OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

July 15, 2002

ADVANCE SHEET NO. 24

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jason C. Bower, Respondent,

v.

National General
Insurance Company, Petitioner.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal From Horry County
J. Stanton Cross, Jr., Master In Equity

Opinion No. 25493
Heard February 5, 2002 - Filed July 15, 2002

AFFIRMED

C. Mitchell Brown and William C. Wood, Jr., both of Nelson Mullins Riley & Scarborough, L.L.P., of Columbia, for petitioner.

Gene M. Connell, Jr., of Kelaher, Connell & Connor,

P.C., of Surfside Beach, for respondent.

JUSTICE WALLER: We granted the petition for a writ of certiorari to review the Court of Appeals' decision in Bower v. National General Ins. Co., 342 S.C. 315, 536 S.E.2d 693 (Ct. App. 2000). We affirm.

FACTS

Respondent Jason Bower was a passenger in his friend's car when the vehicle was involved in an accident. Bower was injured in the accident, and he made an underinsured motorist (UIM) claim as an insured under his father's policy with petitioner National General Insurance Company (National General). National General denied the claim based on the fact that Bower's father had rejected its offer to purchase UIM coverage.

Bower filed this action alleging that National General failed to make a meaningful offer of UIM coverage. Therefore, Bower sought to have the policy reformed to include UIM coverage up to the limits of the insurance policy.[1] On cross-motions for summary judgment, the trial court granted summary judgment in favor of National General. The Court of Appeals reversed and remanded with directions to the trial court to enter summary judgment in favor of Bower and to reform the contract up to the liability limits. Bower, supra.

The Court of Appeals found that National General's offer of UIM coverage was not meaningful because the offer did not inform Bower's father of the right to select optional coverages which were not listed on the form. The form stated in pertinent part:

> Your automobile insurance policy does not automatically provide any underinsured motorist coverage. You have,

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[1]The policy's liability limits were: $100,000/$300,000/$50,000.

> however, a right to buy underinsured motorist coverage in limits **up to the limits** of liability coverage you will carry under your automobile insurance policy. **The limits of underinsured motorist coverage, together with the additional premiums you will be charged, are shown upon this Form**.
>
> . . .
>
> In the future, if you wish to increase or to decrease your limits of additional uninsured or underinsured coverage, you must then contact your insurance company.

(Emphasis added). On the other side of the form, under a separate heading entitled OFFER UNDERINSURED MOTORISTS COVERAGE, the form listed four bodily injury limits with the applicable premium and four property damage limits with the applicable premium.[2] The form then continued as follows:

> Do you wish to purchase Underinsured Motorists Coverage?
> Yes ____ No ____
>
> If your answer is "no" you must then sign here. _____
>
> If your answer is "yes" then specify the limits which you desire. These limits cannot exceed your automobile insurance liability limits.

[2]The bodily injury limits offered were: 25,000/50,000; 50,000/100,000; 100,000/300,000; and 250,000/500,000. The property damage limits offered were: 10,000; 25,000; 50,000; and 100,000. Given Bower's policy limits of 100,000/300,000/50,000, the form listed three choices each of bodily injury and property damage UIM coverage which were equal to or less than Bower's limits.

select Under insured Motorists Bodily Injury limits of: _____ / _____

select Under insured Motorists Property Damage limits of: _____

Bower's father checked the "No" box declining UIM coverage and signed the form.

The Court of Appeals stated that the language on National General's form could be "fairly construed as an offer to purchase **only** those coverage amounts identified on the form. . . ." Bower, 342 S.C. at 319, 536 S.E.2d at 695 (emphasis in original). Because Bower's father was not informed he could choose any amount of UIM coverage, the Court of Appeals held National General failed to make a meaningful offer.

ISSUE

Did National General make a meaningful offer of UIM coverage?

DISCUSSION

National General argues that the Court of Appeals erred in finding it did not make a meaningful offer of UIM coverage. Specifically, National General contends that the Court of Appeals failed to apply, or misapplied, the applicable precedents on this issue. We disagree.

Under South Carolina law, automobile insurance carriers must offer "at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage. . . ." S.C. Code Ann. § 38-77-160 (Supp. 2000). In Garris v. Cincinnati Ins. Co., 280 S.C. 149, 311 S.E.2d 723 (1984), we stated that "underinsured motorist coverage **in any amount** up to the insured's liability coverage must be offered to a policyholder." Id. at 154, 311 S.E.2d at 726 (emphasis added).

The insurer bears the burden of establishing it made a meaningful offer of UIM coverage. Butler v. Unisun Ins. Co., 323 S.C. 402, 475 S.E.2d 758 (1996). "[A] noncomplying offer has the legal effect of no offer at all." Hanover Ins. Co. v. Horace Mann Ins. Co., 301 S.C. 55, 57, 389 S.E.2d 657, 659 (1990). If an insurer fails to make a meaningful offer, the policy will be reformed by operation of law to include UIM coverage up to the insured's liability limits. E.g., id.; Butler, supra.

In State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 354 S.E.2d 555 (1987), we adopted the following four-prong test by which to determine whether an insurer made a meaningful offer of UIM 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. at 521, 354 S.E.2d at 556.

The issue in the instant case involves the fourth prong of the Wannamaker test. Bower argued to the Court of Appeals that National General's offer did not inform him of the right to select optional coverages which were **not** listed on its form, and therefore, its offer was not meaningful under Wannamaker. The Court of Appeals agreed. National General's primary argument to this Court is that the instant case is indistinguishable from Norwood v. Allstate Insurance Co., 327 S.C. 503, 489 S.E.2d 661 (Ct. App. 1997) where the Court of Appeals found the offer of UIM coverage meaningful.

In Norwood, Allstate's form listed three choices of UIM coverage up to Norwood's 25,000/50,000/25,000 liability limits.[3] Allstate's form indicated Norwood could purchase UIM coverage "up to" her liability limits. According to the Court of Appeals' opinion, the offer form also "instruct[ed] Norwood how to either increase or decrease her limits of UIM coverage." Id. at 506, 489 S.E.2d at 663. Based on these considerations, the Court of Appeals concluded that Norwood "had the ability . . . to select varying amounts of UIM coverage up to the liability limits of her policy." Id.

National General contends that Norwood established a three-part test for the fourth prong of the Wannamaker test. According to National General, if a form offers at least three choices of UIM coverage, specifies that the applicant can purchase UIM coverage "up to" the liability limits, and instructs the applicant how to increase or decrease UIM coverage, then the offer is meaningful as a matter of law.

We disagree that any such "test" was created by the Court of Appeals. However, National General is correct in that the Norwood court held Allstate's offer meaningful based primarily on these three **factual** considerations, and that the same facts are present in the instant case. We nonetheless agree with the Court of Appeals that Norwood is distinguishable from this case.

National General's form contained the following language that the

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[3]The parties have made the Allstate form from the Norwood case a part of the record in this case. Allstate's form listed a total of six options for limits up to 250,000/500,000/50,000, three of which went up to Norwood's limits. In this case, National General's form listed four limits, three of which went up to Bower's liability limits. Therefore, just as in Norwood, there were three **available** limits from which Bower could choose UIM coverage. However, because National General separated the bodily injury limits from the property damage limits and there were three choices for each, technically there were up to nine combinations for UIM coverage listed upon the form.

form in Norwood did not:

> **The limits** of underinsured motorist coverage, together with the additional premiums you will be charged, **are shown upon this Form**.

(Emphasis added). The Court of Appeals found this language indicated to the insured that the only options available were the UIM coverages listed on the form. Specifically, the Court of Appeals found that this language was similar to that used by the insurer in Wilkes v. Freeman, 334 S.C. 206, 512 S.E.2d 530 (Ct. App. 1999). In Wilkes, the insurer's UIM explanation form stated that:

> **All of the limits** of underinsured motor vehicle coverage we sell, together with the additional premiums you will be charged, **are shown on this form**.

334 S.C. at 210, 512 S.E.2d at 532 (emphasis added). The Court of Appeals held that despite the fact that the offer form showed three limits equal to or less than Wilkes's liability coverage, the form failed to provide any indication that the applicant may request other coverage amounts. Id. Significantly, the Court of Appeals stated that "merely listing several available options without providing a clear description on how the applicant may request other limits is insufficient to discharge the insurer's duty under section 38-77-160." Id. at 211-12, 512 S.E.2d at 533.

We agree that Wilkes is factually analogous to the instant case. While the language on National General's form did not state outright that "all" available limits are listed, as the form in Wilkes did, a common-sense reading of this language would lead a reasonable person to that conclusion. In other words, because of this language, National General's form fails to inform an insured that "underinsured motorist coverage **in any amount** up to the insured's liability coverage" is what is actually being offered. Garris v. Cincinnati Ins.

Co., 280 S.C. at 154, 311 S.E.2d at 726 (emphasis added).[4]

Accordingly, we hold that National General's offer cannot be considered meaningful since it did not inform Bower that **any** limits up to the liability limits could be purchased. As the Court of Appeals observed: "Had National General intended the listed coverages to be **mere examples** of available coverages or the most common coverages chosen, it certainly could have said so." Bower, 342 S.C. at 319, 536 S.E.2d at 695 (emphasis added).

Indeed, we note that the South Carolina Department of Insurance (DOI) has issued a sample offer form which clearly communicates this idea. The form includes the following language:

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[4]The dissent suggests that had Bower been "interested" in purchasing UIM coverage, he simply could have filled in any amount desired in the blank spaces provided by the National General offer form. The dissent, however, appears to shift the inquiry to the insured's subjective intent regarding UIM coverage, when the appropriate inquiry rests on the offer made by the insurer. See Butler, supra (the insurer bears the burden of establishing it made a meaningful offer of UIM coverage); Wannamaker, 291 S.C. at 521, 354 S.E.2d at 556 ("the burden is on the insurer to **effectively** transmit the offer to the insured") (emphasis added). Moreover, we held in Wannamaker that the statute governing the offer of UIM coverage "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 the coverage." Id. (emphasis added). Here, National General's offer of UIM coverage was made in such a manner as to convey that the only available limits were the ones shown upon the offer form. The offer therefore failed to provide Bower with the information needed "to make an intelligent decision of whether to accept or reject the coverage." Id. While we agree with the dissent that an insured must "exercise common sense," we certainly cannot expect an insured to act intelligently when, as a matter of law, an offer has not been meaningfully conveyed. See Hanover Ins. Co. v. Horace Mann Ins. Co., 301 S.C. at 57, 389 S.E.2d at 659 ("a noncomplying offer has the legal effect of no offer at all").

> Your automobile insurance policy does not automatically provide any underinsured motorist coverage. You have, however, a right to buy underinsured motorist coverage in limits up to the limits of liability coverage you will carry under you automobile insurance policy. **Some of the more commonly sold limits of underinsured motorist coverage, together with the additional premiums you will be charged, are shown upon this Form. If there are other limits in which you are interested, but which are not shown upon this Form, then fill in those limits.** If your insurance company is allowed to market those limits within this State, your insurance agent will fill in the amount of increased premium.

(Emphasis added). This language would effectively communicate to an insured that there are available limits of UIM coverage other than those limits listed on the form. We strongly encourage insurers to include such language on their offer forms. While the DOI's exact language need not be provided, we believe that this or similar language certainly would make the offer of UIM coverage in any amount up to the liability limits truly meaningful to the insured.[5]

CONCLUSION

We hold the Court of Appeals correctly reversed summary judgment for National General and ordered that judgment be entered for Bower and the policy be reformed up to the liability limits. Accordingly, the decision of the Court of Appeals is

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[5]Both this Court and the Court of Appeals have, in previous cases, quoted with approval this language from the DOI's form. See Butler v. Unisun Ins. Co., 323 S.C. 402, 475 S.E.2d 758 (1996); Rabb v. Catawba Ins. Co., 339 S.C. 228, 528 S.E.2d 693 (Ct. App. 2000); Osborne v. Allstate Ins. Co., 319 S.C. 479, 462 S.E.2d 291 (Ct. App. 1995), aff'd, Op. No. 96-MO-00222 (S.C. Sup. Ct. filed Oct. 9, 1996).

AFFIRMED.

MOORE and PLEICONES, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which BURNETT, J., concurs.

CHIEF JUSTICE TOAL: I respectfully dissent. In my opinion, National General made a meaningful offer of UIM to Bower. Therefore, I would reverse the Court of Appeals decision and decline to reform Bower's policy up to the liability limits.

In *Wannamaker,* this Court expressly adopted the four-part test developed by the Supreme Court of Minnesota discussed by the majority. The fourth prong of that test at issue here mandates that "the insured must be told that optional coverages are available for an additional premium." *Wannamaker*, 291 S.C. at 521, 354 S.E.2d at 556 (citing *Hastings v. United Pacific Ins. Co.*, 318 N.W.2d 849 (Minn. 1982). In the present case, National General's policy stated, "[y]ou have . . . a right to buy underinsured motorist coverage in limits up to the limits of liability coverage you will carry under your automobile insurance policy." In addition, the policy listed at least 4 choices of coverage for underinsured coverage, 3 of which went up to the limits of Bower's coverage.
Moreover, the policy provided a blank space for the insured "to specify the limits you desire."

Although this language is very similar to the offer of UIM approved in *Norwood*, the majority distinguishes Bower's policy from the *Norwood* policy based on the statement in Bower's policy that "[t]he limits of [UIM] coverage, together with the additional premiums you will be charged, *are shown upon this Form*." (Emphasis added). I concede the language would be clearer if, instead, the policy stated explicitly that the insured could purchase UIM coverage *in any amount* up to the insured's limits, *including amounts not shown on the form.* However, we have not mandated that insurers are required to use the exact language recommended by the Department of Insurance and quoted by the majority in order to make an offer of UIM meaningful. I disagree that the language in the policy at issue would lead a reasonable person to believe that coverage could only be purchased in the amounts shown, and would find it represents a meaningful offer of UIM under *Wannamaker.*

The majority correctly points out that the insurer bears the burden of establishing it made a meaningful offer of UIM. At issue in this case is

whether the insured was told optional coverages were available for an additional premium. *Wannamaker*. As discussed in the majority opinion, National General listed up to nine combinations of available UIM coverage on its form, and left a blank space for the insured "to specify the limits you desire" on the form. I simply do not agree with the majority that this offer was not meaningful under the objective, reasonable person standard set out in *Wannamaker*.[6]

In my opinion, National General did make a meaningful offer of UIM coverage to Bower, but Bower chose not to purchase UIM and knowingly rejected National General's meaningful offer for it. Therefore, reforming his policy to provide it would result in a windfall for Bower. Accordingly, I would deny coverage and **REVERSE**.

