The Supreme Court of South Carolina

RE: Lawyers Suspended by the South Carolina Bar

The South Carolina Bar has furnished the attached list of lawyers who have been administratively suspended from the practice of law pursuant to Rule 419(c), SCACR. This list is being published pursuant to Rule 419(d), SCACR. If these lawyers are not reinstated by the South Carolina Bar by April 1, 2002, they will be suspended by order of the Supreme Court and will be required to surrender their certificates to practice law in South Carolina. Rule 419(e), SCACR.

Columbia, South Carolina

March 8, 2002

2002-Suspended for Non-Payment

Ms. Kimberli C. Aboyade
Weil, Gotshal & Manges LLP
767 5th Ave.
New York, NY 10153

Mr. Lawrence J. Alfieri
79 Kensington Rd.
Garden City, NY 11530

Ms. Shirley Anderson-Clay
4308 Cinibar Ct.
Fort Washington, MD 20744

Ms. L. Scott Askins
WEBMD Corp.
1175 Peachtree St., NE Ste. 2400
Atlanta, GA 30361-6207

Mr. Keun Ho Bae
P O Box 895
Rutherford, NJ 07070-0895

Mr. Nat B. Benson Jr.
Bencare, Intl.
1049 Anna Knapp Blvd.
Mt. Pleasant, SC 29464

Mr. Thomas Arthur Bound
1433 Old Virginia Ct.
Marietta, GA 30067

Ms. Paula S. Carrick
320 Twin Oaks Dr.
Seneca, SC 29672

Ms. Whui Chang
2443 Fillmore St. # 218
San Francisco, CA 94115

Mr. Charles P. Coates III
16 Balanger Rd.
Newark, DE 19711

Mr. Charles W. Connelly Jr.
212 S. Tryon St., Ste. 1440
Charlotte, NC 28281

Ms. Elizabeth Lane Cook
Cook Law Firm
230 Columbia Ave.
Chapin, SC 29036

Mr. Jerry W. Craig
147 Wappoo Creek Dr. Ste. 205
Wappoo Centre
Charleston, SC 29412

Ms. Michelle Garon Day
Blue Williams, L.L.P.
3421 N. Causeway Blvd. 9th Floor
Metairie, LA 70002

Mr. John Scott Egan
Brown, Todd & Heyburn, PLLC
400 W. Market St., 32nd Floor
Louisville, KY 40202-3363

Ms. Laury Lea Gordon Estrada
U. S. Dept. of Justice
1400 New York Ave., N.W., Ste. 11424
Washington, DC 20005

Ms. Nell H Figge
56 Pinckney Landing Dr. Brays Island Plantation
Sheldon, SC 29941

Mr. James C. Floyd Jr.
1520 Boundary St.
Newberry, SC 29108

Ms. Heather Dawn Foster
1430 Lee St., E #A
Eastover, SC 29044-9770

Mr. James H. Fowles Jr.
140 Yelton Lane
Rowland, NC 28383

Ms. Deborah Thomas Gourdin
11 Treyburn Ct.
Greer, SC 29650

Mr. Gray Hummel Harley
Charleston Cnty. Public Defender's Office
P O Box 72065
Charleston, SC 29415-2065

Mr. Earl D. Hewlette Jr.
P O Box 21853
Charleston, SC 29413

Mr. Andrew F. Hodges
Georgia-Pacific Corp.
P O Box 105605
Atlanta, GA 30348

Mr. Charles E. Houston Jr.
Charles E. Houston, Jr., PA
32 Office Park Rd., Ste 200
Hilton Head Island, SC 29928

Mr. Thomas David Jones
8155 Jefferson Hwy. Apt. 903
Baton Rouge, LA 70809-1616

Ms. Tonya Lynne Lewis
U.S. Envir. Protection Agency
Region 4 Atlanta Federal Cntr. 61 Forsyth St., SW
Atlanta, GA 30303-3104

Mr. Donald T. Locke
Kilpatrick Stockton, LLP
3737 Glenwood Ave., Ste. 400
Raleigh, NC 27612

Ms. Lynn Sandifer Martin
4676 Chippenham Dr.
Roanoke, VA 24018-3443

Mr. Robert Bruce Martin
9530 Mariners Cove Lane
Ft. Meyers, FL 33919

Mr. Mitchell Andrew Mayer
50 Glenwood Rd., Apt. 22
Greenville, SC 29615-1704

Mr. William Daniel Mayes
The Law Offices of W. Daniel Mayes
P O Drawer 2650
Aiken, SC 29802

Mr. Lonnie Julius McAllister
582 Milden Rd.
Fayetteville, NC 28314

Mr. Robert S. Metro
Laurich & Deeb, PA
9 Oak Circle, Ste. 200
Bluffton, SC 29910

Mr. Wilton Darnell Newton
709 Woodrow St., Ste. 116
Columbia, SC 29205

Ms. Pamela Lynn Pannozzo
6815 Glendale Ave.
Boardman, OH 44512

Mr. Grover S. Parnell Jr.
Finneran & Nicholson, PC
77 N. Washington St., 9th Floor
Boston, MA 02114

Ms. Anne Margaret Payne
Employer's Reinsurance Corp.
P O Box 2991
Overland Park, KS 66201-1391

Mr. Allen J. B. Robinson
259 Adventure Trail
Horse Shoe, NC 28742

Mr. Scott Edward Shealy
Citizen's Fuel Co.
P O Box 2805
Asheville, NC 28802

Mr. David Miller Sigmon
Dority & Maning, PA
P O Box 1449
Greenville, SC 29602

Mr. Robert Steven Smith
P O Box 809
Paw Creek, NC 28130

Ms. Lynne Marie Stewart
1380 Parker Rd.
Holly, MI 48442

Mr. Robert B. Struble
Rollins, Inc., Law Dept.
2170 Piedmont Rd., N.E.
Atlanta, GA 30324

Mrs. Mary Love Sullenberger
V.P. & Assistant
General Counsel Spherion
Corp. 3535
Piedmont Rd. NE
Atlanta, GA 30305

Mr. Larry L. Thompson
James, Gustafson & Thompson
1001 E. Chicago, Ste. 103
Naperville, IL 60540

Mr. Julian H. Toporek
221 W. York St.
Savannah, GA 31401

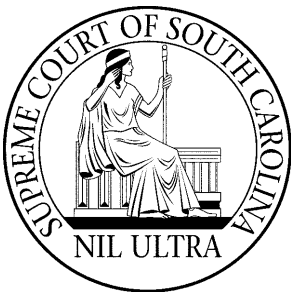
Mr. Thomas M. Tupper
Tupper & Assoc.
3496 Lake Lansing Rd. Ste. 170
E. Lansing, MI 48823

Ms. Teresa L. White
3216 Peachford Lane
Raleigh, NC 27616

Ms. Mitzi Campbell Williams
Charles W. Bell & Assoc.
511 E. York St.
Savannah, GA 31401

Mr. Mark Wise
6385 Quail Ridge Dr
Bartlett, TN 38135

Mr. Patrick L. Wright
18622 Larmamie Rd.
Country Club Hills, IL 60478



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

March 11, 2002

ADVANCE SHEET NO. 7

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

	Page
25425 - Dr. Martha Thomasko v. Daniel E. Poole, Jr.	12
25426 - Century Indemnity Co., et al. v. Golden Hills Builders, Inc., et al.	24
24527 - Charles W. Patrick v. State	36
24528 - State v. James Eugene Huntley	45
24529 - City of Rock Hill v. Michael Dean Thompson	51

UNPUBLISHED OPINIONS

2002-MO-019 - Nathan Witter v. State
(Beaufort County - Judge Luke N. Brown and Judge Alexander S. Macaulay)

PETITIONS - UNITED STATES SUPREME COURT

25304 - Richard Charles Johnson v. William D. Catoe	Pending
25319 - Kenneth E. Curtis v. State of SC, et al.	Pending
25347 - State v. Felix Cheeseboro	Pending
25359 - Rick's Amusement Inc., et al. v. State of SC	Pending
2001-OR-00171 - Robert Lamont Green v. State	Pending
2001-OR-00780 - Maurice Mack v. State	Pending
2001-MO-047 - DuBay Enterprises, etc. v. City of North Charleston Board of Zoning Adjustment, et al.	Pending

PETITIONS FOR REHEARING

25400 - In the Matter of John A. Gaines	Denied 3/6/02
25410 - Evelyn Conner v. City of Forest Acres	Pending
25416 - Lee Roy Ingle v. State	Pending
2002-MO-010 - Town of Sharon v. Stanley H. Chambers	Denied 3/6/02

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

		Page
3458	Weaver v. Lentz	57
3459	Lake Frances Properties v. City of Charleston	68
3460	State v. Roger Dale Cobb	75

UNPUBLISHED OPINIONS

2002-UP-152 AB's v. Richland County
(Richland, Judge Alison Renee Lee)

2002-UP-153 State v. Billy Ard Porter
(Florence, Judge James E. Brogdon, Jr.)

