Company,

Respondent.

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

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Opinion No. 3492
Heard April 10, 2002 - Filed May 13, 2002

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AFFIRMED

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W. Lamar Flatt, of Best & Flatt, of Columbia, for appellant.

William P. Davis, of Baker, Ravenel & Bender, of Columbia, for respondent.

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ANDERSON, J.: Appellant Eric A. Smith brought this declaratory judgment action seeking reformation of an insurance policy issued

to Roosevelt Ladson, alleging the insurer failed to make a new offer of underinsured motorist ("UIM") coverage when a second vehicle was added to the policy. The Circuit Court denied the request for reformation, finding an insurer is not required to make a new offer of UIM coverage when an insured adds additional vehicles to an existing policy. We affirm.

FACTS/PROCEDURAL BACKGROUND

This action arises out of an automobile accident in which Smith was injured while riding as a passenger in a Hyundai owned and driven by Ladson. Smith is seeking to reform Ladson's automobile insurance policy so as to include UIM coverage for the accident.

Ladson was covered under an automobile insurance policy issued by the respondent, South Carolina Insurance Company ("SCIC"). He initially obtained a one-year policy for coverage on a 1990 Geo Metro for the period May 7, 1999 to May 7, 2000. The policy liability limits were 15/30/10.[1] On the day of his application, Ladson signed a form declining UIM coverage. The parties have stipulated the form was approved by the South Carolina Department of Insurance for use in offering optional coverages (such as UIM), which insurers were required to offer under South Carolina law. On February 9, 2000, Ladson added a second vehicle to his policy, a 1994 Hyundai. It is undisputed that SCIC did not make a second offer of UIM coverage to Ladson when the Hyundai was added to the policy.

On February 17, 2000, Smith was injured while riding as a passenger in the Hyundai driven by Ladson. Smith settled his claim against Ladson for the policy's liability limit of $15,000 and executed a covenant allowing him to pursue any available UIM coverage.

Smith brought this declaratory judgment action against SCIC seeking

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[1] Bodily injury liability limits were $15,000 per person and $30,000 per accident, with a property damage liability limit of $10,000 per accident.

reformation of the policy issued to Ladson so as to include UIM coverage because SCIC did not make a new offer of UIM coverage when Ladson added the Hyundai. Both parties moved for summary judgment.

The Circuit Court granted SCIC's motion for summary judgment and ruled SCIC was not required to make a new offer of UIM coverage when Ladson added the second vehicle to his policy, relying upon § 38-77-350(C) of the South Carolina Code. Smith appeals.

STANDARD OF REVIEW

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 a judgment as a matter of law." Rule 56(c), SCRCP; see also Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party opposing summary judgment. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997).

LAW/ANALYSIS

In a question of first impression in South Carolina, Smith contends the Circuit Court erred in finding an insurer is not required to make a new offer of UIM coverage when an insured adds an additional vehicle to an existing automobile insurance policy. We disagree.

Section 38-77-160 states automobile insurance carriers "shall … offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist." This statute mandates that "underinsured motorist coverage in any amount up to the insured's liability coverage **must** be offered to a policyholder." Garris v. Cincinnati Ins. Co., 280 S.C. 149, 154, 311 S.E.2d

723, 726 (1984) (emphasis added).

Our Supreme Court has held that "it is clear from the language of the statute that the burden is on the insurer to effectively transmit the offer to the insured." State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987). In Wannamaker, the Court held "the statute mandates the insured to be provided with adequate information, and in such a manner, as to allow the insured to make an intelligent decision of whether to accept or reject coverage." Id. The Supreme Court expressly adopted a four-part test to determine whether an insurer has complied with its duty to offer the optional coverage:

> (1) the insurer's notification process must be commercially reasonable, whether oral or in writing;
>
> (2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms;
>
> (3) the insurer must intelligibly advise the insured of the nature of the optional coverage; and
>
> (4) the insured must be told that optional coverages are available for an additional premium.