BURNETT, J., concurs.

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[6]The language is not analogous to the policy language in *Wilkes v. Freeman*, as the majority argues it is. The *Wilkes* policy stated, "*All* of the limits of underinsured motorist coverage we sell, together with the additional premiums you will be charged, *are shown on this form*." *Wilkes*, 334 S.C. at 208, 512 S.E.2d at 531. (Emphasis added). Bower's policy did not state "all" the limits of UIM "we sell" are listed on this form, and it provided a blank space for Bower "to specify the limits you desire." The statement in *Wilkes* is much more definitive than the one in Bower's policy, especially considering the blank space provided for Bower to specify the coverage he desired. If Bower was interested in purchasing different coverage amounts of UIM, he could have written in the amount desired in the blank space provided in his policy. Although the insurer bears the burden of establishing it made a meaningful offer, I do not believe making a meaningful offer obviates the need for the insured to exercise common sense.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Bobby Wayne Stone, Appellant.

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

Opinion No. 25494
Heard May 16, 2002 - Filed July 15, 2002

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Deputy Chief Attorney Joseph L. Savitz, III, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

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

respondent.

JUSTICE WALLER: Appellant, Bobby Wayne Stone, was convicted of murder, first-degree burglary, and possession of a weapon during a violent crime. He was sentenced to death for murder, and consecutively sentenced to thirty years for burglary, and five years for possession of a weapon. We affirm the convictions, but reverse Stone's death sentence and remand for a new sentencing proceeding.

FACTS

Shortly before 7:00p.m. on February 26, 1996, Ruth Griffith heard gunshots in her backyard. She called her next door neighbor, Landrow Taylor, who came over; the two called 911. As they waited in the living room, Griffith and Taylor heard someone come onto the screened porch on the side of the house and start banging on the door to the house. A wooden board which had been nailed over a broken window pane on the lower right-hand corner of the door broke out. Sumter police officer, Sergeant Charles Kubala arrived at 7:07p.m.; he was motioned to the side of the house by Taylor. As Taylor and Griffith waited inside the house, they heard someone shout "Halt" or "Hold It" followed immediately by three or four gunshots. A second police officer arrived to find Kubala had been shot in the right ear and neck. Kubala died at the scene.

After four hours of searching the wooded area behind Griffith's home, Stone was found lying beneath two fallen trees, with a .22 caliber pistol under him. A shotgun had been left on the screened porch. Stone confessed to the shooting, but claimed he had drank about twelve beers in the six hours prior to the shooting. He told police that when he heard a man's voice yelling at him from outside the screened porch, he turned and the gun went off, so he ran.[1] The jury convicted Stone of murder, first degree burglary, and possession of a

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[1] Stone claimed he had gone to visit Griffith as he had dated Griffith's niece a few years earlier and had previously been to her home.

firearm during commission of a violent crime.

ISSUES

1. Did the court err in failing to direct a verdict on the charge of first-degree burglary?

2. Did the court err in excusing a juror during sentencing?

3. Did the court err in refusing to charge the statutory mitigating circumstances of S.C. Code Ann. § 16-3-20(C)(b)(6) & (7)(Supp. 2001)?

4. Did the court err in failing to instruct the jury that Stone would be ineligible for parole if sentenced to life imprisonment?

1. DIRECTED VERDICT- FIRST DEGREE BURGLARY

Stone asserts he was entitled to a directed verdict on the charge of burglary as there was no evidence he entered Ruth Griffith's "dwelling." We disagree.

Under S.C. Code Ann. § 16-11-311(A)(Supp. 2001), a person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and the entering is accompanied by an aggravating circumstance. For purposes of burglary, a "dwelling house" is defined by S.C. Code Ann. § 16-11-10 (1985) as follows:

> With respect to the crimes of burglary and arson and to all criminal offenses which are constituted or aggravated by being committed in a dwelling house, any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, watchman, clerk, laborer or person who lodges there with a view to the protection of property shall be deemed a dwelling house, and of

> such a dwelling house or of any other dwelling house all houses, outhouses, buildings, sheds and erections which are within two hundred yards of it and are appurtenant to it or to the same establishment of which it is an appurtenance shall be deemed parcels.

A "dwelling" also means the living quarters of a building which is used or normally used for sleeping, living, or lodging by a person. S.C. Code Ann. § 16-11-310 (Supp. 2001).

We find Griffith's screened porch meets the statutory definition of a dwelling. The porch is attached to the left side of Griffith's house. It has three concrete block stairs going up to it, and appears from photographs to be very small, approximately four feet on each side, with wood panels which extend two-thirds of the way up on two sides, and a screened door on the third side. The porch leads into and out of the laundry room and is used primarily to store wood and paint cans. Griffith uses the porch for ingress and egress to her clothesline outside. We find the screened porch is appurtenant, and is used for the protection of Griffith's property (paint and wood) so as to come within the definition of a dwelling.

We have not previously addressed, under the current burglary statute, whether a fully enclosed screened porch is a dwelling within the meaning of section 16-11-10. In the 1913 case of State v. Puckett, 95 S.C. 114, 78 S.E. 737 (1913), we addressed whether the defendant could be convicted of burglary for entering an unenclosed piazza, which had a two and one-half foot balustrade, and was open on the top 6-7 feet, with a picket gate on each end to keep out chickens and dogs. Under the facts of the case, the Court held the evidence did not show the piazza was such a part of the dwelling house as was contemplated by law to make it an offense to enter in the nighttime against the security of the dwelling house.[2] However, at the time Puckett was decided, common law

[2] The Puckett Court noted that on the night in question it was damp and raining and the defendant was found on the piazza "under suspicious

required a breaking in order to establish the offense of burglary. The offense of burglary no longer requires such a breaking. Further, unlike Puckett, the porch here was completely enclosed and was utilized for the protection of Griffith's property. We find these factors sufficient to demonstrate the porch was part of Griffith's dwelling.

Furthermore, numerous courts in other jurisdictions have held screened porches qualify as part of a dwelling for purposes of burglary statutes. See State v. Bordley, 2000 WL 706788 (Del. Super. 2000); State v. Jenkins 741 S.W.2d 767, 768-770 (Mo.Ct.App.1987) (upholding burglary conviction for entry into enclosed screen porch despite unsuccessful attempt to open inner door to home); Davis v. State, 938 P.2d 1076 (Alaska 1997); People v. Wise, 30 Cal.Rptr.2d 413, 416- 18 (1994); Johnson v. Commonwealth, 875 S.W.2d 105, 106-07 (Ky.App.1994); People v. McIntyre, 578 N.E.2d 314 (Ill. 1991) (screened porch attached to house was part of "living quarters" and thus was a "dwelling"); State v. Lawrence, 572 So.2d 276, 278-79 (La.App.1990)(particular back porch was part of the residence; porch was fully enclosed screened porch underneath the main roof); State v. Watts, 76 N.C.App. 656, 334 S.E.2d 68, 70 (1985); People v. Lewoc, 475 N.Y.S.2d 933, 934 (1984)(fully enclosed porch, with windows and walls of wooden construction running length of the house); State v. Gatewood, 221 P.2d 392 (Kan. 1950)(porch which was screened in and connected to kitchen by door and window). Similarly, other courts have held appurtenant structures to a home, even if not directly accessible from the home, are nonetheless part of the "dwelling" as contemplated by burglary statutes. See State v. Maykoski, 583 N.W.2d 587 (Minn. 1998) (basement); People v. Ingram, 40 Cal.App.4th 1397, 48 Cal.Rptr.2d 256 (5th Dist.1995) (garage attached to house, even though not connected by an inside doorway to the inhabited part of house); People v. Moreno, 158 Cal. App. 3d 109, 204 Cal. Rptr. 17

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circumstances." The Court found that "there is no evidence that he stole anything or made any overt act to commit a felony." 78 S.E. at 737. Accordingly, Puckett could have been decided on the basis of a lack of intent to commit a crime. Whether the piazza was part of the "dwelling" was unnecessary to resolution of the case.

(1984)("given that garage was under the same roof, functionally interconnected with, and immediately contiguous to other portions of the house, simple logic would suffer were we to leap over this interrelationship to a conclusion that a garage is not part of a dwelling because no inside entrance connects the two").

We find the screened porch is part of the "dwelling." Accordingly, Stone was not entitled to a directed verdict.

2. REMOVAL OF JUROR DURING SENTENCING

Stone next asserts the trial court abused its discretion in removing Juror Clydie Thompson during sentencing. We agree.

At sentencing, the state called Stone's aunt, Bernice Perry, as a witness. When Perry was placed on the witness stand, Juror Thompson indicated to the court that she knew Ms. Perry. Although Perry had been announced as a witness at the start of voir dire, Thompson did not know her name. Thompson had lived down the street from Perry five or six years earlier, and they were casual acquaintances only. Thompson indicated her acquaintance would not affect her ability to be fair and impartial.

The solicitor objected to Thompson's continued participation contending it would be difficult for her to impose a death sentence on a former acquaintance's nephew. The court removed Juror Thompson and replaced her with the second alternate juror. We find this was error.

In State v. Woods, 345 S.C. 583, 587-88, 550 S.E.2d 282, 284 (2001), we recently stated:

> When a juror conceals information inquired into during voir dire, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would

> have been a material factor in the use of the party's peremptory challenges**.** Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986). Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn. State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct.App.1991).

Although the present case does not involve a new trial, Woods is instructive. It is patent here that Juror Thompson's failure to disclose her acquaintance with Perry was innocent. Moreover, we find her scant acquaintance would neither have supported a challenge for cause nor would it have been a material factor in the state's exercise of its peremptory challenges. Thompson clearly indicated her former acquaintance with a witness whose name she did not even know, would not have affected her in any way. Accordingly, we hold the trial court abused its discretion in removing her.

3. CHARGE ON STATUTORY MITIGATORS

Stone next asserts reversible error in the trial court's refusal to charge, at sentencing, the statutory mitigating factors set forth in S.C. Code Ann. § 16-3-20(C)(b)(6) and (7) (Supp. 2001), to wit, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, and the age or mentality of the defendant at the time of the crime. He claims the charges were mandated due to evidence that he was intoxicated at the time of the crime. We agree.

In State v. Pierce, 289 S.C. 430, 435, 346 S.E.2d 707, 711 (1986), overruled on other grounds, State v. Torrence, 305 S.C. 405, 406 S.E.2d 315 (1991), we held that "the trial judge was required by law to instruct the jury on statutory mitigating circumstances 2, 6, and 7, given the evidence showing Pierce was using drugs and extremely intoxicated during the commission of the crime. **The failure to instruct is not harmless error**." (Emphasis supplied). Thereafter, in State v. Plemmons, 296 S.C. 76, 78, 370 S.E.2d 871, 872 (1988), we held the specific statutory mitigating circumstances of subsections (2), (6),

and (7) need not be submitted to the jury **if** the trial court gives a specific charge on the defendant's voluntary intoxication as mitigating circumstance.[3]

We have specifically rejected the contention that a charge on one mitigator is sufficient to cover the others. State v. Young, 305 S.C. 380, 409 S.E.2d 352 (1991) (where there is evidence the defendant was intoxicated at the time of the crime, the trial judge is **required** to submit the statutory mitigating circumstances in § 16-3-20(C)(b)(2), (6) and (7));[4] State v. Plemmons, supra. We adhere to these precedents and hold the trial court erred in refusing to charge these statutory mitigating circumstances.

Further, we find the error was exacerbated by the trial court's supplemental instructions to the jury. After the jury had been charged at sentencing, the court specifically called them back for the purpose of reminding them of its earlier instruction, during guilt phase, that "voluntary intoxication is not a defense to criminal act or actions." We find reasonable jurors would clearly have understood this instruction as preventing them from considering evidence of Stone's intoxication in mitigation. To the extent the charge prohibited the jury from considering the mitigating circumstance of Stone's intoxication, it violated the Eighth Amendment. See Payne v. Tennessee, 501 U.S. 808, 822, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), *citing* Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)(Eighth Amendment prohibits state from limiting sentencer's consideration of "any relevant mitigating evidence" which could cause the jury to decline to impose the death penalty). Accordingly, the trial court's refusal to instruct on the statutory mitigating circumstances of S.C. Code Ann. § 16-3-20(C)(b)(6)&(7) and its instruction concerning voluntary intoxication require reversal.

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[3] Here, there was no such charge. To the contrary, the jury was specifically charged that voluntary intoxication was not a defense.

[4] In Young, the trial judge had charged the jury on the mitigators in subsections 6 & 7, but had not charged subsection 2. We held this was error.

4. PAROLE INELIGIBILITY CHARGE

At sentencing, during its closing argument, the state argued that Stone is "going to be a problem in the future– a problem in the future in the prison system." The solicitor went on to argue that "throughout his life, he has been a problem. He has not been willing to obey the laws of society." In talking about Stone's 1987 burglary convictions, the solicitor stated, "This guy who wants you to give him mercy this time. He got thirty years. Then you see what happened after that and how he manipulated the system and [eventually got paroled]. . . and when he is paroled he signs and acknowledges . . . [he] may not possess any weapon whatsoever. . . a condition of parole. . . Was he able to abide by that rule? This guy that wants you to show him mercy now?. . . . He is not going to follow the rules. He hasn't done it in the past. He's not going to do it in the future." The solicitor went on to argue "You make sure that no correctional officer– or somebody else if he were to escape or something– nobody else is up here like this Kubala family. . ." Finally, the solicitor argued, "I'm asking you to carry out . . . a criminal justice system that works and deters criminals, deters Bobby Wayne Stone from ever doing anything like this again to any correctional officer or anyone else."