2002-UP-154 State v. Marion K. Barrett
(Clarendon, Judge John M. Milling)

2002-UP-155 State v. Kevin T. Bryant
(Darlington, Judge John M. Milling)

2002-UP-156 State v. Jan Renee Castaneda
(Georgetown, Judge J. Michael Baxley)

2002-UP-157 State v. William Germain White
(York, Judge John C. Hayes, III)

2002-UP-158 State v. Adam Turkvant
(Orangeburg, Judge Diane Schafer Goodstein)

2002-UP-159 Beasley for Governor v. Collins Entertainment Corp.
(Greenville, Judge James E. Brogdon, Jr., Judge H. Dan Hall)

2002-UP-160 Fernanders v. Young
(Spartanburg, Judge Donald W. Beatty, Judge Wyatt T. Saunders, Jr.)

2002-UP-161 State v. Orville O'Brian Fuller
(Dorchester, Judge Jackson V. Gregory)

2002-UP-162 State v. Ricky Blair
(Lee, Judge Howard P. King)

2002-UP-163 McBratney v. McBratney
(Florence, Judge Roger E. Henderson)

2002-UP-164 State v. Michael A. Smith
(Spartanburg, Judge Lee S. Alfred)

2002-UP-165 State v. Wayne Hemingway
(Williamsburg, Judge Thomas W. Cooper, Jr.)

2002-UP-166 State v. Janice Lee Mascio
(Florence, Judge James C. Williams)

2002-UP-167 State v. Charles Thompson
(Clarendon, Judge Howard P. King)

2002-UP-168 In the Interest of: Brandon S.
(Lexington, Judge C. David Sawyer, Jr.)

2002-UP-169 State v. Ulysses Elmore
(Abbeville, Judge Wyatt T. Saunders, Jr.)

2002-UP-170 State v. Jeanette Adams
(York, Judge John C. Hayes, III)

2002-UP-171 State v. Robert Francis Berry
(Dorchester, Judge Luke N. Brown, Jr.)

2002-UP-172 Wilson, V. Unverferth Manufacturing Co.
(Williamsburg, Judge Howard P. King)

2002-UP-173 Riddle v. Alexander
(Greenville, Judge Joseph J. Watson)

PETITIONS FOR REHEARING

3420 - Brown v. Carolina Emergency Pending

3433 - Laurens Emergency v. Bailey	Pending
3436 - United Education Dist. v. Education Testing Service	Pending
3438- State v. Knuckles, Harold	Pending
3439 - McInnis, Alyce v. Estate of E. C. McInnis	Pending
3440 - State v. Dorothy Smith	Pending
3442 - State v. Dwayne L. Bullard	Pending
3444 - Tarnowski v. Lieberman	Pending
3445 - State v. Rosemond, Jerry	Pending
3448 - State v. Corey L. Reddick	Pending
2001-UP-495 - William R. Smith	Moot
2001-UP-522 - Kenney v. Kenney	Pending
2001-UP-548 - Coon v. McKay Painting	Pending
2001-UP-560 - Powell v. Colleton City	Pending
2001-UP-565 - United Student Aid v. SCDHEC	Denied 3-7-02
2002-UP-005 - State v. Tracy Davis	Pending
2002-UP-012 - Gibson v. Davis	Pending
2002-UP-024 - State v. Charles Britt	Pending
2002-UP-026 - Babb v. Thompson	(2) Pending
2002-UP-029 - State v. Kimberly Renee Poole	Pending
2002-UP-030 - Majors v. Taylor	Pending
2002-UP-059 - McKenzie v. Exchange Bank	Pending
2002-UP-060 - Smith, Selma v. Wal-Mart	Pending

2002-UP-061 - Canterbury v. Auto Expr.	Pending
2002-UP-062 - State v. Carlton Brown	Pending
2002-UP-064 - Bradford v. City of Mauldin	Pending
2002-UP-066 - Barkley v. Blackwell's	Pending
2002-UP-067 - McKenzie v. McKenzie	Pending
2002-UP-069 - State v. Quincy O. Williams	Pending
2002-UP-079 - County of Charleston v. Charleston County Board of Zoning	Pending
2002-UP-082 - State v. Martin Luther Keel	Pending
2002-UP-087 - Brandt v. Brandt	Pending
2002-UP-095 - State v. Roderick Folks	Pending
2002-UP-098 - Babb v. Summit Teleservice	Pending
2002-UP-105 - Sheppard v. Brown	Pending
2002-UP-110 - Dorman v. Eades	Pending
2002-UP-125 - Scott v. Parkinson	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3263 - SC Farm Bureau v. S.E.C.U.R.E.	Pending
3271 - Gaskins v. Southern Farm Bureau	Pending
3314 - State v. Minyard Lee Woody	Pending
3343 - Langehans v. Smith	Pending
3360 - Beaufort Realty v. Beaufort County	Denied 3-6-02
3362 - Johnson v. Arbabi	Pending

3367 - State v. James E. Henderson, III	Pending
3369 - State v. Don L. Hughes	Pending
3376 - State v. Roy Johnson #2	Denied 3-6-02
3382 - Cox v. Woodmen	Pending
3386 - Bray v. Marathon Corporation	(2) Pending
3403 - Christy v. Christy	Pending
3404 - State v. Charles M. Stuckey, Jr.	Denied 3-6-02
3405 - State v. Jerry Martin	Pending
3408 - Brown v. Stewart	Pending
3413 - Glasscock v. United States Fidelity	Pending
3416 - Widman v. Widman	Pending
3417 - Hardee v. Hardee	Pending
3425 - State v. Linda Taylor	Pending
2001-UP-016 - Stanley v. Kirkpatrick	Pending
2001-UP-300 - Robert L. Mathis, Jr. v. State	Pending
2001-UP-304 - Jack McIntyre v. State	Pending
2001-UP-321 - State v. Randall Scott Foster	Pending
2001-UP-322 - Edisto Island v. Gregory	Pending
2001-UP-324 - State v. John Williams, III	Pending
2001-UP-360 - Davis v. Davis	Pending
2001-UP-384 - Taylor v. Wil Lou Gray	Pending
2001-UP-385 - Kyle & Associates v. Mahan	Pending
2001-UP-391 - State v. Jerome Hallman	Pending

2001-UP-393 - Southeast Professional v. Companion Property & Casualty	Denied 3-6-02
2001-UP-399 - M.B. Kahn Construction v. Three Rivers Bank	Pending
2001-UP-403 - State v. Eva Mae Moss Johnson	Pending
2001-UP-419 - Moak v. Cloud	Pending
2001-UP-421 - State v. Roderick Maurice Brown	Pending
2001-UP-425 - State v. Eric Pinckney	Pending
2001-UP-452 - Bowen v. Modern Classic Motors	Pending
2001-UP-455 - Stone, Walter v. Roadway	Pending
2001-UP-461 - Storage Trailers v. Proctor	Pending
2001-UP-470 - SCDSS v. Hickson	Pending
2001-UP-476 - State v. Jeffery Walls	Pending
2001-UP-477 - State v. Alfonso Staton	Pending
2002-UP-478 - State v. Leroy Stanton	Pending
2001-UP-479 - State v. Martin McIntosh	Pending
2002-UP-518 - Abbott Sign Company v. SCDOT	Pending
2001-UP-528 - State v. Kenneth Allen Barnes	Pending
2001-UP-538 - State v. Edward Mack	Pending
2002-UP-050 - In the Interest of Michael Brent H.	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dr. Martha Thomasko, Petitioner,

v.