Id.

"If the insurer fails to comply with this duty, the policy will be reformed, by operation of law, to include UIM coverage up to the limits of liability insurance carried by the insured." Rabb v. Catawba Ins. Co., 339 S.C. 228, 232, 528 S.E.2d 693, 694-95 (Ct. App. 2000), cert. denied. Apparently in response to Wannamaker, the legislature enacted § 38-77-350 of the South Carolina Code. Id. at 232, 528 S.E.2d at 695.

This appeal involves an interpretation of subsection (C) of § 38-77-350, which provides as follows:

> An automobile insurer is not required to make a new offer of coverage on any automobile insurance policy which renews, extends, changes, supersedes, or replaces an existing policy.

The Circuit Court found that a new UIM offer was not required and granted summary judgment to SCIC, noting "[s]ubsection (C) [of § 38-77-350] provides that the insurer need not make a new offer at renewal, provided that one such offer has been made in connection with an existing policy. There is no mention of making offers for each vehicle on the policy or making additional offers when vehicles are added to the policy."

The Circuit Court further noted the form on which Ladson was offered UIM coverage when he initially obtained his insurance policy contained the following notice:

> You will not be presented with another copy of this Form by your insurance agent or your current insurance company when you extend, change, supersede, or replace your automobile liability insurance policy.

"The cardinal rule of statutory construction is that we are to ascertain and effectuate the actual intent of the legislature." Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989) (citations omitted). "[W]ords used therein must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation." Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (citations omitted). "The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Id. (citations omitted). This Court's primary function in interpreting a statute is to ascertain the intent of the General Assembly. A statute must receive a practical and reasonable interpretation consistent with the "design" of the legislature.

On appeal, Smith cites McDonald v. South Carolina Farm Bureau Insurance Company, 336 S.C. 120, 518 S.E.2d 624 (Ct. App. 1999), in which

we held that an insurer should have offered UIM coverage to McDonald when he bought his mother's car and the insurer substituted his name for hers on the automobile insurance policy. We rejected the insurer's argument that, under § 38-77-350(C), it was not required to offer McDonald UIM coverage because the insurance policy merely substituted his name for his mother's as the named insured on the policy.

We find <u>McDonald</u> inapposite because in that case, McDonald had never been a named insured with Farm Bureau or was given the opportunity to accept or reject UIM coverage. When McDonald became the named insured on the policy, it altered the legal relationship of the parties. As we observed:

> Where Section 38-77-350(C) states the insured is not required to make a "new" offer, it clearly envisions the circumstances where the insurer has already made an "old" offer.
>
> We find this reasoning applicable to the present case. Removing [the mother] from the policy and substituting McDonald as the named insured was not a mere policy change. It was the creation of a new insurance policy with a new named insured. Before McDonald became the named insured, he had never been given the opportunity to accept or reject UIM coverage. Therefore, an offer of UIM coverage to McDonald was required under Section 38-77-160.

<u>Id.</u> at 125, 518 S.E.2d at 626 (citing <u>Ackerman v. Travelers Indem. Co.</u>, 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995)).

In this case, our legislature has not defined the circumstances constituting a "change" in coverage, but the plain language of section 38-77-350(C) leads us to the ineluctable conclusion that the addition of extra vehicles to an existing insurance policy does **<u>not</u>** require an additional offer of UIM coverage where the insurer has previously made a proper offer to the insured.