After the court charged the jury, defense counsel requested an instruction concerning "life imprisonment, life in prison without parole." The court then called the jury back in and instructed that "[u]nder our law life imprisonment means that a person will be– will serve the balance of his life in prison, okay?" Stone asserts the trial court erred in failing to instruct the jury that if sentenced to life imprisonment, he would be **ineligible for parole**. We agree.

Under the recent precedents of Kelly v. South Carolina, 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed. 2d 670 (2002) and Shafer v. South Carolina, 532 U.S. 36, 121 S.Ct. 1263, 149 L.Ed.2d 178 (2001), Stone was entitled to an instruction that if sentenced to life imprisonment, he would be ineligible for parole. In Kelly, the United States Supreme Court held that where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without parole, due process entitles the defendant to inform the jury of his parole ineligibility, either by jury instruction

or in arguments by counsel. The Kelly court specifically noted that arguments by counsel in Shafer to the effect that the defendant "would die in prison" or would "spend his natural life there" as well as the trial judge's instructions that "life imprisonment means until the death of the defendant" were insufficient to convey a clear understanding to Shafer's parole ineligibility. 122 S.Ct. at 733-34. The Court also noted that the fact that the jury did not request further instructions concerning parole ineligibility was irrelevant. 122 S.Ct. at 733. Finally, the Kelly court noted that "evidence of future dangerousness in prison can raise a strong implication of 'generalized . . . future dangerousness'. . . . A jury hearing evidence of a defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior, whether locked up or free, and whether free as a fugitive or as a parolee." 122 S.Ct. at 731.

Here, it is patent the state argued Stone's future dangerousness to the jury, both in the context of his danger in prison and the possibility he could escape in the future. Moreover, notwithstanding counsel and the court told the jury Stone would spend the rest of his life in prison, these statements do not clearly convey to the jury the fact that Stone would be ineligible for parole as required by Kelly. Accordingly, the trial court's failure to instruct that Stone would be ineligible for parole if sentenced to life imprisonment requires reversal.

Stone's remaining issue is affirmed pursuant to SCACR, Rule 220(b) and the following authorities: Stone's issue 3- State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996) (admission of expert testimony is within discretion of trial court).[5]

[5] In conjunction with his first issue, Stone asserted that, if he was entitled to a directed verdict on the burglary charge, then the trial court's charge to the jury that it could not convict him of involuntary manslaughter if it found him guilty of burglary was error. In light of our holding that Stone was not entitled to a directed verdict on the burglary charge, this claim is moot.

Stone's convictions are affirmed, as are his sentences for burglary and possession of a weapon. The matter is remanded for a new sentencing proceeding on his murder conviction.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

William R. McClanahan, individually and on behalf of Richland County Landowners and Taxpayers similarly situated, Appellants,

v.

Richland County Council and Richland County Planning Commission, Respondents.

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

Opinion No. 25495
Heard April 2, 2002 - Filed July 15, 2002

AFFIRMED

Gerald M. Finkel and Robert E. Culver, of Finkel & Altman, LLC, of Charleston, for appellants.

M. Elizabeth Crum, Jane W. Trinkley, and Deborah Ann Hottel, of McNair Law Firm, P.A., of Columbia, for respondents.

JUSTICE MOORE: This is an appeal from a circuit court decision granting summary judgment to respondents. We affirm.

PROCEDURAL FACTS

Appellant[1] filed a declaratory judgment action against respondents challenging the procedures by which the Richland County Comprehensive Land Use Plan (the Plan) was adopted. Appellant's complaint alleged the following causes of action: (1) violation of S.C. Code Ann. § 6-29-520 (B) (Supp. 2001);[2] (2) violation of S.C. Code Ann. § 4-9-120 (1986);[3] (3) violation of due process; (4) unlawful taking in violation of S.C. Const. Art. I, § 3 ("no person shall be deprived of life, liberty, or property without due process of law"); and (5) request for award of costs and attorney's fees.

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[1]We refer to appellant in the singular because class certification has not been sought or granted pursuant to Rule 23, SCRCP.

[2] S.C. Code Ann. § 6-29-520 (B) provides: "Recommendation of the plan or any element, amendment, extension, or addition must be by resolution of the planning commission, carried by the affirmative votes of at least a majority of the entire membership. . . ."

[3] S.C. Code Ann. § 4-9-120 provides: "The council shall take legislative action by ordinance which may be introduced by any member. With the exception of emergency ordinances, all ordinances shall be read at three public meetings of council on three separate days with an interval of not less than seven days between the second and third readings. . . ."

Respondents moved to dismiss appellant's complaint. Judge William P. Keesley dismissed the procurement cause of action, which was contained within appellant's third cause of action (alleging a due process violation). Appellant did not appeal that dismissal.

Thereafter, respondents filed a motion for partial summary judgment on appellant's third cause of action. Appellant filed a memorandum in opposition to respondents' motion and filed a motion for summary judgment on his first and second causes of action. Respondents then filed a motion for summary judgment on the first, second, fourth, and fifth causes of action. Respondents' motions for summary judgment were granted.

FACTS

The compliance deadline for counties to adopt a comprehensive land use plan under the Comprehensive Planning Act, S.C. Code Ann. §§ 6-29-310, *et seq.* (Supp. 2001), was set for May 3, 1999. Accordingly, the Richland County Council adopted a schedule for adoption of the Plan.

On March 29, 1999, the Richland County Planning Commission[4] received input on the Plan from the public, including input from Kay McClanahan (wife of appellant). Thereafter, the Commission voted by a 4-3 vote to recommend approval of the Plan, with the exception of the Vision portion,[5] to the Richland County Council.

On April 5, 1999, the Commission voted by a 4-2 vote to send the "Land Development Regulations forward with the recommendation of

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[4] The Richland County Planning Commission, pursuant to S.C. Code Ann. § 6-29-320 (Supp. 2001) (county council of each county may create a county planning commission), was created by the Richland County Council. The Commission consists of nine members.

[5] The Vision is an additional part of the Plan that is Richland County's vision to guide future growth.

approval and to defer action on the Vision Plan until it is determined how to incorporate it." Subsequently, during the same Commission meeting, a second vote was taken and the motion carried 5-0 "to submit and read the . . . Plan as a resolution."

On April 6th, after receiving public input from Kay McClanahan and others, the Council gave first reading to the Plan. On April 13th, the Council held its duly noticed public hearing on the Plan. A draft of the plan had been made available for public inspection on April 2nd.

On April 26th, the Council called a special meeting. Prior to the second reading of the Plan, the proposed amendments to the Plan were reviewed. The public, including Kay McClanahan, addressed the Council regarding the Plan. The Council then approved the Plan for second reading and incorporated the amendments to the Plan.

On May 3rd, the Commission, whose meeting commenced at 2:30 p.m., recommended the Plan, this time including the Vision portion of the Plan, to the Council by a 5-4 vote.

The Council met at 7:00 p.m. on the same date. Three proposed amendments to the Plan were made available to the public for review at the meeting. The public then addressed the Council regarding the Plan. Thereafter, the Council unanimously passed the resolution adopting the Plan and incorporating the amendments.

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. Garvin v. Bi-Lo, Inc., 343 S.C. 625, 541 S.E.2d 831 (2001) (citation omitted). In ruling on a motion for summary judgment, the evidence and the inferences that can be drawn therefrom should be viewed in the light most favorable to the non-moving party. *Id.*

ISSUES[6]

I. Whether the failure to follow statutory procedure in approving the Plan renders the Plan void?

II. Whether the trial court misapplied the law with respect to appellant's due process claim?

III. Whether the trial court failed to allow the completion of necessary discovery prior to the summary judgment hearing on the due process claim?

DISCUSSION

I

Appellant argues the Council's first and second readings of the Plan are invalid because the Planning Commission failed to recommend the Plan prior to those readings. Appellant states that S.C. Code Ann. § 6-29-510(E) (Supp. 2001) requires that the Commission must recommend the Plan to the Council. We agree.

All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. South Carolina Life and Accident and Health Ins. Guar. Ass'n v. Liberty Life Ins. Co., 344 S.C. 436, 545 S.E.2d 270 (2001).

Section 6-29-510(E) states, "All planning elements must be an

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[6]At oral argument, appellant withdrew the issue regarding whether the Planning Commission lacked authority to pass the Plan after two unsuccessful votes.

expression of the planning commission recommendations to the appropriate governing bodies . . .," and section 6-29-510(D) states that a plan "must include . . . the . . . planning elements." Because the Plan must include the enumerated planning elements and the planning elements must be an expression of the Commission's recommendations to the Council, the Council cannot approve the plan until the Commission has recommended the plan. *Cf.* South Carolina Police Officers Retirement Sys. v. City of Spartanburg, 301 S.C. 188, 391 S.E.2d 239 (1990) ("must" is considered mandatory under principles of statutory construction). However, this fact does not assist appellant because the Commission voted to recommend the Plan to the Council, which included the necessary planning elements, one day prior[7] to the Council's first reading of the Plan.[8]

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[7]Appellant raises the issue that the trial court's order granting summary judgment was based upon a fact which was controverted by respondents' pleading. The fact at issue is whether the Planning Commission approved the Comprehensive Plan by a majority of the entire membership at its April 5th meeting. Appellant's contention is without merit given the clear fact in the Record that the Commission resolved to recommend the Plan to the Council on April 5, 1999.

Appellant further argues that even if a majority vote to recommend the Plan was reached on April 5th, respondents are precluded by judicial estoppel from alleging that fact. *See* Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997) (judicial estoppel precludes party from adopting position in conflict with one earlier taken in same or related litigation). Respondents are not judicially estopped from stating a fact that is clear from the record before the trial court.

[8] Appellant further appears to argue that S.C. Code Ann. § 629-520(B) (Supp. 2001) was violated. Section 6-29-520(B) provides:

> Recommendation of the plan or any element, amendment, extension, or addition must be by resolution of the planning commission, carried by the affirmative votes of at least a majority

While the Commission deferred the adoption of the Vision plan as the County's adopted vision to guide future growth and development, this does not undermine the Commission's recommendation of the Plan to the Council. Under S.C. Code Ann. § 6-29-510(E) (Supp. 2001), "[a]ll planning elements must be an expression of the planning commission recommendations to the appropriate governing bodies . . ." The Vision, while not an enumerated planning element,[9] is a planning element.

Even though the Vision is an element of the Plan, we find the Plan was properly recommended by the Commission on April 5th because the Commission has the ability to recommend the plan as a whole or to recommend the elements of the Plan in separate instances. *See* S.C. Code

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of the entire membership. . . .

Appellant appears to be arguing that this statute mandates that the Commission must recommend the Plan prior to the Council giving the Plan first reading. However, this statute is for the purpose of stating that the Plan can be recommended only if the resolution to recommend is carried by the affirmative votes of at least a majority of the members of the Commission. This statute is not concerned with whether the Council can give first reading to a plan without the Commission's recommendation.

[9] S.C. Code Ann. § 6-29-510(D) (Supp. 2001) provides:

> A local comprehensive plan must include, but not be limited to, the following planning elements:
>
> (1) a population element . . .;
> (2) an economic development element . . .;
> (3) a natural resources element . . .;
> (4) a cultural resources element . . .;
> (5) a community facilities element . . .;
> (6) a housing element . . .; and
> (7) a land use element . . .

Ann. § 6-29-530 (Supp. 2001) ("The local planning commission may recommend to the appropriate governing body and the body may adopt the plan as a whole by a single ordinance or elements of the plan by successive ordinances. . . .").

Because the Commission voted to recommend the Plan to the Council prior to the Council giving first reading to the Plan, the trial court properly granted respondents' summary judgment motion.

II

Appellant argues the trial court misapplied the law regarding his due process claim. He alleges the following facts evidence the Council's failure to provide due process to Richland County citizens: (1) certain members of the Council were affected by improper conflicts of interests; (2) the Council failed to follow procurement procedure so that it could hire clearly biased "consultants" to prepare the Plan; and (3) the Council failed to follow state-mandated procedures in the passage of the Plan. Appellant states the trial court mistook the due process claim to be discrete claims of violations of ethics rules and the County procurement statute.

Contrary to appellant's assertions, the trial court in fact ruled on his due process claim. The court found the adoption process had not deprived appellant of his property. The court, noting the Plan is only a guideline and that there had not been an impairment of appellant's rights, concluded appellant's concerns were not ripe for adjudication.

As noted, because the trial court in fact ruled on appellant's due process claim, his argument that the trial court misunderstood his due process claim is without merit. In any event, even if the trial court misunderstood appellant's due process claim, summary judgment on the claim is proper. S.C. Const. art. I, § 3, provides that no person shall be deprived of property without due process of law. Appellant has not been deprived of due process of law because he was not deprived of his property due to the adoption of the Plan, nor due to the manner of the Plan's adoption. Appellant's claim in this

regard is not justiciable because it is not ripe for review. Waters v. South Carolina Land Resources Conservation Comm'n, 321 S.C. 219, 467 S.E.2d 913 (1996) ("A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute.").

Accordingly, the trial court properly granted summary judgment on the due process claim.

III

Appellant argues the trial court erred by hearing the motion for summary judgment on his due process claim without allowing him to complete necessary discovery.

Given our conclusion that appellant's due process claim is without merit because he has not been deprived of his property, further discovery in the form of depositions would not have aided the trial court in its decision whether to grant summary judgment on appellant's due process claim. *Cf.* Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999) (citation omitted) (summary judgment must not be granted until opposing party has had full and fair opportunity to complete discovery).

CONCLUSION

We find the trial court properly granted summary judgment on appellant's claims.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Earline C. Sabb, Respondent,

v.

South Carolina State University, Appellant.

Appeal From Orangeburg County
M. Duane Shuler, Circuit Court Judge

Opinion No. 25496
Heard January 23, 2002 - Filed July 15, 2002

AFFIRMED

Stephen P. Groves, Sr., Wilbur E. Johnson, Nancy Bloodgood, and Stephen L. Brown, all of Young Clement, Rivers & Tisdale, LLP, of Charleston, for appellant.