Daniel E. Poole, Jr., Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25425
Heard October 11, 2001 - Filed March 11, 2002

AFFIRMED

Robert L. Widener, of McNair Law Firm, of Columbia; and Robert A. Muckenfuss, of McGuire Woods, of Charlotte, N.C., for petitioner.

David S. Cobb, of Turner, Padget, Graham & Laney, of Charleston, for respondent.

JUSTICE BURNETT: Dr. Martha Thomasko ("Thomasko") sued Daniel Poole, Jr., ("Poole") for negligence as a result of an vehicle accident. The trial court denied plaintiff Thomasko's motion for a directed verdict on the issue of her comparative negligence. The Court of Appeals affirmed the trial court in an unpublished opinion, and Thomasko appealed to this Court. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Defendant Poole testified that on March 25, 1995, he exited a store parking lot in his vehicle and attempted to cross three lanes of traffic to make a u-turn on Highway 17 in Myrtle Beach. Poole testified to looking in the direction of on-coming traffic before exiting the parking lot. Poole noticed two vehicles approximately 150-200 feet away. Poole entered the far right lane and began to transverse the other lanes at 8-10 miles per hour.

Poole's Suburban collided with Thomasko's vehicle as he entered the far left lane. Poole's vehicle sustained damage to its driver's side rear panel while Thomasko's received damage to its front, passenger side wheel well. Thomasko did not see Poole's vehicle until the moment before impact. Poole did not realize he collided with another vehicle until after seeing Thomasko's vehicle in his rear view mirror.

Thomasko testified to experiencing an uneasy feeling in the right side of her chest after the accident. The day after the accident she began experiencing pain throughout her body.

On April 12, several weeks after the accident, Thomasko fell in a store parking lot. She later visited a doctor because of a pain in the right side of her chest. Thomasko testified her doctor suspected her right breast implant ruptured.

Thomasko filed a negligence lawsuit against Poole seeking

damages for personal injuries sustained during the accident.[1] At the close of the evidence, Thomasko moved for a directed verdict on Poole's defense of comparative negligence. The trial court denied the motion ruling the jury could reasonably find Thomasko negligent in failing to take all precautions to avoid the accident.[2]

The jury deliberated for approximately an hour and a half before sending a note to the judge asking: "If we find fault by the defendant and neglect by the defendant but do not feel that injuries were sustained by the accident, who do we rule for?" The trial judge instructed the jury that if Thomasko failed to prove damages caused by the accident, then she failed to prove her case. The jury continued deliberations for three more minutes and returned with a general verdict for Poole.

Thomasko argues on appeal that the trial judge's denial of her motion for directed verdict on the issue of comparative negligence was error requiring a new trial.

ISSUES

I. Did Thomasko preserve the issue of whether the trial judge erred in denying her motion for a directed verdict?

II. Did the trial court err in denying Thomasko's motion for a directed verdict on the issue of comparative negligence?

III. If the denial of the motion for directed verdict was error, did the ruling constitute prejudice sufficient to require a new trial?

---

[1] Thomasko claimed One Hundred and Sixteen Thousand Dollars ($116,000.00) in damages for doctor visits, two new breast implants, lost wages, as well as pain and suffering.

[2] The trial judge reasoned the jury could find Thomasko failed to take precautions to avoid the accident because it was not a "bad accident."

LAW/ANALYSIS

I

As a threshold issue, Poole argues Thomasko failed to object to the trial judge's jury instruction and thus failed to preserve the directed verdict ruling for appellate review. We disagree.

An appellate court cannot address an issue unless first raised by appellant and ruled on by the trial judge. Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 453 (2000). Thomasko moved for a directed verdict on the issue of comparative negligence. The trial judge denied the motion. Thomasko objected, on the record, to the denial. She was not required to object again to the subsequent jury instruction regarding comparative negligence. The issue is preserved for our review.

II

Thomasko argues the trial judge committed reversible error by denying her motion for directed verdict. We disagree.

The law of comparative negligence controls this case. See Nelson v. Concrete Supply Co., 303 S.C. 243, 399 S.E.2d 783 (1991). Under comparative negligence, the plaintiff's contributory negligence does not bar recovery unless that negligence exceeds defendant's. Id.; see Hubbard & Felix, The South Carolina Law of Torts 174 (2d ed. 1997).

A trial judge, when ruling on a motion for directed verdict, must view the evidence in the light most favorable to the non-moving party. Wintersteen v. Food Lion, Inc., 344 S.C. 32, 542 S.E.2d 728 (2001). In a comparative negligence case, the trial court should grant the motion if the sole reasonable inference from the evidence is the non-moving party's negligence exceeded fifty percent. Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000). Because the term is relative and dependant on the facts of

a particular case, comparing the negligence of two parties is ordinarily a question of fact for the jury. Creech v. South Carolina Wildlife and Marine Res. Dep't, 328 S.C. 24, 32, 491 S.E.2d 571, 575 (1997); Mahaffey v. Ahl, 264 S.C. 24, 214 S.E.2d 119 (1975). For these reasons, this Court is reticent to endorse directed verdicts in cases involving comparative negligence.

A plaintiff, to establish a cause of action for negligence, must prove the following four elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; (3) resulting in damages to the plaintiff; and (4) damages proximately resulted from the breach of duty. Bloom v. Ravoira, supra. "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998).

Both Poole and Thomasko have duties. Thomasko has a duty to adjust her speed to conditions and hazards. S.C. Code Ann. § 56-5-1520 (Supp. 2000). Poole has a duty to yield to the favored driver, Thomasko, before switching lanes. S.C. Code Ann. § 56-5-1900 (Supp. 2000).

Both parties have a duty to keep a reasonable lookout to avoid hazards on the highway. See 60A C.J.S. *Motor Vehicles* §§ 247, 343 (1969)(Having the right of way does not excuse an individual from the common law duty to keep a reasonable lookout to avoid hazards); Cf. Brown v. Howell, 284 S.C. 605, 327 S.E.2d 659 (1985)(Motorists must use ordinary care in keeping a proper lookout for vehicles approaching an intersection). The relation between contributory negligence and the common law duty to keep a reasonable lookout is not a novel issue. See e.g., Williams v. Kinney, 267 S.C. 163, 226 S.E.2d 555 (1976); Wilson v. Marshall, 260 S.C. 271, 195 S.E.2d 610 (1973).

This Court in Williams v. Kinney, supra, reversed a trial court's directed verdict on the issue of contributory negligence. In the case, the defendant stopped at a traffic light in the left lane. Plaintiff, following Defendant's vehicle, drove to the right lane. Defendant attempted to make a

right hand turn from the left lane in violation of South Carolina law and collided with Plaintiff.

Plaintiff argued Defendant negligently failed to observe his turn signal. Defendant admitted she did not see Plaintiff's signal, but countered no reasonable person would expect a driver to turn right from the left lane. This Court held, "[w]hether the failure of [Plaintiff], who was following [Defendant], to observe the flashing turn signals was a causative factor was for the jury... [t]he jury could have concluded that this collision occurred due to the failure of the [Plaintiff] to observe the turning signals." Id., 267 S.C. at 166-67, 226 S.E.2d at 556.

In Wilson v. Marshall, supra, this Court again reversed the trial court's granting Plaintiff's motion for directed verdict. The uncontradicted evidence showed Defendant failed to stop at an intersection as required by law. Instead, Defendant proceeded into the intersection and was struck by Plaintiff. Despite an unobstructed view, Plaintiff testified he did not see Defendant until moments before impact. The Court held that although the evidence left little doubt Defendant was the primary cause of the collision the jury could have reasonably inferred that Plaintiff failed "to exercise due care in keeping a proper lookout and driving at an appropriately reduced speed under the circumstances." Id. 260 S.C. at 276, 195 S.E.2d at 612.

Viewing the evidence in the light most favorable to Poole, the evidence shows he came to a stop before entering the highway and observed two vehicles 150-200 feet away. Poole, exiting the parking lot, crossed over two lanes of traffic before the collision between Poole's and Thomasko's vehicles. Poole's vehicle did not speed quickly through the lanes, but traveled across the road at 8-10 miles per hour.

Although nothing obstructed Thomasko from seeing Poole's vehicle, she did not notice the vehicle until it was upon her. Thomasko testified seeing a brown vehicle coming towards her. Poole's vehicle was white. Poole crossed in front of Thomasko, causing her vehicle to strike the vehicle at the rear wheel. There is no evidence Thomasko attempted to stop

before the crash.