Other Jurisdictions

We are aware of some divergence of opinion in other jurisdictions considering this issue. Compare Makela v. State Farm Mut. Auto. Ins. Co., 497 N.E.2d 483 (Ill. App. Ct. 1986) (holding, in a case involving a multiple-vehicle policy, that a new offer of uninsured motorist coverage was not required for the addition of a new vehicle, which was comparable to the renewal or supplementation of an existing policy, events that did not trigger the statutory requirement of a new offer; the court's holding was based, in part, upon the principle that an insurance contract is personal to the insured because it insures the risk of loss to the insured and does not attach to specific vehicles); Pierce v. Allstate Ins. Co., 848 P.2d 1197, 1200-01 (Or. 1993) (en banc) (concluding that, although an insurer by statute must offer uninsured coverage when it initially issues a policy, it need not make another offer when an insured adds, deletes, or replaces vehicles, the court noting that "once an insured has been made aware that the coverage is available, an insurer is not obligated … to inquire continuously whether the insured really meant to refuse") (quoting White v. Safeco Ins. Co. of Am., 680 P.2d 700 (Or. Ct. App. 1984)); El-Habr v. Mountain States Mut. Cas. Co., 626 S.W.2d 171, 172 (Tex. Ct. App. 1981) (holding an endorsement to an existing insurance policy which added a new vehicle "did not create a new contract of insurance, but was merged with and became a part of the original policy"), with Withrow v. Pickard, 905 P.2d 800 (Okla. 1995) (noting the addition of a vehicle constitutes a new policy distinct from the original which requires that uninsured coverage be offered in conjunction with the new vehicle); Allstate Ins. Co. v. Kaneshiro, 998 P.2d 490 (Hawaii 2000) (concluding a new offer of optional UM/UIM coverage was required where a party was substituted for the named insured and a vehicle was added to the policy as they constituted material changes to the existing policy).

CONCLUSION

We hold the addition of a new vehicle is a "change" to an existing policy as contemplated by § 38-77-350(C) and thus a new offer of UIM coverage is not mandated. We rule that an insurer is **not** required to make a new offer of UIM coverage when an insured adds an additional vehicle to an existing automobile

insurance policy. Reformation of the insurance policy was not required in this case based on the plain language of § 38-77-350(C). Any limitation in the scope of the statute's application is a matter best left for the consideration of our legislature.

AFFIRMED.

CURETON, J., and THOMAS, Acting Judge, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Carjow, LLC,

Respondent,

v.

Rev. John D. Simmons,

Appellant.

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

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Opinion No. 3493
Submitted April 8, 2002 - Filed May 13, 2002

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AFFIRMED

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Robert L. Gailliard, of Charleston, for appellant.

William J. Hennessy, Jr., of Dodds & Hennessy, of Charleston, for respondent.

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HEARN, C.J.: After purchasing the New Hope Pentecostal Holiness Church (New Hope) at a foreclosure sale, Carjow, LLC brought this

action to recover possession or the equivalent value of church pews and ceiling fans/lights. It also sought damages for lost rent caused by their removal. The master-in-equity found that the pews and ceiling fans/lights were fixtures and granted Carjow its requested relief. Rev. John Simmons, the former pastor, appeals. We affirm.

FACTS

In April 1987, New Hope purchased a church building at 5801 Robinson Street in Hanahan, South Carolina. The First Federal Savings & Loan Association of Charleston (Bank) financed the purchase. Rev. Simmons testified that the pews were obtained in a separate transaction.[1]

In 1989, Hurricane Hugo damaged the church. At that time, the pews were unfastened from the floor and moved around the room to avoid water drips and allow for repairs to the ceiling.[2] Rev. Simmons testified that they moved the pews to avoid leaks "[e]very time it rained" but "when we put it back down, we put it back down like we took it up" and the intention was that the pews would eventually be reattached.

In 1999, the Bank began foreclosure proceedings on the property. Frances B. Kerr appraised the property for the Bank. He made drawings and took pictures showing the pews and ceiling fans/lights inside the sanctuary. Kerr testified he did not check to see if the pews were fastened to the floor; however, he testified that his appraisal included the pews and ceiling

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[1]Rev. Simmons testified he installed an air conditioning unit in the church before the sale, and, in exchange, the prior owner of the church property agreed not to remove the pews which were attached to the floor with "L" brackets.