John F. Koon, of Koon and Cook, P.A.; and Richard A. McDowell, Sr., of McDowell Law Firm, LLC; of Columbia; and Elizabeth Cook, of Breland & Bernstein, LLP; of Greenville, for respondent.

JUSTICE MOORE: We agreed to certify this case from the Court of Appeals to determine the question of whether the exclusivity provision of the Workers' Compensation Act is procedural in nature or whether it involves subject matter jurisdiction. After finding the exclusivity provision does not involve subject matter jurisdiction, we affirm the trial court on the issues raised by appellant.

PROCEDURAL FACTS

Respondent (hereinafter referred to as Sabb) brought suit against appellant asserting claims of negligent supervision of an employee and negligent retention of an employee, as well as other claims.

Upon the trial's conclusion, the jury returned a verdict for Sabb in the amount of $200,000 in actual damages. Appellant (hereinafter referred to as University) appealed to the Court of Appeals.

We certified the case, upon request by the Court of Appeals, to determine the question of whether the exclusivity provision of the Workers' Compensation Act involves subject matter jurisdiction.

ISSUES

I. Whether the exclusivity provision[1] of the Workers'

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[1]S.C. Code Ann. § 42-1-540 (1985) (the exclusivity provision), provides:

> The rights and remedies granted by [the Act] to an employee when he and his employer have accepted the provisions of [the Act], respectively, to pay and accept compensation on account of personal injury or death by accident,

Compensation Act is procedural or whether it involves subject matter jurisdiction?

II. Whether the trial court should have granted appellant's motion for a directed verdict and/or a judgment notwithstanding the verdict?

III. Whether the trial court erred by allowing evidence regarding a co-employee of Sabb?

ISSUE I

Because Sabb's claims, as employee of University, arose out of and in the course of her employment, the Workers' Compensation Act (the Act) provides the exclusive remedy for her. *See* Dickert v. Metropolitan Life Ins. Co., 311 S.C. 218, 428 S.E.2d 700 (1993) (the Act provides exclusive remedy for employees who sustain work-related injury; claim of negligence for failure to exercise reasonable care in selection, retention, and supervision of co-employee is covered by the Act); Stokes v. First Nat'l Bank, 306 S.C. 46, 410 S.E.2d 248 (1991) (mental injury arising from non-physical stress is within the Act); S.C. Code Ann. § 42-1-310 (Supp. 2000) ("Every employer and employee . . . shall be presumed to have accepted the provisions of [the Act] respectively to pay and accept compensation for personal injury . . . arising out of and in the course of the employment and shall be bound thereby.").

Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong. Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994). Sabb's tort action is

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shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.

clearly a part of the general class of cases which the court of common pleas has the jurisdiction to hear. Accordingly, the trial court in this case had subject matter jurisdiction under the Gold Kist definition.[2]

However, we acknowledge, while the trial court has subject matter jurisdiction over tort claims, certain cases may be taken from the trial court's original jurisdiction by the General Assembly. We find the General Assembly has vested the Commission with exclusive original jurisdiction over the types of claims made by Sabb, such that the circuit court was divested of its original jurisdiction over Sabb's claims.[3]

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[2]To the extent the following cases could be read to provide the circuit court is without subject matter jurisdiction to hear Sabb's claims, they are overruled: Woodard v. Westvaco Corp., 319 S.C. 240, 460 S.E.2d 392 (1995); Dockins v. Ingles Markets, Inc., 306 S.C. 287, 411 S.E.2d 437 (1991); McSwain v. Shei, 304 S.C. 25, 402 S.E.2d 890 (1991); Bridges v. Wyandotte Worsted Co., 243 S.C. 1, 132 S.E.2d 18 (1963).

[3]The phrase "shall exclude all other rights and remedies" in the exclusivity provision demonstrates plain and unambiguous legislative intent to vest the Workers' Compensation Commission with exclusive original jurisdiction over an employee's claims, such as Sabb's claims.

Further support for this conclusion comes from S.C. Code Ann. § 15-78-60 (14) (Supp. 2000) of the Tort Claims Act, which provides that the governmental entity is not liable for a loss resulting from any claim covered by the Act.

From these statutes, it is apparent the General Assembly intends for employees to seek a remedy from employers for their work-related injury only through the Workers' Compensation Commission and not through the trial courts. Therefore, the trial court's original jurisdiction over this type of tort claim was divested by the General Assembly's enactment of these statutes, which, in turn, means the trial court lacked original jurisdiction to hear Sabb's claims.

Therefore, the Commission had exclusive original jurisdiction to hear Sabb's claims. However, because University failed to raise the exclusivity provision as a defense to Sabb's tort action on appeal, that challenge is waived. We reiterate the exclusivity provision does not involve subject matter jurisdiction. We now address University's issues on appeal.

UNIVERSITY'S APPEAL

FACTS

Sabb, after working for University for five years, joined University's campus police department in 1984. In 1989, she became a certified training officer and Paul White became chief of the department.

Within three weeks of White becoming chief, Sabb's training duties were terminated and given to another officer who was not a certified training officer. Sabb filed several grievances against Chief White. For instance, when Sabb requested light duty due to an arthritic hip, Chief White informed her she would be required to take annual or sick leave. Sabb filed a grievance with University, but later withdrew the grievance when the Vice-President Provost had the policy rescinded in writing. Chief White then placed Sabb on light duty working the midnight shift as a dispatcher.

In 1991, Sabb signed a petition circulated by officers within the department concerning problems with Chief White. Due to the petition, University appointed a committee to investigate. The Committee found: (1) over half of the police personnel signed a statement requesting the chief's removal; (2) as to the chief's revelation that he had no idea a problem existed, the Committee found the small size of the department made it difficult for anyone to work in such a hostile environment without being aware of the tensions that existed; (3) the chief had an apparent inability to assess problems when they arose and take corrective action to prevent escalation of the problems; and (4) the supervising staff had engaged in gross unprofessional behavior by expressing happiness at the chief's predicament.

The Committee recommended that Chief White participate in a mandatory management and leadership improvement plan for 120 days; and that his failure to participate in the plan would constitute grounds for removal from the department. It was also recommended that the supervisory staff undergo extensive training pertaining to personnel procedures, interpersonal skills development, and shared departmental decision making. The Committee recommended both Chief White and his supervisory staff, of which Sabb was a member, attend workshops to learn about institutional policies and procedures pertaining to discipline.

Sabb testified Chief White did not accomplish the above requirements, that University did not ensure compliance with the report, and that conditions did not improve within the department. Further, as a result of the petition, Sabb testified Chief White became openly hostile towards her.

In 1994, University held a meeting in which it was announced University would be investigating the department. Following the meeting, Sabb testified Chief White had his own meeting where he singled Sabb out and told her, as chief, he reserved the right to make any decisions he wanted. A week later, Chief White was removed from the police department for a reason unrelated to the investigation, and Lieutenant Wilson became the chief.

Once Chief Wilson assumed his position, he made Sabb the Acting Lieutenant of Operations which placed her in charge of the entire operations of the department. However, when Chief White returned as chief less than a year later, he removed Sabb as Acting Lieutenant of Operations.

Subsequently, Sabb attempted to discipline Sergeant Pamela Gissentanna. Chief White refused to sign the discipline form; however, Chief Wilson (who remained chief along with Chief White for a period of time following Chief White's return) signed the form recommending suspension. Sabb testified that Gissentanna was never suspended. As a result, Sabb filed grievances with University regarding this matter and on the ground Chief White had removed her as Acting Lieutenant of Operations.

The complaints were found to be non-grievable.

In another matter, while Sabb was on sick leave, Chief White eliminated her training duties and gave her the midnight shift as a patrol officer during a meeting she could not attend. Sabb stated that by becoming a patrol officer she was resuming the duties with which she commenced her police work over fifteen years earlier. University did not respond to her grievance regarding this matter.

Sabb filed another grievance on the basis she was denied a promotional opportunity when Chief White placed a co-employee in the position of Lieutenant of Operations without advertising the position per University requirements. University responded, in a letter to Sabb, that the position had not yet been established and the co-employee was temporarily assigned the Operations responsibilities. University informed Sabb that when the Lieutenant of Operations position was established, University job posting guidelines would be followed. As a result, University denied her grievance request because she had not been denied a promotional opportunity. In the presentation of her case, Sabb introduced a newspaper article that was published two days after the University's denial of her grievance request. This article announced that the co-employee "was named lieutenant of operations." Sabb testified, to her knowledge, the position was never posted as an opening and there were no interviews for the position.

Sabb testified, as a result of Chief White's actions, she had an escalated blood pressure, interference with her sleep, and panic attacks. She called University's President and related her health problems. She also told University she feared for her life because Chief White had attempted to fight her.

After consulting with her physician, Dr. Ester Hare, Sabb requested a transfer to another department. At the time she requested the transfer, she was on bed rest and heavy medication.

Following her transfer, Sabb informed University she wished to keep

her police credentials because she intended to return to the police department. However, her police certification was returned when her change in status form was sent to the Criminal Justice Academy because the form stated she had resigned from the department for personal reasons. Sabb testified the return of her credentials devastated her. Upon attempting to have the credentials returned, Sabb was told she would have to repeat Academy training.

Dr. Hare testified when Sabb first came to see her, Sabb was nervous, tearful, and had an escalated blood pressure. She testified she prescribed medicines for Sabb's anxiety and depression. As a result of conversations with Sabb, Dr. Hare wrote a letter to University, stating she was treating Sabb for hypertension and work-related anxiety because Sabb was afraid of her boss. In the letter, she recommended Sabb be placed in another position. Since Sabb left the police department, Dr. Hare testified Sabb has not been placed on medication.

Several of Sabb's co-workers testified on Sabb's behalf. Ella Reed testified Chief White told her as long as he was there, Sabb would never get a raise or promotion because she was not fit to be a police officer. Ronald Hook, another co-worker, testified he reported problems with the chief's personnel practices to University. Hook testified he had filed a grievance with University, partially due to Chief White's treatment of him, such as cornering him and making harsh remarks to him.[4]

Following the conclusion of Sabb's case, University moved for a directed verdict on the negligence claims on the basis there was no showing of any facts that created a duty on the part of the University and there was no showing a duty had been breached by University. University also moved for a directed verdict on the ground University had discretionary immunity under

[4]Two other co-workers, Richard Johnson and Herman Singletary, testified they had filed grievances with University and had each filed a lawsuit against University.

S.C. Code Ann. § 15-78-60(5) (Supp. 1998). The trial court denied the motion.

The jury returned a verdict in Sabb's favor. University moved for a judgment notwithstanding the verdict (JNOV), which was denied.

ISSUE II

University argues the trial court erred by denying its motion for a directed verdict and/or a JNOV for three reasons: (1) because the "discretion" exception contained in S.C. Code Ann. § 15-78-60(5) (Supp. 2000) barred respondent's claims; (2) because respondent failed to prove University owed her a duty; and (3) because respondent failed to prove University breached a duty owed her.

In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999). The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. *Id.* This Court will reverse the trial court only when there is no evidence to support the ruling below. *Id.* Further, a trial court's decision granting or denying a new trial will not be disturbed unless the decision is wholly unsupported by the evidence or the court's conclusions of law have been controlled by an error of law. *Id.*

Directed verdict and JNOV motions on basis of discretionary immunity

The Tort Claims Act waives immunity for torts committed by the State, its political subdivisions, and governmental employees acting within the scope of their official duties. Pike v. South Carolina Dep't of Transp., 343 S.C. 224, 540 S.E.2d 87 (2000). There are several exceptions to this waiver of immunity, including what is known as discretionary immunity. *Id.*

S.C. Code Ann. § 15-78-60(5) (Supp. 2000) provides that a governmental entity is not liable for a loss resulting from:

> the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee.

Mere room for discretion on the part of the entity is not sufficient to invoke the discretionary immunity provision. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997). Discretionary immunity is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards. Wooten ex rel. Wooten v. South Carolina Dep't of Transp., 333 S.C. 464, 511 S.E.2d 355 (1999). The governmental entity bears the burden of establishing discretionary immunity as an affirmative defense. Summer v. Carpenter, *supra*.

The burden was on University to show that it not only actually weighed competing considerations and alternatives regarding the supervision of Chief White but that, in doing so, it utilized accepted professional standards appropriate to resolve this issue. However, there is no evidence University did so. The testimony of University's President and University's Human Resources Director belie any notion that University weighed competing considerations and alternatives when deciding not to discipline or remove Chief White.

While it is true University made attempts to change the hostile environment in the department by requiring Chief White and others to undergo training sessions, there is no evidence University weighed competing considerations when making these decisions. Further, there is no testimony University utilized accepted professional standards appropriate to resolve the issue of Chief White's hostility towards and actions regarding his employees. Accordingly, the trial court properly denied the motions for directed verdict and JNOV. *See* Summer v. Carpenter, *supra* (mere room for

discretion on part of governmental entity is not sufficient to invoke discretionary immunity provision; governmental entity bears burden of establishing discretionary immunity as affirmative defense). *See also* Pike v. South Carolina Dep't of Transp., *supra* (to allow governmental entity to shield itself with only a showing of "some evidence" would eviscerate standard entity must meet to establish discretionary immunity enunciated by the Court; certainly a governmental entity should not be entitled to discretionary immunity as a matter of law merely by creating an issue of fact).

Directed verdict and JNOV motions based on lack of duty or breach of alleged duty

In a negligence action, a plaintiff must show the (1) defendant owes a duty of care to the plaintiff, (2) defendant breached the duty by a negligent act or omission, (3) defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) plaintiff suffered an injury or damages. Steinke, *supra*. If there is no duty, then the defendant in a negligence action is entitled to a directed verdict. *Id.*

A duty arose on University's part once University was placed on notice of Chief White's behavior and actions. After University received the grievances of Sabb and other employees, University had a duty to address the employees's concerns with due care.