Thomasko asserts the trial court misinterpreted the evidence and erroneously relied on the severity of the accident in denying her motion for a directed verdict. The severity and location of the damage to both vehicles could have bolstered Poole's version of the accident.

The damage to both vehicles was slight, suggesting both were traveling at a low rate of speed. The damage occurred at Thomasko's front end and near Poole's rear tire, suggesting Thomasko ran into Poole as he proceeded across traffic at an angle. The damage to the vehicles suggests both Thomasko and Poole were negligent in failing to keep a reasonable lookout.

Several inferences could be drawn from the facts, including, finding Poole or Thomasko could have failed to keep a proper lookout. A jury could find Poole blind-sided Thomasko or Thomasko was blind to her duty to keep a reasonable lookout. This Court is required to affirm the trial court's denial of a motion for directed verdict where multiple inferences can be drawn from the evidence. In re Matthews, 345 S.C. 368, 550 S.E.2d 311 (2001); Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (1999).

Thomasko's failure to keep a proper lookout is a jury question. See Mahaffey v. Ahl, supra, (this Court held whether driver should have seen an individual approaching on a motorbike in time to stop or slow down to avoid an accident was a jury question); Spurlin v. Colprovia Prod. Co., 185 S.C. 449, 194 S.E. 332 (1937). As an appellate court we decide issues of law leaving determination of the facts and credibility of witnesses to the jury. This Court's sole task is to determine if multiple inferences can be drawn from the evidence of Thomasko's negligence to uphold the denial of her motion for directed verdict. Viewing the evidence in light most favorable to

Poole, we **AFFIRM**.[3]

MOORE and WALLER, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which Acting Justice Marc H. Westbrook, concurs.

[3] Because denial of the motion for directed verdict was not in error, we do not address the third issue.

CHIEF JUSTICE TOAL: I respectfully dissent. I agree with the majority that Thomasko properly preserved the directed verdict motion for appellate review. However, I would hold that the trial judge erred in denying Thomasko's motion for directed verdict and that Thomasko was prejudiced by the error.

In deciding a motion for directed verdict, the trial judge must consider the evidence in the light most favorable to the party opposing the motion. *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 542 S.E.2d 728 (2001). If multiple inferences can be drawn from the evidence, this Court is required to affirm the trial court's denial of the motion. *In re Matthews*, 345 S.C. 638, 550 S.E.2d 311 (2001); *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 514 S.E.2d 126 (1999). Inversely, if there is no evidence to support a material element of the plaintiff's cause of action, the issue should have never gone to the jury, and this Court is required to reverse the trial court's denial of the motion. *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978). Here, I cannot find any evidence in the record to support the trial court's ruling.

The record reflects that Poole looked in the direction of oncoming traffic before exiting the Wal-Mart parking lot. He stated that he saw two cars approaching his position both approximately 150 – 200 feet away. He then pulled out of the parking lot and proceeded to switch lanes at a speed of 8 – 10 miles/hour until he reached the third lane and struck Thomasko's vehicle.

In my opinion, the evidence favoring Poole's defense of comparative negligence, even in the light most favorable to him, is insufficient to present a jury question. Poole claims the following facts support his position that Thomasko was comparatively negligent:

1. Poole testified that when he exited the Wal-Mart parking lot, there were only two vehicles approaching his position. Each of the two vehicles were at least 150 feet from Poole's position.

2. Poole testified that he began to cross three lanes at a speed of 8 – 10 miles/hour. Upon reaching the third lane, Poole testified that he felt his vehicle impact with Thomasko's vehicle.

3. Poole testified that he never saw Thomasko's vehicle until after impact.

4. Thomasko testified that she did not see Poole's vehicle until the moment before impact.

Based on these facts, the trial judge allowed the issue of plaintiff's comparative negligence to go to the jury stating that the jury could have found Thomasko was negligent in failing to avoid the accident because it was not a "bad accident."

First, I disagree that there was any evidence presented to the jury which even suggested Thomasko was negligent. The defense failed to produce evidence of speeding, violation of traffic laws, driver impairment, vehicle impairment, or any other type evidence which could support a reasonable inference of negligence on the part of Thomasko. The fact that Thomasko does not remember seeing Poole prior to the moment of impact creates, at most, mere speculation as to Thomasko's negligence.

I agree with the Respondent and the majority that Thomasko has a duty to keep a reasonable lookout and adjust her speed to conditions pursuant to S.C. Code Ann. § 56-5-1520 (Supp. 2000). However, mere accusation or speculation Thomasko may have failed to keep a proper lookout, without more, cannot rise to the level of negligence as a matter of law. To hold otherwise, as the majority's has done, will require the trial court to submit the issue of comparative negligence to the jury in every car accident case even without any evidence of negligence on the part of the plaintiff.

In addition, Thomasko was the favored driver because she was driving

within the lane that Poole was entering. S.C. CODE ANN. § 56–5–1900 (Supp. 2000) states that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that such movement can be made with safety." Therefore, it was Poole's duty to yield to all southbound traffic before switching lanes. It strains logic to impose a duty on Thomasko to avoid being blind-sided by Poole as the result of his negligence without some evidence of Thomasko's own negligence.

Second, I do not agree that the severity of the accident alone should allow an inference of negligence. To entertain this argument would make the decision of whether to grant a directed verdict dependant on the trial judge's judgment as to the severity of the accident. This is not a precedent I am willing to create.

Poole argues that even if the denial of the Motion for Directed Verdict was in error, Thomasko suffered no prejudice. Poole argues that the jury's question to the bench, combined with the timing of the verdict suggests that the jury found Thomasko did not sustain damages in the accident. I disagree.

When deliberating, the jury foreman came back with the following question: "If we find fault by the defendant and neglect by the defendant but do not feel that injuries were sustained by the accident, who do we rule for?" There is no indication as to whether this was a question by the entire jury or just the foreman. In response to this question, the trial judge charged the jury that damages were an essential element in a cause of action for negligence; therefore, if the Plaintiff failed to prove damages, then she failed to prove her case. Three minutes later, the jury returned with a general verdict for Poole.

It is well established that an appellant seeking reversal of a decision by the trial court must show both error and prejudice. *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 479 S.E.2d 67 (1996). An alleged error does not prejudice the Appellant if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict. *Wells v. Halyard*, 341 S.C. 234, 533 S.E.2d 341(2000); *Visual Graphics Leasing*

Corp., Inc., v. Lucia, 311 S.C. 484, 429 S.E.2d 839 (1993).

The jury returned a general verdict for Poole. Therefore, either the jury found (1) Thomasko was at least 51% at fault for the accident, or (2) Thomasko failed to prove damages. Because the verdict was a general verdict, drawing any conclusion from the jury's question would be nothing more than speculation.

CONCLUSION

Based on the foregoing reasons, I would **REVERSE** and order a new trial.

WESTBROOK, A.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America, Respondent,

v.

Golden Hills Builders, Inc., Peter O. Stoltz, and Brooke M. Stoltz,

of whom Peter O. Stoltz and Brooke M. Stoltz are Appellants.

CERTIFIED QUESTIONS
Clyde H. Hamilton, United States Court of Appeals Judge

Opinion No. 25426
Heard January 23, 2002 - Filed March 11, 2002

QUESTIONS ANSWERED

Richard R. Gleissner, of Finkel & Altman, of Columbia, for appellants.

J.R. Murphy and Anthony W. Livoti, both of Murphy & Grantland, of Columbia, for respondent.

Andrea C. Pope, of Barnes, Alford, Stork & Johnson, of Columbia, for Amicus Curiae Insurance Environmental Litigation Association.

JUSTICE MOORE: We accepted the following questions certified by the United States Fourth Circuit Court of Appeals:

1. Does a standard commercial general liability insurance policy that explicitly provides coverage only for property damage occurring during the policy period provide coverage for continuing damage that begins during the policy period?

2. If so, is coverage precluded by a provision excluding coverage for damage to property that is owned, rented, or occupied by the insured, where the insured held legal title to the property, which was under contract for sale, when the damage began?

3. If not, is a general contractor's claim for the cost of repair to the substrate and framing of a house that was damaged by a subcontractor's improper installation of a stucco exterior precluded by a faulty workmanship exclusion?