[2]Photographs in the record of the empty sanctuary show markings on the floor including holes and some brackets where the pews had been.

fans/lights.[3] Walter Carr, a member of Carjow, testified he inspected the outside of the property but acknowledged that he did not go inside. Instead, he received some of the appraisal documents including the pictures of the church's interior.

After being told by the Bank to vacate the premises, Rev. Simmons removed the pews and the ceiling fans/lights. Since then, he has stored the pews at his new church and the ceiling fans/lights at his house. On May 8, 1999, Carjow purchased the Church for $125,001.00. When Carr entered the church premises, he observed that the pews and ceiling fans/lights were missing.

Carr demanded Rev. Simmons return the pews and ceiling fans/lights. Rev. Simmons testified Carr offered $2,500 for the return of the pews, and Rev. Simmons countered with an offer of $3,500 which was refused. On September 1, 1999, Carjow rented the premises to the Church on the Rock. However, because the facility had no pews or ceiling fans, Carjow and its tenant reached a subsequent agreement reducing the rent by $366 per month "until such time as those items are recovered." When the pews were not returned, Carjow initiated this action.

The matter was referred to the master by consent of the parties. At the hearing, Carr presented evidence that the replacement cost of the pews was $27,438.45 and the replacement cost of comparable ceiling fans/lights was $154.71 each, excluding $50 per fixture for installation. The master found that the pews and the ceiling fans/lights were fixtures of the church and ordered Rev. Simmons to return them and that Carjow be awarded $5,490.00 for lost rent and $400.00 for the cost of reinstalling the ceiling fans/lights. He further provided if Rev. Simmons refused to return the fixtures, Carjow would be granted an additional $21,000.00 for the replacement cost of the fixtures. Rev. Simmons appeals.

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[3]He estimated the pews were worth $28,000 to $30,000 depreciated to $20,000.

DISCUSSION

I. Fixtures

Rev. Simmons argues that the pews and the ceiling fans/lights removed from the property were not fixtures. In this case, we disagree.

In determining whether a particular action sounds in law or equity, this court must discern the main purpose of the action, generally from the body of the complaint. Ins. Fin. Servs., Inc. v. S.C. Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978); see Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 188 (1999). Based on our reading of the complaint, we find this action's main purpose is to recover the pews or their equivalent value plus any other damages caused by Rev. Simmons's detention of the property. Therefore, we believe this action is appropriately analyzed as a conversion action seeking damages. See Oxford Fin. Cos. v. Burgess, 303 S.C. 534, 539, 402 S.E.2d 480, 482 (1991) ("A claim for conversion can be based on an unauthorized detention of property, after demand."). "An action for damages for conversion is an action at law." Blackwell v. Blackwell, 289 S.C. 470, 471, 346 S.E.2d 731, 732 (Ct. App. 1986). As such, we must affirm the master's order if any evidence reasonably supports his factual findings. Id.; accord Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976) ("In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings.").

The determination whether or not an item is a fixture is a mixed question of law and fact. Carson v. Living Word Outreach Ministries, Inc., 315 S.C. 64, 70, 431 S.E.2d 615, 618 (Ct. App. 1993). "It is incumbent on the court to define a fixture, but whether it is such in a particular instance depends upon the facts of that case, unless the facts are susceptible of but one inference." Id. South Carolina courts have defined a fixture as " an article which was a chattel, but by being physically annexed to the realty by one having an interest in the soil becomes a part and parcel of it." Id. Mere affixation does not automatically

render property a fixture. Creative Displays, Inc. v. S.C. Highway Dep't, 272 S.C. 68, 72, 248 S.E.2d 916, 917 (1978). We find the converse is also true– severance of an item for some temporary purpose will not change its character from a fixture back to personal property. See 35A Am. Jur. 2d Fixtures § 110 (2001). In determining whether an item is a fixture, courts should consider the following factors: "(1) mode of attachment, (2) character of the structure or article, (3) the intent of the parties making the annexation, and (4) the relationship of the parties." Hyman v. Wellman Enters., 337 S.C. 80, 84, 522 S.E.2d 150, 152 (Ct. App. 1999).