A jury issue also existed as to whether University had breached that duty. University was on notice of Chief White's activities through conversations Sabb and other employees had with University officials, the petition circulated by members of the police department, the grievances of Sabb and other employees, and through the Committee's report detailing the findings of their investigation into Chief White's actions. Despite these numerous complaints and notifications of Chief White's actions and behavior, University allowed him to continue serving as chief of the department without any real effort to rectify the hostile conditions within the department.

Viewing the evidence in the light most favorable to Sabb, the trial court properly denied the directed verdict and JNOV motions because evidence existed to show University had possibly breached a duty owed to Sabb. *See* Steinke, *supra* (trial court's decision denying directed verdict and JNOV motions will not be disturbed unless there is no evidence to support ruling or unless trial court's conclusions of law have been controlled by error of law).

ISSUE III

University argues the trial court should have excluded all of the evidence regarding Sergeant Pamela Gissentanna, under Rule 403, SCRE, because the probative value of the evidence was substantially outweighed by its prejudicial effect.

This issue is not preserved for our review because University did not make an objection to the evidence during trial[5] and because University did not object to *all* the evidence regarding Gissentanna but now wishes to do so on appeal. *See* State v. Griffin, 339 S.C. 74, 528 S.E.2d 668 (2000) (motion *in limine* is not final and losing party must renew its objection at trial when evidence is presented to preserve issue for review); Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 531 S.E.2d 282 (2000) (to preserve issue for

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[5]Prior to trial, University made a motion *in limine* requesting the trial court exclude from Sabb's presentation at trial any testimony concerning "sexual harassment by way of a third party," which was alleged in Sabb's grievances to University. University stated in its motion that Sabb actually meant that Chief White favored Gissentanna, and that the use of the words "sexual harassment" was unduly prejudicial to University.

At trial, University's objection to an exhibit which contained a reference to sexual harassment was overruled. When Sabb's counsel asked Sabb's co-employee, Hook, if he had observed any favoritism by Chief White towards Gissentanna, University did not object.

appellate review, issue must have been raised to and ruled upon by trial court); Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (1996) (party may not argue one ground for an objection at trial and another ground on appeal).[6]

AFFIRMED.

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

[6]In any event, the evidence attempting to demonstrate an improper relationship between Chief White and Officer Gissentanna was properly admitted because it was relevant for the purpose of showing Chief White may have engaged in favoritism when making decisions regarding his subordinates. *See* Pike v. South Carolina Dep't of Transp., *supra* (admission and rejection of testimony is largely within the trial court's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion).

JUSTICE PLEICONES: I agree with the majority that the Workers Compensation Act ("the Act") does not divest the circuit court of subject matter jurisdiction in this matter. I would, however, grant the University's motion for a directed verdict on Sabb's negligent supervision and retention claims,[7] and therefore, I respectfully dissent.

I question whether an employee should ever be allowed to sue her employer on a theory of negligent retention or supervision for the acts of a supervisory employee.[8] See Patriarca v. Center For Living and Working, Inc., 1999 WL 791888 (Mass. Super. 1999). Assuming such an action could be brought, I would follow the approach taken by a number of courts and require that the actions of the negligently supervised or negligently retained supervisor be significantly more egregious than White's in order to be actionable in tort. See e.g. Hayes v. Patton-Tully Transp. Co., 844 F.Supp. 1221 (W.D. Tenn. 1993) (negligent supervision claim will lie only where supported by viable claim of tortious conduct by offending employee); Mulhern v. City of Scottsdale, 799 P.2d 15 (Az. Ct. App. 1990) (in order for employer to be liable for negligent hiring, retention, or supervision, the employee must have committed an actionable tort); Schoff v. Combined Ins. Co. of America, 604 N.W.2d 43 (Iowa 1999) (the torts of negligent hiring, supervision, or training must include as an element an underlying tort or wrongful act committed by the employee); Hogan v. Forsyth Country Club Co., 340 S.E.2d 116 (N.C. Ct. App. 1986) (before employer can be held liable for negligently hiring or retaining an employee, plaintiff must prove

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[7]Although Sabb's complaint also asserted causes of action for intentional infliction of emotional distress, violation of Whistle Blower Act , assault, civil conspiracy, and negligent hiring, the only theories submitted to the jury were her claims of negligent retention and negligent supervision.

[8]Of course, but for the University's failure to interpose the exclusivity provisions of the Act, this case would not have been before the Circuit Court in the first instance. In my view, this failure to assert the exclusivity provisions of the Act may have been strategic, owing to an assessment that the case would probably be dismissed.

that the offending employee committed a tortious act resulting in injury to plaintiff); Gonzales v. Willis, 995 S.W.2d 729 (Tex. Ct. App. 1999) (plaintiff-employee's negligent hiring, retention, and supervision claims against employer failed where plaintiff-employee failed to show actions of offending employee amounted to an actionable tort); Haverly v. Kaytec, Inc., 738 A.2d 86 (Vt. 1999) (the tort of negligent supervision must include as an element an underlying tort or wrongful act committed by the employee).

The evidence presented by Sabb at trial established the following: (1) White reassigned Sabb's job duties, that is, he relieved Sabb of her training and supervisory duties, and scheduled her to work the night shift; (2) when Sabb reported that she was physically unable to perform her normal job assignments, White "threatened" to make Sabb submit leave (after Sabb complained to the University, White did not carry through with the "threat," but instead reassigned Sabb to light duty); (3) White singled-out Sabb at a staff meeting and verbally reiterated his authority as head of the police department; and (4) White refused to approve Sabb's request to discipline an employee supervised by Sabb. None of this conduct rises to the level of a tort.[9]

To allow recovery based on the theory advanced in this case has grave consequences for the employer-employee relationship. The workplace is often stress-laden. Employees frequently disagree with the personnel decisions of their supervisors. Often employees complain to management

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[9]The only possible theory I can perceive from Sabb's complaints is a claim for outrage or intentional infliction of emotional distress. There is insufficient evidence as a matter of law to support recovery for outrage. See Shipman v. Glenn, 314 S.C. 327, 443 S.E.2d 921 (Ct. App. 1994) ("callous and offensive conduct" of supervisor insufficient to support employee's recovery for intentional infliction of emotional distress; conduct must be so extreme and outrageous as to exceed bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community; plaintiff not proceeding on theory of negligent retention or supervision).

about job assignments and the treatment they receive from supervisors. Allowing an employee to recover from the employer based on the facts of this case leaves employers with two options in the future: (1) fire the supervisor when a subordinate employee complains, or (2) retain the supervisor, and become liable for money damages if the complaining employee prevails on a negligent retention and supervision claim.[10] While White's conduct bespeaks an undesirable management style, the University should not be liable to this unhappy plaintiff as a result.

In my opinion, the University was entitled to a directed verdict on Sabb's claims of negligent supervision and negligent retention. Sabb has wholly failed to show that White's actions towards her constituted a tort.

[10]There exists, of course, a third option: take action against the complained-of employee short of job termination. The University pursued that option here, but that course of action did not relieve it of liability to Sabb.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Dennis
C. Gilchrist, Respondent.

Opinion No. 25497
Submitted June 18, 2002 - Filed July 15, 2002

DEFINITE SUSPENSION

Henry B. Richardson, Jr. and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Michael J. Giese, of Greenville, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR.[1] In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension ranging from six months to eighteen months. We accept the

[1]Respondent was placed on interim suspension by order of this Court dated April 25, 2000. In the Matter of Gilchrist, 340 S.C. 287, 531 S.E.2d 523 (2000).

Agreement and impose a definite suspension of eighteen months from the practice of law. The facts as admitted in the Agreement are as follows.

Facts

Respondent pled guilty to possession of crack cocaine, in violation of 21 U.S.C. § 844(a). He was sentenced to eighteen months imprisonment and three years of supervised release. After the United States Government filed a motion for a reduction of sentence, respondent was re-sentenced to five years probation and six months of home confinement.

Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (violating the Rules of Professional Conduct); Rule 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer); Rule 8.4(c) (engaging in conduct involving moral turpitude); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

Respondent has also violated the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(4) (conviction of a crime of moral turpitude or a serious crime); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); and Rule 7(a)(6) (violating the oath of office taken upon admission to practice law in this state).

Conclusion

Respondent has fully acknowledged that his actions in the aforementioned matters were in violation of the Rules of Professional Conduct and the Rules for Lawyer Disciplinary Enforcement. We therefore

suspend respondent from the practice of law for eighteen months. This suspension is not retroactive to the date of respondent's interim suspension. Pursuant to Rule 33(f)(10), RLDE, Rule 413, SCACR, respondent must have completed probation prior to petitioning for reinstatement to the practice of law. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

The Supreme Court of South Carolina

RE: In the Matter of Larry S. Drayton, Respondent

O R D E R

On April 8, 2002, Respondent was suspended from the practice of law for a period of ninety days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

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

JEAN H. TOAL, CHIEF JUSTICE

BY Daniel E. Shearouse
Clerk

Columbia, South Carolina

July 9, 2002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Food Lion, Inc.,

Appellant,

v.

United Food & Commercial Workers International Union,

Respondent.

Appeal From Greenville County
Joseph J. Watson, Circuit Court Judge

Opinion No. 3533
Heard October 11, 2000 - Filed July 8, 2002

AFFIRMED

Charles Porter, Jane W. Trinkley and Robert L. Widener, all of McNair Law Firm, of Columbia; Donald A. Harper, of The Harper Law Firm, of Greenville ; Richard L. Wyatt, Jr., Larry E. Tanenbaum and Thomas P. McLish, all of Akin, Gump, Strauss, Hauer & Feld, of Washington, D.C., for appellant.

Arnold S. Goodstein, of Summerville; Alice F. Paylor, of Rosen, Rosen & Hagood and Armand Derfner, both of Charleston; and Robert F. Muse, of Stein, Mitchell & Mezines; Robert M. Weinberg and Andrew D. Roth, both of Bredhoff & Kaiser, all of Washington, D.C., for respondent.

SHULER, J.: Food Lion, Inc. appeals the trial court's dismissal of its action for abuse of process against the United Food & Commercial Workers International Union. We affirm.

FACTS/PROCEDURAL HISTORY

On February 12, 1993, Food Lion, Inc. filed a complaint in circuit court alleging the United Food & Commercial Workers International Union committed the common-law tort of abuse of process by funding and directing a lawsuit against it as part of a "corporate campaign" strategy used to inflict economic harm on certain disfavored food retailers.[1] The Union removed the action to federal court on March 16. Food Lion filed a motion for remand and the Union responded with a motion to dismiss. On July 21 the federal court issued an order denying Food Lion's motion and granting the motion to dismiss,

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[1] In the suit, several former Food Lion employees complained of wrongful termination and failure to give notice of their right to continue health care coverage. After nearly a decade of litigation, the federal district court found in favor of the defendants. See Bryant v. Food Lion, Inc., 100 F. Supp.2d 346 (D.S.C. 2000), *aff'd*, 8 Fed. Appx. 194 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 459 (2001). Although the Union was not a party to the Bryant lawsuit, liability for the abuse of process tort generally "extends to all who knowingly participate, aid, or abet in the abuse." Broadmoor Apartments of Charleston v. Horwitz, 306 S.C. 482, 486, 413 S.E.2d 9, 11 (1991). Similarly, "[t]hose who advise or consent to the [abusive] acts, or subsequently ratify them, are liable as joint tortfeasors." Id.

finding the National Labor Relations Act preempted the state law cause of action for abuse of process.

Food Lion filed a motion to reconsider and therein sought to amend its complaint. The court permitted the amendment and vacated the dismissal on January 22, 1994. On February 3, the Union filed a second motion to dismiss for failure to state a cause of action under South Carolina law, which the court denied on June 24. The Union then filed a motion to reconsider the failure to dismiss and a subsequent motion for partial summary judgment. The federal court denied both motions on October 4, 1995.

Following reassignment of the case, another judge sua sponte questioned the original remand ruling and asked the parties to re-argue the issue of subject matter jurisdiction. On July 24, 1998, the federal court, finding it lacked jurisdiction, remanded the case to the South Carolina circuit court. Thereafter, on October 27, 1998, the Union moved to dismiss the action pursuant to Rule 12(b)(6), SCRCP, and a hearing was held January 12, 1999. By order dated March 11, 1999, the court dismissed the amended complaint for failure to state a valid cause of action for abuse of process and, alternatively, because the action was preempted by federal law. Food Lion filed a motion to alter or amend the judgment, which the court denied on April 20, 1999. This appeal followed.[2]

LAW/ANALYSIS

Standard of Review

A trial court's ruling on a 12(b)(6) motion to dismiss for failure to state facts constituting a cause of action must be based solely upon the allegations set

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[2] Although Food Lion lists ten separate "issues" in its "Statement of Issues on Appeal," we find the appeal essentially presents only two questions for review, i.e., whether the trial court erred by dismissing Food Lion's abuse of process claim pursuant to Rule 12(b)(6), SCRCP and/or by finding the claim preempted by federal law.

forth on the face of the complaint. See State Bd. of Med. Exam'rs v. Fenwick Hall, Inc., 300 S.C. 274, 387 S.E.2d 458 (1990). In deciding the motion, the court must view the allegations in the light most favorable to the plaintiff, "with every doubt resolved in his behalf." Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). The trial court, therefore, should refuse a 12(b)(6) motion if the "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." Id. (quoting Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)).

Discussion

The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure. See Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 210, 153 S.E.2d 693, 695 (1967) ("[A]n abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect — the improper use of a regularly issued process."); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 121 at 897 (5th ed. 1984) ("[T]he gist of the tort is . . . misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish."). The purpose itself, though ulterior, need not be illegitimate; rather, the abuse occurs when the purpose is accomplished by using the process in a manner in which it was not intended to be used. See Fowler W. Harper et al., The Law of Torts § 4.9 (3d ed. 1996).