4. If the coverage is precluded by the faulty workmanship provision, is that coverage restored by a provision that provides coverage for damage arising from products-completed operations hazards?

FACTS

The appellants, Peter and Brooke Stoltz (hereinafter referred to as Homeowners), filed an action in South Carolina state court against Golden Hills Builders (Insured), a general contractor engaged in the business of constructing residential homes. Homeowners alleged their home was defective because a subcontractor of Insured constructed the synthetic stucco exterior of their home in a manner that caused moisture damage to the properly constructed substrate and framing of the home.

Insured began building the home in 1989 and substantially completed it by mid-1990. On June 28, 1990, Insured entered into a contract for completion of the house with Homeowners. Insured's commercial general liability insurance policy had an effective date of December 7, 1989, to December 7, 1990. The residence was deeded to Homeowners on February 22, 1991. Homeowners began noticing problems in 1998; however, the parties stipulate that the moisture damage began occurring prior to December 7, 1990, and that the damage has been continuous since that time.

Homeowners sought damages incurred in replacing the defective exterior and repairing the substrate and framing. They also sought attorney's fees and punitive damages.

Respondent, Century Indemnity Company (Insurer),[1] filed an action in the United States District Court for the District of South Carolina against Insured and Homeowners. Insurer sought a declaratory judgment that any damages awarded in the state court action would not be covered by a standard commercial general liability policy that Insurer had issued to Insured. The District Court granted Insurer's motion for summary judgment, finding coverage did not exist for the cost of replacing the synthetic stucco exterior or for repairing the damage to the substrate.

---

[1]A predecessor of Insurer sold the policy to Insured.

Insured did not appeal the District Court's ruling. Homeowners, however, appealed to the Fourth Circuit Court of Appeals the portion of the decision that addressed the lack of coverage for the substrate damage.

CERTIFIED QUESTION 1

> Does a standard commercial general liability insurance policy that explicitly provides coverage only for property damage occurring during the policy period provide coverage for continuing damage that begins during the policy period?

DISCUSSION

The insurance policy at issue in the instant case states:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "property damage" to which this insurance applies.

The policy further states:

> This insurance applies to . . . "property damage" only if: (1) the . . . "property damage" is caused by an "occurrence" that takes place in the "coverage territory" and (2) the . . . "property damage" occurs during the policy period.

"Occurrence" is defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." This case, as stipulated, involves the "repeated exposure to substantially the same general harmful conditions." Moisture penetrates past the synthetic stucco of the home, becomes trapped, and then damages the wooden substrate and framing of the home. This repeated exposure began

during the policy period.

In the policy, "property damage" is defined as a:

> Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; . . .

Accordingly, property damage relates back in time to the time of the occurrence, that is, when the first injury occurred to the property.

The parties have stipulated that the home in question was within the "coverage territory," that "property damage" was caused by an "occurrence," and that "property damage" occurred during the policy period.

The issue is whether the policy should cover (1) only the amount of property damage that occurred during the policy period, *i.e.*, between December 7, 1989, and December 7, 1990; or (2) all sums Insured becomes legally obligated to pay if property damage occurs during the policy period.

We believe this issue can be resolved solely by reference to Joe Harden Builders, Inc. v. Aetna Cas. & Sur. Co., 326 S.C. 231, 486 S.E.2d 89 (1997).[2]

---

[2]In Joe Harden, a condominium owner sought damages from Contractor for the cracking of the building's exterior brick wall. The Contractor's subcontractor had misaligned the building's concrete columns and floor slabs which caused the masonry contractor to modify the construction of the exterior brick wall. This wall began to crack because it was not intended for structural support.

Contractor settled with the owner, won an arbitration award against the subcontractor, and then sought payment from the insurer under the subcontractor's insurance policy. Contractor brought a declaratory judgment action in the United States District Court to determine coverage under the

In Joe Harden, the Court adopted a modified continuous trigger theory for determining when coverage is triggered under a standard occurrence policy. "Under this theory, coverage is triggered whenever the damage can be shown in fact to have first occurred, even if it is before the damage became apparent, and the policy in effect at the time of the injury-in-fact covers all the ensuing damages." *Id.* at 236, 486 S.E.2d at 91. Coverage is also triggered under every policy applicable thereafter.

Because the policy at issue here contains substantially the same language as the policy at issue in Joe Harden, the modified continuous trigger theory applies in the instant case. As a result, the insurance policy provides coverage for property damage that occurred during the policy period and for any continuing damage.

Therefore, the answer to the certified question of whether the policy provides coverage for continuing damage that began during the policy period is yes.

CERTIFIED QUESTION 3[3]

> Is a general contractor's claim for the cost of repair to the substrate and framing of a house that was damaged by a subcontractor's improper installation of a stucco exterior precluded by a faulty workmanship exclusion?

---

insurance policy. The Court accepted the District Court's certification of a question that concerned the issue of coverage under an occurrence policy when there is progressive damage that is not apparent at the time of the underlying injury-causing event.

[3]Given that the outcome of Certified Questions 3 and 4 is dispositive of the case, we decline to answer Certified Question 2.

DISCUSSION

Insured was the general contractor of the home that Homeowners purchased. The defective stucco exterior was constructed by a subcontractor of Insured.

The policy excludes from coverage property damage to:

> That particular part of any property that must be restored, repaired, or replaced because "your work" was incorrectly performed on it.

(hereinafter referred to as the faulty workmanship provision). "Your work" is defined as "[w]ork or operations performed by you or on your behalf and . . . materials, parts or equipment furnished in connection with such work or operations."

Insurance policies are subject to the general rules of contract construction. B.L.G. Enterprises, Inc. v. First Financial Ins. Co., 334 S.C. 529, 514 S.E.2d 327 (1999). The Court must give policy language its plain, ordinary, and popular meaning. *Id.* When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. *Id.* Furthermore, exclusions in an insurance policy are always construed most strongly against the insurer. Boggs v. Aetna Cas. and Sur. Co., 272 S.C. 460, 252 S.E.2d 565 (1979).

A comprehensive general liability policy, such as the one at issue, provides coverage "for all the risks of legal liability encountered by a business entity," with coverage excluded for certain specific risks. Rowland H. Long, LL.M., *The Law of Liability Insurance*, § 3.06[1] (2001). This type of insurance "is not intended to insure business risks, *i.e.*, risks that are the normal, frequent, or predictable consequences of doing business, and which business management can and should control or manage." *Id.* § 10.01[1]. Specifically, "[t]he policies do not insure [an insured's] work itself, but rather, they generally insure consequential risks that stem from that work."

Id. *See also* Isle of Palms Pest Control Co. v. Monticello Ins. Co., 319 S.C. 12, 459 S.E.2d 318 (Ct. App. 1995), *aff'd*, 321 S.C. 310, 468 S.E.2d 304 (1996) (general liability policy is intended to provide coverage for tort liability for physical damage to property of others; it is not intended to provide coverage for insured's contractual liability which causes economic losses); Sapp v. State Farm Fire & Cas. Co., 486 S.E.2d 71, 75 (Ga. App. 1997) (noting risk intended to be insured is possibility that work of insured, once completed, will cause bodily injury or *damage to property other than to completed work itself*, and for which insured may be found liable; coverage applicable under CGL policy is for tort liability for injury to persons and damage to *other* property and not for contractual liability of insured for economic loss because completed work is not that for which the damaged person bargained).

Homeowners argue that the provision, which excludes from coverage property damage to "[t]hat particular part of any property that must be restored, repaired, or replaced because 'your work' was incorrectly performed on it," should be interpreted to mean that only the work that was incorrectly performed (the exterior stucco) is excluded and repairs to other parts of the property where the work was correctly performed (the substrate and substructure) are not excluded. Because the substrate and substructure were correctly constructed but were damaged by the improperly installed stucco, Homeowners argue that repairs to the substrate and substructure are not barred by the exclusion because the work was not "incorrectly performed on" those parts.