The master, citing Carson, applied the correct definition and test for determining whether an item is a fixture. Accordingly, even if this court might have reached a different result based on its view of the evidence, we must affirm if there is any evidence supporting his factual determination that this test was met. Mode of attachment, character of the property, and relationship of the parties are not disputed. Therefore, our analysis hinges on the intent of the parties.

With respect to the ceiling fans/lights, these items were attached to the property at the time of the sale and were necessary for the comfort of the building's occupants. The record reflects an assumption by the purchaser and the appraiser that these items would stay in place after the sale. Therefore, we find that the evidence supports the master's determination that these items were fixtures. See Equibank v. United States, 749 F.2d 1176, 1180 (5th Cir. 1985) ("[A] lamp which is simply plugged into a socket is a [sic] movable and may be removed from a residence without violating the mortgage, but an installed light fixture, be it an expensive, antique chandelier or a garden-variety fixture, becomes a component part of the building.").

Regarding the pews, we decline to hold that this type of property is a fixture as a matter of law. Instead, we look to the facts of this case. It is undisputed that the pews were physically attached to the church building when New Hope bought the property. Moreover, the only reason the pews were

detached from the floor was because of hurricane damage, and Rev. Simmons testified that the intention was always that they would reattach the pews. Carr testified that the pew locations were clearly marked by the portions of the sanctuary floor that were not faded by sunlight and that some holes and brackets still marred the floor.

We find the analysis of Sims v. Williams, 441 S.W.2d 385 (Mo. Ct. App. 1969) persuasive here. In Sims, the trustees of a church sought to recover eighteen church pews which were removed from the property. The respondent, who purchased the church building in a foreclosure sale, claimed the pews as fixtures. The trial court agreed and the appellate court affirmed, finding the clear intention was that the pews became a part of the church property. "They were built for this church and installed therein to be a part of and complete the church. They were bolted to the floor in such manner that their removal damaged the floor of the building." Id. at 387.

Based on the above, we find there is evidence supporting the trial court's ruling that the pews were fixtures and affirm.

II. Damages for Lost Rental Income

Rev. Simmons next argues Carjow is not entitled to damages for loss of rental income caused by the removal of the pews because the purported loss was based on a negotiated agreement and "speculative at best." We disagree.

Actual damages are awarded to compensate for proven injury or loss. Black's Law Dictionary 394 (7th ed. 1999). Here, Carr testified he was leasing the church building to the Church of the Rock. He testified that the monthly rent of the facility with ceiling fans/lights and the pews would be $1,592.00. Without these fixtures, however, Carr testified the property only rented for $1,226.00 per month. Rev. Simmons did not present evidence that these values were inaccurate.

As a property owner, Carr was competent to give his opinion as to the property's rental value and his damages. See Seaboard Coast Line R.R. v. Harrelson, 262 S.C. 43, 46, 202 S.E.2d 4, 5 (1974) ("[A] landowner, who is familiar with his property and its value, is allowed to give his estimate as to the value of the land and damages thereto, even though he is not an expert."). Here, the master accepted Carr's estimate regarding his damages for lost rent. We give deference to the master's factual findings because he had a better vantage point from which to judge the witnesses' credibility. See McDuffie v. O'Neal, 324 S.C. 297, 306, 476 S.E.2d 702, 706 (Ct. App. 1996). "[T]he conclusions of the master who observed the demeanor and appearance of the witnesses have peculiar value on questions of credibility of witnesses." Patterson v. Goldsmith, 292 S.C. 619, 626, 358 S.E.2d 163, 167 (Ct. App. 1987). Accordingly, we affirm the master's award as an appropriate measure of Carjow's damages for lost rent.

AFFIRMED.