To sustain a claim for abuse of process, it is axiomatic that "the judicial process must in some manner be involved." Keeton, supra, § 121 at 898; see Kirchner v. Greene, 691 N.E.2d 107 (Ill. Ct. App. 1998) (holding that where no court process is involved there can be no abuse of process); 72 C.J.S. *Process* § 106 at 697 (1987) ("[I]f the process is not used at all, no action can lie for its abuse."). Although no South Carolina case has defined the term "process" in the context of the tort, we agree with Food Lion that the trial court erroneously circumscribed its meaning by giving it the technical construction found in Royal Exchange Assurance of London v. Bennettsville & C.R. Co., 95 S.C. 375, 79 S.E.2d 104 (1913). In our view, "process," as it pertains to the abuse of process tort, embraces the full range of activities and procedures attendant to litigation.

See Hart v. O'Malley, 647 A.2d 542, 551 (Pa. Super. Ct. 1994) ("The word 'process' as used in the tort of abuse of process has been interpreted broadly and encompasses the entire range of procedures incident to the litigation process.") (citation omitted); Nienstedt v. Wetzel, 651 P.2d 876, 880 (Ariz. 1982) ("'[P]rocess' as used in the tort . . . is not restricted to the [traditionally] narrow sense of that term."); 72 C.J.S. §106 at 694 ("For purposes of the tort, the word 'process' may encompass a range of court procedures incident to the litigation."); Harper, supra, § 4.9 at 4:104, n.52 ("That a tort action, loosely called 'abuse of process,' requires the use of the word *process* as that word is technically defined in other contexts is no more self-evident than that a tort action loosely called 'false imprisonment' should require a 'prison.'").

A plaintiff alleging abuse of process in South Carolina must assert two essential elements: 1) an "ulterior purpose," and 2) a "willful act in the use of the process not proper in the conduct of the proceeding." Hainer v. Am. Med. Int'l, Inc., 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997); see LaMotte v. Punch Line of Columbia, Inc., 296 S.C. 66, 370 S.E.2d 711 (1988). "An ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process." First Union Mortgage Corp. v. Thomas, 317 S.C. 63, 74, 451 S.E.2d 907, 914 (Ct. App. 1994); see Davis v. Epting, 317 S.C. 315, 454 S.E.2d 325 (Ct. App. 1994) (finding no ulterior purpose where the record presented no evidence the process was used to gain anything other than a right to access disputed property); Rycroft v. Gaddy, 281 S.C. 119, 125, 314 S.E.2d 39, 44 (Ct. App. 1984) (holding no ulterior purpose was shown where defendants' use of subpoena to obtain bank records was for the "entirely legitimate purpose" of gathering evidence").

As to the second, or "willful act" element, our supreme court has stated that "[s]ome definite act . . . not authorized by the process or aimed at an object not legitimate in the use of the process is required." Hainer, 328 S.C. at 136, 492 S.E.2d at 107 (quoting Huggins, 249 S.C. at 209, 153 S.E.2d at 694); see Rycroft, 281 S.C. at 125, 314 S.E.2d at 43. Thus, the element comprises three components: 1) a "willful" or overt act 2) "in the use of the process" 3) that is improper because it is either (a) unauthorized or (b) aimed at an illegitimate

collateral objective.[3] Id.

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[3] Contrary to Food Lion's argument, the improper act must relate to the judicial process. See Cisson v. Pickens Sav. & Loan Ass'n, 258 S.C. 37, 45, 186 S.E.2d 822, 826 (1972) ("[I]t is the malicious misuse or perversion of the process for an end not lawfully warranted by it that constitutes the tort known as abuse of process.") (citation omitted); Bell Lines, Inc. v. Strickland, 254 S.C. 148, 150, 173 S.E.2d 788, 788 (1970) (reversing the trial court's failure to sustain demurrer in part because "[n]o process was involved in any act done by plaintiff prior to the commencement of the action"). This is self-evident in that the language used to describe the element clearly refers to a "willful act *in the use of the process* not proper in the conduct of the proceeding." Hainer, 328 S.C. at 136, 492 S.E.2d at 107 (emphasis added). Indeed, proof of the "willful act" element demonstrates the improper use or "abuse" of the process. Although Food Lion contends our prior case law indicates the "willful act" and the "process" may exist independent of one another, we believe these cases stand only for the proposition that the willful act requirement is not limited to those abusive acts occuring *after* process has issued, but includes coercive or extortionate acts that *cause* process to issue in the first instance. See, e.g., Huggins, 249 S.C. at 212, 153 S.E.2d at 696 (holding the evidence sufficiently established the defendant abused the process by initiating criminal proceedings for the unintended purpose of extorting money it felt was due); Sierra v. Skelton, 307 S.C. 217, 222, 414 S.E.2d 169, 172 (Ct. App. 1992) (rejecting the argument that the focus in an abuse of process action is solely on the improper use of process after it has been issued); Rycroft, 281 S.C. at 125, 314 S.E.2d at 44 (finding no cause of action for abuse of process against defendant C&S Bank, because "the bank caused no process to issue against Rycroft"). For example, a careful reading of Huggins reveals the willful act supporting the abuse of process claim was not merely the store manager's demand that Huggins pay $10 for items allegedly taken previously; rather, it included the manager's directive to call the police, which resulted in the employment of the criminal process for something other than its intended purpose (the punishment of shoplifters). As the court stated: "Appellant cannot divorce itself from responsibility for

Food Lion indisputably alleged the first element of the tort by stating in its amended complaint that the Union "generated, funded, pursued and directed" the Bryant lawsuit for the "improper ulterior purpose of furthering the objectives of its corporate campaign." See Hainer, 328 S.C. at 136, 492 S.E.2d at 107 (noting the improper purpose usually is "to obtain a collateral advantage[] not properly involved in the proceeding itself") (quoting Huggins, 249 S.C. at 209, 153 S.E.2d at 694). As to the second element, Food Lion alleged the Union committed the following "willful acts":

> a. Filing the Complaint alleging a class action in the Bryant case for collateral purposes . . . .
>
> b. Amending the Complaint in the Bryant case to add widely diverse additional named plaintiffs as class representatives for collateral purposes . . . .
>
> c. Taking formal and informal discovery in the Bryant case, including depositions, interrogatories, and interviews, for collateral purposes . . . .
>
> d. Taking depositions of persons [the Union] claimed as its clients in the Bryant case for collateral purposes . . . .
>
> e. Filing a motion to release from a Confidentiality Order the depositions [the Union] had taken of persons it claimed as its own clients in the Bryant case for collateral purposes . . . .

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the proceedings that resulted from the store manager's actions . . . [as the ensuing criminal proceedings] were tainted throughout with the ulterior and improper purpose of coercing [Huggins] to pay for merchandise that the store manager 'felt' or suspected he had previously taken." Huggins, 249 S.C. at 212, 153 S.E.2d at 696.

f. Non-privileged publication of various allegations in pleadings filed by [the Union] in the Bryant case . . . for collateral purposes . . . .

We agree with the trial court, albeit for different reasons, that these acts *as described* are facially insufficient to allege the second element of the tort.[4]

Food Lion correctly observes that an abuse of process action may lie if a party prosecutes an "entire lawsuit" for collateral purposes.[5] See 1 Am. Jur. 2d *Abuse of Process* § 11 at 420 (1994) ("[I]f the suit is brought not to recover on the cause of action stated in the complaint, but to accomplish a purpose for which the process was not designed, there is an abuse of process."). To this end, Food Lion's amended complaint states the Union employed "all of the process attendant to the Bryant case for purposes neither proper in the regular conduct of the Bryant lawsuit nor contemplated in the regular pursuit of its claims." The complaint's fatal flaw, however, is that Food Lion did not state facts sufficient to allege the third component of the "willful act" element — that is, in what

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[4] Although we acknowledge the trial court misconstrued Food Lion's amended complaint as asserting several causes of action for abuse of process rather than a single cause of action, we do not believe the court's evaluation of "each willful act separately, rather than as a broader pattern of conduct, masked the abusive nature" of the Union's behavior. In our view, whether the complaint is viewed as alleging one cause of action or six, Food Lion's allegation of an "ulterior purpose" still must be accompanied by a separate allegation of a "willful act in the use of the process not proper in the conduct of the proceeding." Hainer, 328 S.C. at 136, 492 S.E.2d at 107.

[5] To the extent the Union argues abuse of process does not apply to the perversion of an entire lawsuit because any "abuse" could be cured by other remedies available to the court (i.e., sanctions), it misconstrues the purpose of the tort. An abuse of process action is not designed to compel compliance with court procedures or to deter future misconduct. Rather, the tort is intended to compensate a party for harm resulting from another's misuse of the legal system.

manner the willful acts enumerated are improper. See Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995) (affirming dismissal of third-party complaint for civil conspiracy against plaintiff's attorney under 12(b)(6), SCRCP, where complaint failed to allege in what manner attorney acted outside his professional capacity). In other words, although properly alleging an act involving the process of the court, Food Lion failed to assert how the process was perverted or abused.

Food Lion's argument is premised on its belief that alleging the Union undertook the acts "for collateral purposes" sufficiently alleges the improper nature of the acts. We disagree. An allegation of an ulterior purpose or "bad motive," standing alone, is insufficient to assert a claim for abuse of process. Hainer, 328 S.C. at 136, 492 S.E.2d at 107 (explaining that no liability for the tort exists "where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions"); see First Union, 317 S.C. at 75, 451 S.E.2d at 914-15 ("Because First Union simply carried the attachment process to its authorized conclusion, its actions as a matter of law do not constitute abuse of process."); Keeton, supra, § 121 at 897 ("[E]ven a pure spite motive is not sufficient where process is used only to accomplish the result for which it was created.").

Furthermore, although an ulterior purpose may be inferred from an improper willful act,[6] "the inference is not reversible and it is not possible to infer [improper] acts from the existence of an improper motive alone." Keeton, supra, § 121 at 899; see 72 C.J.S. § 107 at 696 ("Misapplication [of the process] will not be inferred from a wrongful purpose."). Hence, to sustain a claim for the tort, a party must allege facts sufficient to show not only that the lawsuit was brought for an ulterior purpose, i.e., for collateral reasons, but that willful acts were taken through which the process was misapplied or abused. See Huggins, 249 S.C. at 214, 153 S.E.2d at 697 ("The abuse, the perversion, of the process

[6] See, e.g., First Union, 317 S.C. at 74, 451 S.E.2d at 914 (stating an ulterior purpose is shown when a party uses the process to gain an illegitimate objective).

. . . is the foundation of the cause of action . . . ."); Kirchner, 691 N.E.2d at 116-17 ("The mere use of the legal process . . . does not constitute abuse of process. 'Some act must be alleged whereby there has been a misuse or perversion of the process of the court.'") (citations omitted). To hold otherwise would vitiate the requirement of having to allege both elements of the tort — an "ulterior purpose" and an improper "willful act" — because a bald allegation that various acts were undertaken for collateral purposes would, in effect, be simply alleging an ulterior purpose.

The distinction between the two requirements is evident in the language of the Restatement of Torts: "One who uses a legal process, whether criminal or civil, against another *primarily* to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." Restatement (Second) of Torts § 682 (1977) (emphasis added). As noted in the Restatement comment, "[t]he significance of ['primarily'] is that there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant." Restatement (Second) of Torts § 682 cmt. b. at 475 (1977). Accordingly, liability exists not because a party merely seeks to gain a collateral advantage by using some legal process, but because the collateral objective was its sole or paramount reason for acting. See id.; Harper, supra, § 4.9 at 4:84-85 ("The process must be used 'primarily' to accomplish the ulterior end."); Scozari v. Barone, 546 So.2d 750, 751 (Fla. Dist. Ct. App. 1989) ("For the cause of action to exist, there must be a use of the process for an *immediate* purpose other than that for which it was designed. There is no abuse of process, however, when the process is used to accomplish the result for which it was created, regardless of an incidental or *concurrent* motive of spite or ulterior purpose.") (emphasis added); Wong v. Panis, 772 P.2d 695, 700 (Haw. Ct. App. 1989) ("Liability for abuse of process is imposed when the putative tortfeasor uses legal process 'primarily' for an ulterior motive."). It therefore follows that when a claim for abuse of process is predicated on an alleged act "aimed at an object not legitimate in the use of the process," the ulterior purpose allegation must be accompanied by an allegation that the process was misused by the undertaking of the alleged act, not for the purpose for which it was intended but for the primary purpose of achieving a collateral aim.

Here, Food Lion's amended complaint alleged only that the Union committed various acts — initiating and amending the Bryant lawsuit, taking discovery, filing motions, etc. — for collateral purposes. As discussed above, a party who simply pursues a lawsuit with a collateral purpose in mind has done nothing improper. Thus, even given a liberal construction, the "willful acts" as delineated and described by Food Lion were, without more, proper uses of the process. See Meidinger v. Koniag, Inc., 31 P.3d 77, 86 (Alaska 2001) (dismissing a counterclaim alleging the pursuit of damages and injunctive relief as "overt acts" because the allegations were simply "examples of actions taken in the regular course of litigation").

Moreover, nowhere in the complaint did Food Lion claim the Union did not use the Bryant lawsuit for its stated purpose, i.e., to redress the termination and health care grievances of several former Food Lion employees. As a result, the amended complaint failed to assert any facts sufficient to show the acts undertaken by the Union in the Bryant proceeding were aimed not at its purported, and therefore proper, purpose of remedying alleged wrongs, but towards a primary purpose of achieving a collateral objective.[7] We therefore find Food Lion did not adequately allege the second element of the tort.[8] See

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[7] Although we conclude no "magic words" are required (e.g., "primarily," "solely," "paramount" etc.), the complaint clearly must allege a party abused the process by not utilizing it for its intended purpose.