However, given the purpose of CGL policies as pointed out above, Homeowners' argument cannot be sustained. Based on the law of this State, coverage for the repair and/or replacement of the substrate and substructure of the home is excluded by the faulty workmanship provision. *See* Engineered Prods., Inc. v. Aetna Cas. & Sur. Co., 295 S.C. 375, 368 S.E.2d 674 (Ct. App. 1988) (under policy excluding coverage of insured's liability for damages resulting from restoration, repair, or replacement of its own defective work, insurer had *no duty to defend* its insured in action seeking compensation for replacement of rack system lost in storm, *where losses*

were result of faulty workmanship by insured's subcontractor who failed to anchor system properly); C.D. Walters Constr. Co., Inc. v. Fireman's Ins. Co. of Newark, New Jersey, 281 S.C. 593, 316 S.E.2d 709 (Ct. App. 1984) (CGL insurer is not obligated to defend insured where action against insured did not involve accidental injury to *property other than that on which insured was performing its work*). *See also* Bituminous Cas. Corp. v. Northern Ins. Co. of New York, 548 S.E.2d 495 (Ga. App. 2001) (faulty workmanship provision of CGL insurance policy excluded coverage for water damage sustained by owners' unfinished residence as result of contractor's alleged negligence in building deck; also rejected argument that coverage not excluded because negligence caused damage to "other property," that is, other parts of project other than those on which contractor worked).

Accordingly, the answer to the question of whether coverage is excluded by the faulty workmanship provision is yes.

CERTIFIED QUESTION 4

> If the coverage is precluded by the faulty workmanship provision, is that coverage restored by a provision that provides coverage for damage arising from products-completed operations hazards?

DISCUSSION

The policy provides that the faulty workmanship exclusion does not apply to "property damage" included in the "products-completed operations hazard" provision. This provision states:

> 11. a. "Products-completed operations hazard" includes all . . . "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
>
> (1) Products that are still in your physical possession;

or

(2) Work that has not yet been completed or abandoned.

b. "Your work" will be deemed completed at the earliest of the following times:

(1) When all of the work called for in your contract has been completed.

. . .

(3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Under this provision, the products-completed operations hazard does not include "property damage" which arose out of Insured's products that were still in Insured's physical possession, as was the case here because Insured still had physical possession of the home. B.L.G. Enterprises, Inc., *supra* (when contract is unambiguous, clear, and explicit, it must be construed according to terms parties have used).

Further, the products-completed operations hazard does not include "property damage" which arose out of Insured's work that had not yet been completed.[4] The work had clearly not been completed at the end of the

[4]*See* Laidlaw Envtl. Servs. (TOC), Inc. v. Aetna Cas. & Sur. Co. of Illinois, 338 S.C. 43, 524 S.E.2d 847 (Ct. App. 1999) (By plain meaning, products-completed operations coverage applies when insured contractor completes work on a project; "Accordingly, '[w]ork that has not yet been completed' is still in progress and not covered under the products-completed

policy period. In June 1990, Homeowners entered into a contract for completion of the home with Insured. Upon completion, Homeowners were deeded the property in February 1991, two months after the insurance policy period had ended. Further, the work that was done as of December 7, 1990, the end of the policy period, had not been put to its intended use by Homeowners. The intended use was residing in the home which did not occur until February 1991. Therefore, Insured's work was not completed at the end of the policy period.[5]

As a result, the products-completed operations hazard provision does not restore coverage.

CONCLUSION

We therefore answer the certified questions in the following manner: (1) a standard commercial general liability policy provides coverage for continuing damage that began during the policy period; (2) coverage is excluded by the faulty workmanship provision; and (3) coverage is not restored by the products-completed operations hazard provision. Given our conclusion that coverage is excluded by the faulty workmanship provision,

---

coverage.").

[5]Homeowners argue that the language should be interpreted to mean that upon the completion of each *activity*, coverage would be extended to that activity. For example, once the plumbing was completed, coverage would be extended to that part that had been completed, *i.e.*, the plumbing. However, the plain language of the policy contradicts such an interpretation. The policy provision clearly states, "When *all* of the work called for in your contract has been completed." (Emphasis added). Further, the language of the provision 11.b.(3) clearly contradicts such an interpretation ("When that part of the work done at a job site has been put to its intended use by any person or organization *other than another contractor or subcontractor* working on the same project" (Emphasis added)).

we refrain from addressing Certified Question 2.

QUESTIONS ANSWERED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charles W. Patrick, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Abbeville County
James W. Johnson, Jr., Trial Judge
Larry R. Patterson, Post-Conviction Judge

Opinion No. 25427
Submitted January 24, 2002 - Filed March 11, 2002

REVERSED AND REMANDED

Assistant Appellate Defender Tara S. Taggart, of Office of Appellate Defense of Columbia, for petitioner.

Attorney General Charles M. Condon, Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., and Assistant Attorney General William Bryan Dukes, all

of Columbia, for respondent.

CHIEF JUSTICE TOAL: This Court granted certiorari to review the denial of Charles W. Patrick's ("Petitioner") application for Post Conviction Relief ("PCR").

FACTUAL/ PROCEDURAL BACKGROUND

Petitioner was originally indicted in 1975 for burglary, two counts of armed robbery, assault and battery with intent to kill, and the use of a motor vehicle without the owner's consent. All the indictments, except the burglary indictment, were nol prossed prior to trial. After a trial in March 1976, Petitioner was convicted of burglary and sentenced to life in prison. His conviction was affirmed in *State v. Allen*, 269 S.C. 233, 237 S.E.2d 64 (1977).[1]

In 1992, Petitioner applied for post conviction relief. The circuit court found he received ineffective assistance of counsel and reversed his conviction. This Court denied the State's request for certiorari.

In August 1993, the State re-indicted Petitioner for burglary, two (2) counts of armed robbery, assault and battery with intent to kill, and use of a vehicle without permission. In a jury trial which lasted from August 31, 1993 until September 3, 1993, the State tried Petitioner on all charges, including the charges which were originally nol prossed in 1976. The jury convicted Petitioner on all counts. The trial judge sentenced Petitioner to life in prison on the burglary charge; twenty-five years, concurrent, for each of the two armed robbery charges; twenty years, consecutive to the armed robbery sentences, for assault and battery with intent to kill; and five years, concurrent, for the use of a vehicle without permission. Petitioner's convictions and sentences were

---

[1]Petitioner and two co-defendants were tried together for the burglary. All three defendants were convicted and sentenced to life. Their convictions were affirmed in *State v. Allen*, under the name of one of the other co-defendants.

affirmed on direct appeal. *State v. Patrick*, 318 S.C. 352, 457 S.E.2d 632 (Ct. App. 1995). Petitioner's request for certiorari was denied on April 18, 1996.

Petitioner filed an application for PCR, which was denied after a hearing. Petitioner then sought certiorari. The issues before this Court are:

I. Was Petitioner's counsel ineffective in failing to obtain a ruling on the merits of his claim of prosecutorial retaliation?

II. Was counsel ineffective in failing to argue for mercy?

LAW/ ANALYSIS

I. Prosecutorial Retaliation

Petitioner argues his trial and appellate counsel[2] was ineffective in failing to properly raise the issue of prosecutorial retaliation at trial and on appeal. We agree.

In a PCR proceeding, the burden of proof is on the applicant to prove the allegations in his petition. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985), *cert. denied*, 474 U.S. 1094, 106 S. Ct. 869, 88 L. Ed. 2d 908 (1986). To prove counsel was ineffective, the applicant must show counsel's performance was deficient and the deficient performance caused prejudice to the applicant's case. *Strickland v. Washington*, 446 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To show prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Strickland*. This Court will sustain the PCR court's factual findings and conclusions regarding ineffective assistance of counsel if there is any

[2]Petitioner was represented by the same attorney at trial and on direct appeal.

probative evidence in the record to support those findings. *Skeen v. State*, 325 S.C. 210, 481 S.E.2d 129 (1997).

A. Trial Errors

Petitioner first argues his counsel was deficient in failing to adequately raise the issue of prosecutorial retaliation at his retrial. We disagree.

At the retrial, counsel made a motion to quash the two indictments for armed robbery, the indictment for assault and battery with intent to kill, and the indictment for the use of a vehicle without permission – the four charges which were nol prossed prior to Petitioner's original trial. Counsel stated,

> I would point out to the court that these were basically all nol prossed by the State in 1976. The State elected not to go forward with those charges in 1976 and dismissed them. And I think it's improper for the State to come back today and relevel [sic] those charges against [petitioner], simply because he was successful in winning his PCR.