GOOLSBY and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Mark Lee,
Employee/Claimant,

Appellant,

v.

Harborside Café and The Hartford Company, Employer/Carrier,

Respondents.

____

Appeal From Beaufort County
J. Ernest Kinard, Jr., Circuit Court Judge

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Opinion No. 3494
Submitted April 8, 2002 - Filed May 13, 2002

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AFFIRMED

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Samuel S. Svalina and Jennifer I. Campbell, both of Svalina Law Firm, of Beaufort, for appellant.

Stephen L. Brown, F. Drake Rogers and Stephen P. Groves, all of Young, Clement, Rivers & Tisdale, of Charleston, for respondents.

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HOWARD, J.: In this workers' compensation action, Mark Lee alleges he sustained a psychological impairment in addition to a physical injury while working as a cook for the Harborside Café ("Employer"),[1] in Hilton Head, South Carolina, during the summer of 1992. The single commissioner found Lee was entitled to an award for partial loss to his psychological system and continued treatment for irritable bowel syndrome. The full commission reversed, and the circuit court affirmed the full commission's decision. Lee appeals. We affirm.

FACTS

Lee was injured on July 20, 1992, when a golf cart he was on went over a seawall at Harbour Town in Hilton Head Island. Lee did not know how to swim and was afraid he would drown. While clinging to a rope to prevent himself from falling in the water, Lee was struck by the golf cart and received several minor physical injuries.

Lee was treated for his minor injuries and released with no findings of permanent impairment. He was paid fourteen weeks of temporary total benefits for the time during which he was unable to work. After a hearing in October 1996, the single commissioner determined Lee had reached maximum medical improvement ("MMI") for his physical injuries by November 17, 1992. However, the commissioner concluded Lee was entitled to further treatment and evaluation for post-traumatic stress disorder and irritable bowel syndrome. Employer was ordered to provide this treatment.

When Lee's treating physicians again placed him at MMI, Employer requested a hearing. On December 3, 1998, the single commissioner conducted

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[1]The Employer and its insurance carrier, The Hartford Company, are joined as respondents to this appeal. For clarity, these parties shall both be referred to as the "Employer."

a hearing to determine whether Lee had any permanent partial disability. In her subsequent order, the single commissioner awarded Lee twenty-five weeks of permanent partial disability for a partial loss of his "psychological system," treating it as a scheduled member of the body, as well as ten weeks for partial loss of use of his rectum due to the irritable bowel syndrome. The single commissioner found that Lee had reached MMI with respect to both his post-traumatic stress disorder and his irritable bowel syndrome on May 25, 1998 and that Employer was not responsible for any medical treatment after that date. However, with regard to the irritable bowel syndrome, Employer was ordered to provide medication necessary to maintain Lee at his current plateau.

Employer timely appealed this order to the full commission. The full commission reversed the decision of the single commissioner.[2] Lee appealed the full commission's order to the circuit court. The circuit court affirmed the decision of the full commission. Lee's subsequent motion for reconsideration was denied. Lee appeals.

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[2]The full commission's order is not included in the record on appeal. Nonetheless, in Lee's subsequent "Appeal from Workers Compensation Commission Panel Review" filed December 2, 1999, he states that the full commission made three findings:

> 1. That the Single Commissioner's finding that the Carrier shall pay to [Lee] 25 weeks of permanent partial disability for a partial loss of his "psychological system" is an error at law and simply not supported by the evidence in the record;
>
> 2. That the Employer/Carrier shall not be responsible for any prescriptions and/or medical treatment after the date of [MMI], which is May 25, 1998; and
>
> 3. That the Hearing Commissioner's finding that [Lee] is due 10 weeks for partial loss of use of his rectum is hereby affirmed.

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Any review of the full commission's factual findings is governed by the substantial evidence standard. Smith v. Squires Timber Co., 311 S.C. 321, 325, 428 S.E.2d 878, 880 (1993). The "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). Substantial evidence is evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion that the full commission reached. Miller v. State Roofing Co., 312 S.C. 452, 454, 441 S.E.2d 323, 324-25 (1994).