[8] Food Lion admits as much in the reply brief, stating its complaint alleged "the Union did not invoke court procedures 'solely for the purpose of litigating its contentions with respect to the issues raised by [the Bryant] complaint,' but rather that it invoked those procedures for collateral purposes, and then engaged in willful acts intended to further those purposes." Although Food Lion also declares in its primary brief that the complaint alleged variously that "none of the Union's acts described . . . was aimed at an objective related to the prosecution of the lawsuit" and that "the Union's purpose in pursuing the Bryant lawsuit was not to vindicate any legitimate grievance over employee benefits, but rather was to use the lawsuit as a vehicle for causing Food Lion financial harm," these assertions clearly

Mazowiecki v. Beck, 529 A.2d 171, 174 (Conn. 1987) ("[Existing case law demonstrates that there is no bright line that clearly distinguishes between the ends ordinarily associated with litigation and the ulterior purpose that the tort of abuse of process is intended to sanction. Much turns on the specificity of the pleadings. . . . [Courts have held [general] complaints to be legally insufficient because they do not allege conduct showing the use of process to accomplish a purpose for which it was not designed. . . . So general an allegation of abuse does not satisfy the requirement of showing the use of legal process '*primarily* to accomplish a purpose for which it is not designed. . . .'") (citations omitted); Hart, 647 A.2d at 552 ("[The complaint fails to address an essential element of the tort of abuse of process, i.e., that the process was used *primarily* for a purpose for which the process was not designed. It is not enough that the process employed was used with a *collateral* purpose in mind. . . . [A]ppellants' complaint [must] factually set forth that the continuance was not used for the purpose for which continuances are intended.") (internal citations omitted) (emphasis added); Baubles & Beads v. Louis Vuitton, S.A., 766 S.W.2d 377, 379 (Tex. App. 1989) (holding pleadings insufficient to state a cause of action for abuse of process where plaintiffs merely averred "Defendants improperly used the process to intimidate Plaintiffs, to obtain publicity and to increase Christmas sales of [Louis Vuitton] products, to decrease the sales of Defendants, to threaten Defendants with criminal prosecution, and to falsely accuse Defendants of a crime").

A complaint which neglects to allege a perversion or misuse of the process by omitting facts necessary to show an *improper* willful act in the use of the process has not stated a cause of action for abuse of process and fails as a matter of law. See LaMotte, 296 S.C. at 71, 370 S.E.2d at 713-14 (finding plaintiffs failed to assert a cause of action for abuse of process when they did not allege defendants "engaged in 'a willful act in the use of the process not proper under regular conduct of the proceedings'") (citation omitted); Scott v. McCain, 275 S.C. 599, 600-02, 274 S.E.2d 299, 300-01 (1981) (holding defendant's counterclaim alleging plaintiffs filed lawsuits to deprive him "of protected

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do not appear in the amended complaint contained in the record on appeal.

speech and associational rights and to punish and retaliate against him for the past exercise of such rights" did not state a cause of action because it failed to allege "*wayward* acts have taken place whereby collateral advantage has been sought") (emphasis added); see also Rosen v. Tesoro Petroleum Corp., 582 A.2d 27, 33 (Pa. Super. Ct. 1990) ("We find that appellants have failed to state a claim for abuse of process, as the allegations in their complaint amount to no more than a charge for the initiation of litigation for a wrongful purpose, and do not charge appellees with any 'perversion' of properly issued process."). As Food Lion's amended complaint did not allege the "willful act" element of the abuse of process tort with sufficient specificity, the trial court did not err in dismissing the action.[9]

AFFIRMED.

HOWARD, J., concurs.

STILWELL, J., dissents in a separate opinion.

STILWELL, J. (dissenting): Because I believe the majority opinion would require more facts to be pled than are necessary to survive a motion to dismiss, I respectfully dissent.

The test to be utilized by both the trial and appellate court in considering a motion to dismiss pursuant to Rule 12(b)(6), SCRCP is straightforward:

> [I]n deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the face of the plaintiff's complaint and a 12(b)(6) motion should not be granted if "facts alleged and inferences reasonably deducible

[9] Because we hold Food Lion failed to state a cause of action entitling it to relief on any abuse of process theory, we need not address the trial court's alternative ruling that the case was preempted by federal law.

> therefrom would entitle the plaintiff to any relief on any theory of the case." The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action.

Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999) (citations omitted); see also Watts v. Metro Sec. Agency, 346 S.C. 235, 238, 550 S.E.2d 869, 870 (Ct. App. 2001). "All well-pleaded factual allegations are deemed admitted for purposes of considering a motion for judgment on the pleadings." Fields v. The Melrose Ltd. P'ship, 312 S.C. 102, 104, 439 S.E.2d 283, 284 (Ct. App. 1993). "[P]leadings in a case should be construed liberally so that substantial justice is done between the parties. Further, a judgment on the pleadings is considered to be a drastic procedure by our courts." Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) (citations omitted); see also Justice v. The Pantry, 330 S.C. 37, 42, 496 S.E.2d 871, 874 (Ct. App. 1998), aff'd as modified, 335 S.C. 572, 518 S.E.2d 40 (1999).

Under the rules of this state, only ultimate facts need be pled, not all facts. At the pleadings stage, a litigant is not required to submit the evidence necessary to prove its case. "[U]nder our current pleading rules only ultimate facts are required to be stated in pleadings. Ultimate facts are those which the evidence upon trial will prove, and not the evidence which will be required to prove those facts." Brown v. Inv. Mgmt. & Research, Inc., 323 S.C. 395, 400 n.3, 475 S.E.2d 754, 756 n.3 (1996).

> Rule 8, SCRCP, mandates that a pleading contain "ultimate facts" rather than "evidentiary facts" to state a cause of action. "Ultimate facts fall somewhere between the verbosity of 'evidentiary facts' and the sparsity of 'legal conclusions.'"

Watts at 240, 550 S.E.2d at 871 (citation omitted).

I believe the trial court erred in construing each act as a separate claim or cause of action. Appellant argues, correctly, I believe, that they are all factual allegations in support of a single claim of abuse of process in the context of a single lawsuit. Unlike the majority, I believe it matters whether the allegations are construed separately as independent claims or all together as the factual allegations which evidence would later be needed to prove. This matters greatly in weighing the sufficiency of the pleadings to determine if it survives a Rule 12(b)(6) motion.

According to Prosser, abuse of process includes a proper form of legal procedure, which would include discovery, that is perverted to accomplish an ulterior purpose. "Abuse of process differs from [the tort of] malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish." Prosser & Keeton on Torts 897 (5th ed. 1984).

> To cause process to issue without justification is an essential element of malicious prosecution, but not of abuse of process. In the latter, the issuance of the process may be justified in itself[;] it is the malicious misuse or perversion of the process for an end not lawfully warranted by it that constitutes the tort known as abuse of process.

Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 209, 153 S.E.2d 693, 695 (1967) (citations omitted).

The majority opinion would require not just an allegation of a willful act, but inclusion in the pleadings of the facts which make the willful act improper. Initially, it is opined that "the complaint's fatal flaw . . . is that Food Lion did not state facts sufficient to allege the third component of the 'willful act' element—that is, in what manner the willful acts enumerated are improper. . . . In other words, although properly alleging an act involving the process of the court, Food Lion failed to assert how the process was perverted or abused."

Additionally, the majority states:

> to sustain a claim for the tort, a party must allege facts sufficient to show not only that the lawsuit was brought for an ulterior purpose, i.e. for collateral reasons, but that willful acts were taken through which the process was misapplied or abused. [Citations omitted.] To hold otherwise would vitiate the requirement of having to allege both elements of the tort—an "ulterior purpose" and an improper "willful act"—because a bald allegation that various acts were undertaken for collateral purposes would, in effect, be simply alleging an ulterior purpose.

To state that "bald allegations of various acts were undertaken for collateral purposes," while acknowledging that willful acts were alleged, unnecessarily belittles the detailed factual allegations of a perversion of process contained in the complaint.

The majority places great emphasis on the fact that Food Lion does not allege the lawsuit was used primarily for an ulterior purpose, while disclaiming in a footnote that any "magic words" are required to state a cause of action. In citing similar language, our supreme court has declined to place such emphasis on the single word "primarily." See Hainer v. Am. Med. Int'l, 328 S.C. 128, 146, 492 S.E.2d 103, 112 (1997) (Toal, J. dissenting). Thus, while undue emphasis could be placed on the Restatement's use of "primarily," that is not the law in South Carolina.

In Hainer, our supreme court (4-1, Toal, J. dissenting) affirmed this court's reversal of the jury verdict and grant of directed verdict on the basis that the evidence was insufficient to demonstrate an improper willful act, though they found it "may be susceptible of an inference of an ulterior purpose." In dissent, Justice Toal marshaled "persuasive circumstantial evidence" from the record of willful acts. She concluded the majority's acceptance of an "overt act" as necessary to a claim "appears for the first time in South Carolina jurisprudence in the 1992 Court of Appeals opinion Sierra v. Skelton. . . . [and] was not a requirement in any of this Court's abuse of process decisions." I

concur in Justice Toal's observation that Huggins and prior South Carolina jurisprudence on abuse of process, including Broadmoor, require a "flexible approach." "If we approach the tort of abuse of process only in a hyper-technical manner, then we vitiate the purpose for which the cause of action exists." Hainer at 144, 492 S.E.2d at 111-12 (Toal, J. dissenting).

In Broadmoor, our supreme court found sufficient evidence from which the jury could infer that the corporation and its president willfully abused the process by filing a lis pendens for the ulterior purpose of preventing a sale to third parties in hopes of obtaining financial backing to purchase the property at an advantageous price. Broadmoor Apts. of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991). The factual allegations in the pleadings in Broadmoor were nowhere near as detailed and extensive as they are in this case.

To craft as stringent a test as has the majority here raises the bar at the pleading stage to an insurmountable height. Utilizing this standard, none of the prior South Carolina cases that have found a valid claim for abuse of process would have survived a Rule 12(b)(6) motion. We need not decide whether Food Lion will ultimately succeed, only that it survives a 12(b)(6) assault. Thus, I would reverse the trial court.

Because I would reverse the dismissal of Food Lion's abuse of process claim, it becomes necessary to address whether the state common law cause of action is pre-empted by federal law. Food Lion argues the trial judge erred in its alternate holding that federal law, particularly the sanctioning power inherent in the FRCP preempted this action. I agree.

The Federal Rules of Civil Procedure (FRCP) do not preempt the state common law tort, as is clearly evidenced by the language in the Rules Enabling Act (REA) which provides that the FRCP "shall not abridge, enlarge, or modify any substantive rights." 28 U.S.C. § 2072 (b). "A federal statute preempts state action . . . only if the clear and manifest intent of Congress in passing the federal statute was 'to occupy the field to the exclusion of the State.'" Medical Park OB/GYN v. Ragin, 321 S.C. 139, 143, 467 S.E.2d 261, 263 (Ct. App. 1996). There is no indication that Congress had a "clear and manifest" intent to

preempt this field to the exclusion of a state common law action for abuse of process.

While sanctions under the FRCP are intended to deter abusive conduct, tort law is intended, at least in large part, to compensate the victims of abuse. See Rule 37(a)(4), FRCP, advisory committee notes (1970 amendments) (purpose of sanctions for abuse of discovery is to deter the abuse). The tort is not aimed at procedural control of lawsuits, as the rules are, but at remedying abuses. The goal and focus of each are very different. Thus, I conclude that this abuse of process tort action is not preempted by federal law.

For both of the above reasons, I respectfully dissent and would reverse and remand.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richland County,

Appellant,

v.

Charles K. Kaiser and United Oil Marketers,

Respondents.

Appeal From Richland County
Gary E. Clary, Circuit Court Judge

Opinion No. 3534
Submitted May 6, 2002 - Filed July 15, 2002

REVERSED & REMANDED

Larry C. Smith and Bradley T. Farrar, both of Richland County Attorney's office, of Columbia, for appellant.

Timothy G. Quinn, of Columbia, for respondents.

HEARN, C.J.: Richland County (the County) brought an action to compel the owner and lessee of commercial property to comply with a zoning

ordinance requiring screening between commercial properties and residential areas. The trial judge found that the ordinance was vague, indefinite, and unenforceable and the action was barred by the statute of limitations and estoppel and laches. The trial judge also awarded attorney's fees to the owner of the property, Charles Kaiser, and the lessee, United Oil Marketers (United), pursuant to S.C. Code Ann. § 15-77-300 (1985). We reverse and remand for further proceedings.[1]

FACTS

A truck and fuel center was constructed on the subject property in 1982 by Kaiser's lessee. United acquired a leasehold interest in the property in 1998 through a series of lease assignments. Kaiser testified that under the lease, the lessee is the party required to abide by the applicable ordinances and other regulations.

On May 6, 1996, the Richland County zoning administrator wrote Kaiser and United demanding that they comply with Richland County Zoning Ordinance (Ordinance) Article 7-8.[2] Article 7-8 establishes the screening requirements between commercial properties and lots zoned residential as follows:

> Screening shall be required between any new or expanded commercial or industrial use and any lot zoned residential. Also, screening shall be required in any district between any commercial or industrial use adjacent to a people-oriented use such as a playground, school or church. Such screening shall be adequate to protect the residentially zoned lot and any structure

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

[2]Article 7-8 was enacted as part of the Ordinance adopted September 7, 1977. Although the ordinance has been amended to hold the "property owner" responsible for maintaining the "required buffer yards," the 1977 version remained in force at all times pertinent to this action.

> thereon from glare, dispersion of trash or trespassing by pedestrians, and shall not impede visibility of pedestrian and vehicular traffic. As a minimum, a wall, fence or compact evergreen hedge or other type of evergreen foliage or a combination of fence and shrubbery at least six (6) feet in height shall be provided along the side and rear lot lines of the commercial or industrial property. Vegetation used as buffering material shall reach minimum required height within two years. Such screening shall be maintained in a proper manner.

The zoning administrator also demanded the rear property line "be brought into full compliance with the statute within 60 days of receipt of the letter." He testified he received a return receipt indicating Kaiser and United received the letters on May 7, 1996. He further testified that he inspected the property twice after the 60 day period lapsed and found the property was not in compliance.

In January 1998, the County filed a petition for mandamus seeking to force Kaiser and United "to come into complete compliance with the Richland County Zoning Ordinance." United filed a "Motion to Dismiss, Answer and Counterclaim," which sought attorney's fees under the South Carolina Frivolous Civil Proceedings Act and raised the defenses of equitable estoppel, laches, and the statute of limitations.