Petitioner argues counsel never cited specific law to the court, but instead merely stated there was a "general philosophy . . . you can't punish a guy for appealing his case." The trial judge denied the motion to quash, noting he was "without anything to base it on."

At the PCR hearing, Petitioner argued counsel was ineffective in failing to offer any law to the trial court on the issue. The PCR court found the issue had been properly raised and preserved by trial counsel. We agree with the PCR court's finding. Trial counsel raised the issue regarding the possible violation of Petitioner's due process rights when the solicitor chose to "relevel" the charges after they were nol prossed. Therefore, there is sufficient evidence to support the PCR court's finding that trial counsel was not ineffective in failing to preserve the issue. *Skeen v. State*.

B. Appellate Errors

Petitioner also argues counsel was ineffective for failing to properly address this same issue on appeal. We agree.

In his brief to the Court of Appeals, counsel devoted three short paragraphs to this issue, did not give any useful analysis, and only cited one case, *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). In its opinion, the Court of Appeals did not specifically address the issue of prosecutorial retaliation. The court merely concluded that the indictments which had been nol prossed could be brought in the retrial, since they were nol prossed before the jury was impaneled. *State v. Patrick*, 318 S.C. 352, 247 S.E.2d 632 (Ct. App. 1995).

Counsel did not make any note of this issue in his petition for rehearing. Subsequently on July 27, 1995, the Court of Appeals *sua sponte* directed the parties to address this issue of prosecutorial retaliation in a supplemental petition for rehearing in light of *Pearce* and *State v. Fletcher* (originally filed June 19, 1995 but subsequently withdrawn and refiled with a different result in 322 S.C. 256, 471 S.E.2d 702 (Ct. App. 1996) cert. denied Jan. 23, 1997.) Counsel submitted a supplemental brief. However, counsel's argument was conclusory at best. He did not even mention the seminal case, *Pearce,* in his supplemental brief. The State vigorously objected to the Court of Appeals even considering something that had not been properly included in a petition for rehearing, citing Rule 226(d)(2), SCACR.

After the rebriefing, the Court of Appeals denied the petition for rehearing, stating:

> The issue was argued in a conclusory fashion in [petitioner's] final brief. Moreover, the issue was not stated with particularity in [petitioner's] petition for rehearing . . . . After careful consideration of the parties' briefs, [petitioner's] petition for rehearing, respondent's return, and supplemental responses requested by the Court, the petition for rehearing is

denied.

As evidenced by counsel's briefs and the Court of Appeals' statement above, counsel was deficient in failing to adequately raise or address the merits of the issue of prosecutorial retaliation.

C. Prejudice

While it is clear that appellate counsel did not adequately address the merits of Petitioner's prosecutorial retaliation claim, Petitioner still must prove he was prejudiced by counsel's deficient performance. *Strickland v. Washington*. We find Petitioner was prejudiced.

In the landmark decision of *North Carolina v. Pearce*, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment prevented a trial court from penalizing a defendant for choosing to exercise his right to appeal. In order for the presumption of prosecutorial retaliation (or the "*Pearce* presumption") to apply, Petitioner must show there is a "reasonable likelihood" that retaliation was a motive behind bringing the additional charges. *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); *State v. Fletcher*, 322 S.C. 256, 471 S.E.2d 702 (Ct. App. 1996). Where no such "reasonable likelihood" exists, the defendant has the burden to prove actual retaliation. *Alabama v. Smith*, 490 U.S. at 800, 109 S. Ct. at 2205. In the instant case, there is a "reasonable likelihood" retaliation was a motive, and therefore Petitioner was entitled to the presumption.

In this case, the solicitor nol prossed four charges against Petitioner before his 1976 trial. After Petitioner was successful on PCR in 1992, the solicitor then resurrected the four charges for Petitioner's 1993 trial. Seventeen years passed between the trials. There was no new evidence discovered; none of the facts or witness available to the prosecution had changed. The solicitor had from the date of Petitioner's original trial in 1976 until the date of his PCR in 1992 to bring the nol processed charges but did not. This is a typical situation in which the *Pearce* presumption applies. These facts present a "reasonable likelihood" that the solicitor brought the additional charges in retaliation for Petitioner

exercising his right to appeal.

Furthermore, the State has not rebutted the presumption. The solicitor stated he prosecuted the previously nol prossed charges on retrial because it was in the interest of the State of South Carolina and the people of Abbeville County. He also stated that once a solicitor had a life sentence on one charge, it was common practice not to prosecute the additional charges. These are fairly weak reasons for bringing the charges, especially considering the length of time between the original trial and the retrial. Additionally, the charges were nol prossed ***prior*** to the first trial because they "vanished." Therefore, Petitioner did not have a life sentence at the time the charges were nol prossed.

In conclusion, we find counsel was deficient in failing to adequately raise or brief the issue of prosecutorial retaliation. Furthermore, Petitioner was prejudiced by counsel's failure to adequately argue the issue before the Court of Appeals. If counsel had properly argued the issue, the Court of Appeals would have found the *Pearce* presumption applied and that the State failed to rebut the presumption. Therefore, we **REVERSE** the PCR court's ruling that counsel was not ineffective. The charges which were nol prossed prior to the first trial were not properly brought on retrial. Accordingly, Petitioner's convictions for the two counts of armed robbery, assault and battery with intent to kill, and use of a motor vehicle without the owner's consent are **REVERSED**.

II. Mercy

Petitioner argues counsel was ineffective in failing to appeal to the jury for mercy. We agree.

Petitioner was tried under the previous burglary scheme. *See Simmons v. State*, 331 S.C. 333, 503 S.E.2d 164 (1998) (discussing the former burglary statute, S.C. Code Ann. § 16-11-311 (Supp. 1997), and the impact of improper remarks by the solicitor regarding the mercy issue). Under the old statute, a conviction for burglary without a recommendation for mercy carried a mandatory life sentence, while burglary with a recommendation of mercy could

carry as little as five years in prison. Petitioner's counsel admitted at the PCR hearing that he simply forgot to argue for a recommendation of mercy to the jury. He testified it was not a tactical decision to avoid arguing for mercy, rather, he "didn't think about it" until several days later when he "was sitting in [his] office and . . . realized [he] did not argue for mercy." The PCR court found counsel was deficient in failing to argue for a mercy recommendation. In fact, the State, in their brief to this Court, does not seem to contest counsel was deficient. The State simply argues Petitioner was not prejudiced by counsel's error. We find counsel was deficient, and Petitioner suffered prejudice.

The PCR court found Petitioner was not prejudiced by counsel's failure to argue for mercy. The court found Petitioner's other sentences totaled 45 active years, thus making counsel's error non-prejudicial. The PCR court stated, " a letter to trial counsel from the Department of Probation, Parole, and Pardon Services, evinces that the remaining sentences, particularly the twenty- five year sentence for armed robbery, will move [petitioner's] parole eligibility date back further than when he merely had a life sentence for burglary. Therefore, [petitioner] has not been prejudiced by [counsel's] error, because even if he had received the minimum possible sentence on the burglary charge (five years), he still would not have been eligible for parole any sooner."

As stated above, Petitioner should only have been tried for the burglary charge. Therefore, he should not have had additional "active years" to serve, pushing his parole eligibility back beyond what it would have been for a single burglary charge. Without these additional years, then, according to the PCR judge's reasoning, Petitioner was clearly prejudiced by counsel's failure to argue for mercy. Regardless, Petitioner is entitled to relief under *Chubb v. State*, 303 S.C. 395, 401 S.E.2d 159 (1991). Under *Chubb*, failure to argue mercy is *per se* prejudicial.

Accordingly, we **REVERSE** the PCR court's finding that Petitioner was not prejudiced by his counsel's failure to argue for a mercy recommendation and **REMAND** for a new trial.

CONCLUSION

Based on the forgoing, we find Petitioner's convictions for armed robbery, assault and battery with intent to kill, and use of a motor vehicle without the owner's consent were not properly brought by the solicitor. Accordingly, they are **REVERSED**. We further find Petitioner was prejudiced by counsel's failure to argue for mercy on the burglary charge. Therefore, Petitioner's conviction for burglary is **REVERSED** and **REMANDED** for a new trial.

WALLER, BURNETT and PLEICONES, JJ., concur. MOORE, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina, Appellant,

v.