DISCUSSION

The full commission reversed the single commissioner's award of damages for injuries to his psychological system, and the circuit court affirmed this decision. Lee asserts this was error. We disagree.

Generally, an injured employee may proceed under either the general disability sections 42-9-10 and 42-9-20 or under the scheduled member section 42-9-30 in order to maximize recovery under the South Carolina Workers' Compensation Act. See Brown v. Owen Steel Co., 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct. App. 1994) (proceeding under the general disability sections for an injury to a scheduled member gives the claimant "the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section."). Only where a scheduled loss is not accompanied by additional complications affecting another part of the body is the scheduled recovery exclusive. Id. (citing Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960)).

In the current case, Lee does not assert his injury is compensable under sections 42-9-10 or 42-9-20[3]. Instead, he asserts that the injury to his psychological system is compensable as an injury to a scheduled member. See S.C. Code Ann. § 42-9-30 (1985 & Supp. 2001); 25A S.C. Code Ann. Regs. 67-1101 (1990 & Supp 2001).

Section 42-9-30 provides specific recoveries for total or partial physical losses and impairments suffered by an employee to certain scheduled members including: thumbs, fingers, toes, hands, arms, feet, legs, eyes, and ears. S.C. Code Ann. § 42-9-30 (1985 & Supp. 2001). This section further provides:

> For the total or partial loss of, or loss of use of, a member, organ or part of the body not covered herein . . . [t]he Commission shall by regulations prescribe the ratio which the partial loss or loss or partial loss of use of a particular member, organ or body part bears to the whole man, basing such ratios on accepted medical standards and such ratios shall determine the benefits payable under this subsection.

Id. (emphasis added).

Regulation 67-1101 provides additional examples of compensable scheduled members. It states that

> [t]his schedule of organs, members, and bodily parts lists prominent parts of the anatomy subject to occupational injury and is not complete. The value of an organ, member, or bodily part not included may be determined in accordance with the American Medical Association's "Guide to the Evaluation of Permanent Impairment", or any other accepted medical treatise or authority.

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[3]Sections 42-9-10 and 42-9-20 govern the award of compensation for total and partial disability, respectively. See S.C. Code Ann. § 42-9-10 (Supp. 2001); S.C. Code Ann. § 42-9-20 (1985).

> Compensation shall be payable for a total loss, permanent partial loss, or loss of use of a member, organ, or part of the body when compensation is not otherwise payable.

25A S.C. Code Ann. Regs. 67-1101 (1990 & Supp 2001) (emphasis added). The regulation further states it "does not include injury to the many bodily systems, organs, members, and anatomical parts" which may be independently recoverable under sections 42-9-10 and 42-9-20. Id. Nowhere is the psychological system listed as a scheduled member.

Lee asserts that the psychological system is a scheduled member by reference to the American Medical Association's "Guide to the Evaluation of Permanent Impairment," the medical treatise identified in regulation 67-1101. We agree with the circuit court and full commission that Lee's psychological system is not a scheduled member.

While we do not question that the "Guide to the Evaluation of Permanent Impairment" identifies a mental injury as a legitimate medical ailment, we are unpersuaded that a purely intangible injury such as one to the psychological system was intended by the legislature to be classified as a scheduled member compensable under section 42-9-30. The list of scheduled members in the statute and accompanying regulation include only tangible and physically identifiable organs, members, or other parts of the human body. Furthermore, our supreme court has already determined that a psychological impairment is not compensable under section 42-9-30. Fields v. Owens Corning Fiberglass, 301 S.C. 554, 393 S.E.2d 172 (1990). Consequently, the circuit court was correct in affirming the full commission's conclusion that Lee was not entitled to compensation for a psychological impairment under section 42-9-30. Id. at 556, 393 S.E.2d at 174.