At the hearing, the assistant zoning administrator testified that he met with United's representative and a vegetation plan had been approved and implemented. They further stipulated that seventy-two plants had been planted in conformity with this plan. However, the assistant zoning administrator testified that approximately forty-nine of the installed plants were now missing and had not been replaced.

The trial court denied the County's petition, finding (1) the equitable defenses of estoppel and laches applied; (2) the statute of limitations had run against the County since it did not bring its action until approximately eighteen

years after the subject property was developed; (3) Article 7-8 was so vague and ambiguous "as to whom and when it is applicable" that it "must be declared invalid"; and (4) the County was unjustified in bringing this action and no special circumstances made the award of attorney's fees unjust. Furthermore, the trial court awarded $4,901.26 in attorney's fees to Kaiser and United. The County's subsequent motion for a new trial or, alternatively, for reconsideration, was denied. This appeal follows.

STANDARD OF REVIEW

Although the petition in this case was styled as a request for a writ of mandamus, we find that based on the relief sought, the County's pleading is more properly characterized as a request for an injunction. It is the substance of the requested relief that matters "regardless of the form in which the request for relief was framed." Standard Fed. Sav. & Loan Ass'n v. Mungo, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991). A writ of mandamus is used to compel a public officer to perform a ministerial duty or act the officer refuses to perform. See Goodwin v. Carrigan, 227 S.C. 216, 222, 87 S.E.2d 471, 473 (1955). In this case, the public entity sought to require performance from private parties. An injunction is an equitable remedy that may be used to require a party to perform an action. See Kneale v. Bonds, 317 S.C. 262, 268, 452 S.E.2d 840, 843 (Ct. App. 1994). Accordingly, because the relief sought was more in the nature of a request for an injunction than a mandamus, we will treat this action as an appeal from the denial of injunctive relief. Actions for injunctive relief are equitable in nature. Weidemann v. Town of Hilton Head Island, 344 S.C. 233, 236, 542, S.E.2d 752, 753 (Ct. App. 2001). In an action at equity, this court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. Doe v. Clark, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995); Thames v. Daniels, 344 S.C. 564, 571, 544 S.E.2d 854, 857 (Ct. App. 2001).

DISCUSSION

I. ESTOPPEL AND LACHES

The County argues that because the duty created by Article 7-8 is continuous, its enforcement is not barred by the doctrines of estoppel and laches. We agree.

In the absence of South Carolina authority on point, we find it helpful to look to other jurisdictions for guidance. "If the duty or obligation sought to be enforced is continuing in its character, time runs against plaintiff, not from its creation, but from its repudiation or breach." Bors v. McGowan, 68 N.W.2d 596, 601 (Neb. 1955) "Continuing breaches create constantly fresh rights of suit, at least where plaintiff's conduct has been such as to forbid an inference of acquiescence." Id.; see 30A C.J.S. Equity § 133 (1992).

Here, Kaiser and United had a continuous duty to comply with the statute because the statute obligated it to develop and maintain buffer yards to provide adequate screening of commercial property. Further, the County did not acquiesce, but attempted to enforce the ordinance against Kaiser and United. Moreover, Kaiser and United attempted to comply by implementing a vegetation program commensurate with the ordinances's requirements for a buffer yard. Accordingly, we find the county's action was not barred by the doctrines of estoppel and laches.

II. STATUTE OF LIMITATIONS

The County argues its enforcement of Article 7-8 is not barred by the statute of limitations. We agree.

Statutes of limitation do not bar the equitable relief of injunction. Silvester v. Spring Valley Country Club, 344 S.C. 280, 288, 543 S.E.2d 563, 567 (Ct. App. 2001); 58 Am. Jur. 2d Nuisances § 381 (1989). Thus, we find no statute of limitations applies to bar the County's action.

III. CLARITY OF STATUTE

The County argues the trial court erred in finding Article 7-8 vague and indefinite. We agree.

In its order, the trial court found the Ordinance vague and indefinite because it did not address whether the owner of the subject property or his tenant or lessee is responsible for constructing and maintaining the vegetation screening. Article 7-8 merely directs that the subject commercial property must be screened from "any lot zoned residential" or "adjacent to a people-oriented use such as a playground, school or church."

Generally, ordinances are deemed reasonable and valid and should not be struck down unless "palpably arbitrary, capricious or unreasonable." United States Fid. & Guar. Co. v. City of Newberry, 257 S.C. 433, 438-39, 186 S.E.2d 239, 241 (1972); see Casey v. Richland County Council, 282 S.C. 387, 389, 320 S.E.2d 443, 444 (1984) (holding legislation enacted to protect the public health and welfare is presumed valid). The purpose of this ordinance is to ensure screening between commercial and residential areas. It does not allocate responsibilities between parties with an interest in an affected commercial property. The County is not concerned with which party brings the subject property into compliance; rather, its concern is that the appropriate screening is constructed.[3] Therefore, the responsibilities between lessor and lessee should be determined by the terms of their lease agreement. Thus, we find no evidence to support the trial court's finding that the statute was vague and indefinite.

IV. ATTORNEY'S FEES

[3]In amended Ordinance section 27-3.99, the County now holds the "property owner" ultimately responsible for maintaining the appropriate buffering or screening.

The County argues the trial judge erred in awarding Kaiser and Union attorney's fees pursuant to S.C. Code Ann. § 15-77-300 (Supp. 2001). We agree.

Under section 15-77-300, a party defending an action brought by a South Carolina political subdivision may recover attorney's fees and costs if three prerequisites are met: first, the contesting party must be the "prevailing" party; second, the court must find "that the agency acted without substantial justification in pressing its claim against the party"; and third, the court must find "that there are no special circumstances that would make the award of attorney's fees unjust." Heath v. Aiken County, 295 S.C. 416, 420, 368 S.E.2d 904, 905 (1988). An award of attorney's fees under this section will not be overturned unless the complaining party shows that the trial judge abused his discretion in considering the applicable factors from the section. Heath v. County of Aiken, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990). "An abuse of discretion occurs when a court's decision is controlled by an error of law or is without evidentiary support." Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 510, 548 S.E.2d 223, 225 (Ct. App. 2001).

Based on our decision to reverse the trial court's denial of the injunction, we find that Kaiser and Union are not the prevailing parties. Therefore, attorney's fees are not available under section 15-77-300. Accordingly, we reverse the trial court's award of attorney's fees to Kaiser and Union.

CONCLUSION

For the foregoing reasons, the trial court's decision is reversed and we remand for further proceedings on the merits.

REVERSED AND REMANDED.

HUFF and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Ricky Clyde Ledford,

Appellant.

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 3535
Heard June 4, 2002 - Filed July 15, 2002

REVERSED

Senior Assistant Appellate Defender Wanda H. Haile, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson and Assistant Attorney General Melody J. Brown, of Columbia;

Solicitor Robert M. Ariail, of Greenville, for respondent.

HEARN, C.J.: Ricky Ledford appeals his conviction for driving under the influence (DUI), fourth offense. We reverse.

FACTS

On September 30, 1999, at approximately 7:00 a.m., Patty Channell and Damon Duncan were sitting in Channell's car at an intersection. Duncan noticed a white Buick approach the intersection at a high rate of speed and cautioned Channell not to enter the intersection. The Buick entered the intersection, swerved to miss another car, and collided with Channell's car. The Buick then left the accident scene; Duncan, however, recorded the Buick's tag number and gave it to the investigating officer, Johnathan Craig.

After running a check on the tag number, Officer Craig learned the Buick was registered to Willie Ledford. When Officer Craig went to Willie Ledford's residence, he learned she had loaned the car to her son, Ricky Ledford. Officer Craig went to the house where Ms. Ledford said her son could be found and discovered the Buick pulled into a large shrub with a carpet covering its back end. Officer Craig got permission from a resident to enter the house and found Ricky Ledford "passed out" and slumped over on a couch, smelling strongly of alcohol. He attempted to awaken Ledford to question him about the accident; however, Ledford drifted in and out of consciousness. While in the house, Officer Craig informed Ledford they would need to return to the accident scene. Officer Craig testified that as they were leaving the house, Ledford

> started falling down toward the ground all together. So at that point, I kind of had to pick him up. I guess the way I describe it is like a groomsman carrying a bride across the threshold, you know, to kind of pick him up like that to carry him to my car where I got out there

where I could prop him up, stand him up and prop him up on the hood of the car.

During one of Ledford's brief periods of consciousness, Officer Craig asked him whether he had anything to drink since the accident, to which Ledford allegedly answered "no." Officer Craig stated, "At that time I had to lean [Ledford] over the hood of my car, just kind of lay him up on it, droop him over so I could unlock the passenger side . . . and he just slumped over the whole time." Officer Craig then handcuffed Ledford, secured him in the passenger's seat, and drove him back to the accident scene where Duncan and Channell positively identified Ledford as the driver of the Buick. At that point, Officer Craig placed Ledford under arrest and read him his Miranda rights.

Prior to trial, Ledford objected to the admission of his statement to Officer Craig. He argued he could not have made a voluntary statement drifting in and out of consciousness while being carried to Officer Craig's patrol car. The trial court ruled the statement was admissible without holding a hearing to determine whether it was voluntarily made, and found that any inquiry into whether the statement was voluntarily made in light of Ledford's mental state at the time was "an issue for the jury." Ledford further argued he could not have waived his Miranda rights because they were not given to him before he made the statement. The State took the position Ledford was not in custody when he made the statement. The trial court declined to conduct an evidentiary hearing outside the presence of the jury to determine whether Ledford was in custody at the time he gave the statement, again finding the issue was for the jury.

DISCUSSION

Ledford first asserts the trial court erred in failing to hold a hearing outside the presence of the jury to determine the voluntariness of his statement pursuant to Jackson v. Denno, 378 U.S. 368 (1964). We agree.

Generally, a criminal defendant is entitled to an independent evidentiary hearing outside the presence of the jury to challenge the introduction of evidence "that was allegedly obtained by conduct violative of the defendant's

constitutional rights." State v. Patton, 322 S.C. 408, 410, 472 S.E.2d 245, 247 (1996) (quoting State v. Blassingame, 271 S.C. 44, 47-48, 244 S.E.2d 528, 530 (1978)). If the State seeks to introduce a defendant's statement into evidence, the trial court is charged with making an initial determination, through an evidentiary hearing, as to whether the statement was voluntarily made. State v. Washington, 296 S.C. 54, 55-56, 370 S.E.2d 611, 612 (1988). "The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience and conduct of the accused." State v. Franklin, 299 S.C. 133, 138, 382 S.E.2d 911, 914 (1989).

In this case, we find the evidence necessitated a voluntariness hearing pursuant to Jackson v. Denno. The record reveals that Ledford was in and out of consciousness during the time in which he answered Officer Craig's question and Ledford's attorney clearly objected to its admission. The trial court's summary ruling that Ledford's ability to answer any questions was "an issue for the jury," failed to resolve the issue of whether or not the statement was voluntary. As such, we agree with Ledford that the trial court erred in failing to make an initial determination as to the voluntariness of the statement. Moreover, we find great potential for prejudice in the admission of Ledford's statement. The admission that he did not have anything to drink after the accident was a determining issue, particularly in light of Ledford's testimony at trial that he drank two beers and took two Xanax pills after the accident.

Ledford also argues that the trial court erred in failing to hold a hearing to determine whether the statement was given in violation of the mandates of Miranda v. Arizona, 384 U.S. 436 (1966). We agree.

If a defendant makes a custodial statement, then the trial court must not only make an inquiry into the voluntariness of the statement, but also conduct an inquiry to ensure the police complied with the mandates of Miranda and its progeny. Franklin, 299 S.C. at 136-37, 382 S.E.2d at 912-13. "Miranda warnings are required for official interrogations only when a suspect 'has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" State v. Easler, 327 S.C. 121, 127, 489 S.E.2d 617, 621

(1997) (quoting Miranda, 384 U.S. 436, 444 (1966)). "Interrogation is either express questioning or its functional equivalent. It includes words or actions on the part of police that the police . . . should know are reasonably likely to elicit an incriminating response." State v. Kennedy, 333 S.C. 426, 431, 510 S.E.2d 838, 716 (1998)). In contrast to the subjective nature of a voluntariness inquiry, custody is determined by an objective analysis of "whether a reasonable man in the suspect's position would have understood himself to be in custody." Id. at 128, 489 S.E.2d at 621. Finally, our review of the trial court's custody ruling "is limited to a determination of whether the ruling by the trial court is supported by the testimony." State v. Easler, 322 S.C. 333, 342, 471 S.E.2d 745, 751 (Ct. App. 1996), aff'd as modified, 327 S.C. 121, 489 S.E.2d 617 (1997).

The State submits that Miranda warnings were not required under the circumstances of this case because Officer Craig was merely conducting an investigation of the accident, not a custodial interrogation. However, our review of the record convinces us otherwise. Because Ledford could not walk, Officer Craig literally carried him from the house to his patrol car. Officer Craig questioned Ledford as he was propping him up on the hood of his patrol car and preparing to handcuff him and place him inside the car. Thereafter, the officer drove him to the scene of the accident to be identified by the victims. We find it difficult to conceive of another set of circumstances which would create a more unequivocal custodial posture than when a person is physically carried from a residence to a patrol car where he is handcuffed. Furthermore, we find that Officer Craig embarked on a custodial interrogation when he began questioning Ledford after exiting the house, in an effort to obtain incriminating information. Kennedy, 333 S.C. at 431, 510 S.E.2d at 716. Therefore, we find that under any view of the evidence Ledford was entitled to Miranda warnings.

Although the State maintained that Ledford was not in custody, it conceded during oral argument that if this court were to find that Ledford was in custody at the time of questioning, then reversal would be mandated. Thus, in light of our finding that Ledford was entitled to Miranda warnings and the

State's concession during oral argument, we reverse.[1]

REVERSED.

HUFF and HOWARD, JJ., concurring.

[1]In light of our disposition, we need not reach Ledford's remaining issues on appeal.