Lee maintains that Fields is not controlling because regulation 67-1101 "now clearly states that it is not an exclusive and complete list of body parts, members, and organs for which impairment awards may be granted." However, the regulation concerning scheduled losses stated it was not an exclusive list at the time Fields was decided. See S.C. Code Ann. Regs. 67-35 (1989) (stating

that "[t]his schedule . . . is not complete . . . ; and the value of any organ, member, or bodily parts not included in this schedule will be determined in accordance with The American Medical Association's 'Guides to the Evaluation of Permanent Impairment' and any other relevant medical authority"). Lee also asserts that "recent appellate decisions demonstrate an increased recognition of psychological injuries." In support of his argument, Lee cites Stokes v. First National Bank, 306 S.C. 46, 50, 410 S.E.2d 248, 251 (1991), Getsinger v. Owens-Corning Fiberglas Corp., 335 S.C. 77, 80, 515 S.E.2d 104, 105-106 (Ct. App. 1999), and Estridge v. Joslyn Clark Controls, 325 S.C. 532, 482 S.E.2d 577 (Ct. App. 1997). Although these cases would allow compensation for psychological or mental injury in a disability setting, none of these cases support an award of compensation for such an injury as a scheduled loss pursuant to section 42-9-30.

We conclude Lee's psychological system is not a scheduled member and substantial evidence supports the conclusions of the full commission.[4]

Lee also argues he should continue to receive medications and medical treatment to maintain his plateau of recovery beyond the date of MMI on May 25, 1998. We disagree.

The burden is upon a claimant to prove such facts as will render his injury compensable within the provisions of the Worker's Compensation Law. Kennedy v. Williamsburg County, 242 S.C. 477, 480, 131 S.E.2d 512, 513 (1963). Such an award must not be based on surmise, conjecture, or speculation. Id.

Generally, even though a claimant has reached MMI, if additional medical care or treatment would "tend to lessen the period of disability," then the full commission may be warranted in requiring such treatment to at least maintain the claimant's degree of physical impairment. Dodge v. Bruccoli, Clark,

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[4] However, we find any reading beyond the finding that a psychological impairment is not a scheduled loss unnecessarily expands the holding in Fields.

Layman, Inc., 334 S.C. 574, 581, 514 S.E.2d 593, 597 (Ct. App. 1999). That is, MMI "is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment." Id. at 581, 514 S.E.2d at 596. Therefore, "an employer may be liable for a claimant's future medical treatment if it tends to lessen the claimant's period of disability despite the fact the claimant has returned to work and has reached [MMI]." Id. at 583, 514 S.E.2d at 598.

Here, it is undisputed that Lee, in fact, did return to work in the summer of 1998. On cross examination before the single commissioner, Lee admitted that he was receiving $200 per week in worker's compensation benefits from an injury sustained only months before the hearing at his other employment.

None of the letters written by Lee's doctors directly address Lee's ability to return to work or whether any future medical treatments would be necessary to forestall Lee from becoming incapacitated. In fact, the only person to directly address this issue was Dr. Lee Woodward in his Vocational Evaluation report on March 17, 1997. In that report, Dr. Woodward found "no reason for [Lee] to be unable to work" in his occupation as a cook, other than his desire not to.

Under our scope of review, the findings of the full commission will not be set aside if they are supported by substantial evidence and not controlled by legal error. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). We find substantial evidence in the record supports the full commission's order denying future medical treatments for Lee's irritable bowel syndrome. We find nothing in the record to refute the presumption that the full commission weighed all the testimony and found that Lee, at least under the Workers' Compensation Law, is not disabled.

CONCLUSION

For the foregoing reasons, the decision of the circuit court affirming the full commission is

AFFIRMED.[5]

HEARN, C.J. and GOOLSBY, J., concur.

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[5] We decide this case without oral argument pursuant to Rule 215, SCACR.