James Eugene Huntley, Respondent.

Appeal From Lancaster County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 25428
Heard November 27, 2001 - Filed March 11, 2002

REVERSED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Norman Mark Rapoport, and Assistant Attorney General Melody J. Brown, of Columbia; Solicitor John R. Justice, of Chester, for appellant.

Francis L. Bell, of Bell, Tindall & Freeland, of Lancaster, for respondent.

JUSTICE BURNETT: On May 27, 2000, Respondent James Eugene Huntley (Huntley) was arrested for driving under the influence. After the jury was sworn, Huntley moved to suppress the results of his breathalyzer test, arguing the test operator used a different simulator solution test level than that set forth by law. The trial judge agreed and suppressed Huntley's breathalyzer results. The State appeals.[1]

ISSUE

Did the trial judge err by suppressing Huntley's breathalyzer results?

ANALYSIS

In 1998, the General Assembly passed Act No. 434 (Act 434) which made various changes to provisions of the driving under the influence law. One change amended South Carolina Code Ann. § 56-5-2950(a) to specify that before a breath test is administered, "an eight one-hundredths of one percent simulator test must be performed and the result must reflect a reading between 0.076 percent and 0.084 percent." Previously, § 56-5-2950(a) did not require a simulator test.[2] On June 29, 1998, the Governor approved Act 434. Subsequently, Act 434 was enrolled with the Office of the Secretary of State.

---

[1]At the conclusion of the suppression hearing, Huntley stated he had no objection to a stay of the proceedings pending the State's appeal. See State v. McKnight, 287 S.C. 167, 337 S.E.2d 208 (1985) (pre-trial order granting suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable under S.C. Code Ann. § 14-3-330(2)(a) (1976)).

[2]While the South Carolina Law Enforcement Division had a regulation which set forth an approved method for performing breathalyzer tests, the regulation did not specify the parameters governing simulator tests. 26 S.C. Code Ann. Reg. 73-2 (Supp. 1997).

Months later, at the behest of the then Clerk of the Senate, the Code Commissioner amended Act 434. In relevant part, the amended version provides: "before the breath test is administered, a ten one-hundredths of one percent simulator test must be performed and the result must reflect a reading between 0.095 percent and 0.105 percent." S.C. Code Ann. § 56-5-2950(a) (Supp. 1999).[3]

The parties disagree which version of Act 434 is applicable for purposes of Huntley's prosecution. The State argues the amended version of Act 434 applies; Huntley contends the original version of Act 434 applies.[4] We agree with Huntley.

One duty of the Code Commissioner is to "[c]ompile the public statutes of the State." S.C. Code Ann. § 2-13-60(1) (1986). Part of this duty includes preparing indices to the statutes, noting court decisions under appropriate statutory sections, and adding references to new acts and joint resolutions. S.C. Code Ann. § 2-13-60(2), (3), and (6). The Code Commissioner is only authorized to "[c]orrect typographical and clerical errors." S.C. Code Ann. § 2-13-60(10). He is not authorized to make any other changes by way of addition or deletion to the existing laws.

In amending Act 434, the Code Commissioner changed the simulator solution test level and its corresponding range of accuracy. In

---

[3]At the time of Huntley's trial, the General Assembly had not adopted the 1999 Cumulative Supplement as official.

In 2000, the General Assembly revised Act 434 to provide a ten one-hundredths of one percent simulator test with a result between 0.095 percent and 0.105 percent. Act No. 390, 2000 S.C. Acts 3365.

[4]Prior to conducting Huntley's breathalyzer, the test operator ran a simulator test using a ten one-hundredths of one percent simulator test solution. Huntley claimed the test operator should have used an eight one-hundredths of one percent simulator test solution.

addition, the Code Commissioner increased the alcohol inference level throughout § 56-5-2950(b), increased the alcoholic concentration level at which a person must enroll in a safety program (§ 56-5-2951(B)), and increased the level of alcohol concentration at which an insurance penalty may be imposed (§ 56-1-288(U)). The Code Commissioner acted outside his statutory authority in making these substantive changes. Accordingly, we conclude the original version of Act 434 is the law applicable to Huntley's prosecution.

Even though the trial judge properly concluded the original version of Act 434 applied, we nonetheless conclude the trial judge erred by suppressing Huntley's breathalyzer results.

The purpose of a simulator test is to ensure the breathalyzer machine produces an accurate, reliable breath-alcohol reading, and ultimately, an accurate blood-alcohol analysis.

> The alcoholic breath simulator is a part of the breathalyzer devised for the purpose of providing a standard alcohol-air mixture. By mixing an amount of absolute alcohol with distilled water, a desired concentration of breath alcohol may be achieved. The breathalyzer operator, by pumping room air through the simulator solution, is able to determine whether the breathalyzer machine is functioning properly. For instance, if the simulator solution contains .10 of one percent alcohol, room air pumped through the simulator will result in a corresponding reading on the breathalyzer machine.

State v. Parker, 271 S.C. 159, 162, 245 S.E.2d 904, 905 (1978) (emphasis added); see 2 Richard E. Erwin Defense of Drunk Driving Cases § 18.04 (2001) (simulator test provides a known quantity of alcohol to the testing device to determine the capability of the device to properly analyze a sample at the time of the subject test); see also State v. Squires, 311 S.C. 11, 426

S.E.2d 738 (1992) (public purpose behind implied consent law is to facilitate compilation of *reliable* evidence in drunk driving prosecutions).

The alcohol level in the simulator test is used to determine the reliability of the breathalyzer machine's test results; it neither calibrates the breathalyzer machine nor affects the capability of the machine to properly measure the subject's blood-alcohol level. See State v. Parker, supra. Accordingly, as far as reliability is concerned, it is irrelevant whether the simulator test is run using an alcohol level of .10 or .08 percent. What is relevant is that the machine accurately measures the percentage of alcohol in the simulator test solution so that it will, likewise, accurately measure the percentage of alcohol in the subject's breath.

Even if the breathalyzer operator did not use the simulator test solution at the alcohol concentration required by Act 434, Huntley was not prejudiced. There is no question the breathalyzer machine was operating properly and its results were reliable.[5] Consequently, the trial judge erred by excluding Huntley's breathalyzer test results. State v. Chandler, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976) ("[E]xclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the [defendant] cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedures."). Evidence the simulator test was not run in conformity with Act 434 goes to the weight, not the admissibility, of Huntley's breathalyzer results.

REVERSED.

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

---

[5]As conceded by Huntley at trial and in his appellate brief, although the test operator ran a simulator test using a solution of .10 percent alcohol rather than .08 percent, the simulator results indicated the machine was operating properly.

JUSTICE PLEICONES: I respectfully dissent. I agree with the majority that the original version of Act 434 is applicable to Huntley's case. Unlike the majority, however, I believe that the failure to comply with the clear and unambiguous statutory language mandating a simulator test be run using "an eight one-hundredths of one percent" alcohol solution bars the use of the breath test results at trial. State v. Breech, 308 S.C. 356, 417 S.E.2d 873 (1992)(DUI statute strictly construed in favor of defendant).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The City of Rock Hill, Petitioner,

v.

Michael Dean Thompson, Respondent.

IN THE ORIGINAL JURISDICTION

Opinion No. 25429
Heard November 27, 2001 - Filed March 11, 2002

DENIED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Norman Mark Rapoport, Assistant Attorney General Melody D. Brown, of Columbia; and Senior City Solicitor for the City of Rock Hill, S.C., Christopher E.A. Barton and City Solicitor for the City of Rock Hill, S.C., Gary C. Lemel, of Rock Hill, for petitioner.

Michael L. Brown, Jr., of Rock Hill, for respondent.

Justin S. Kahn, of Kahn Law Firm, of Charleston, and John S. Nichols, of Bluestein & Nichols, of Columbia, for respondent.

JUSTICE BURNETT: Petitioner City of Rock Hill (City) petitions the Court to issue a writ of mandamus "requiring the Honorable Jane Pittman Modla, Judge of the City of Rock Hill Municipal Court, and all lower courts in which the issue may arise, to apply 1998 Acts 434 as corrected by the Code Commissioner and presently enrolled with the Secretary of State, as the law of the State of South Carolina." The writ is denied.

BACKGROUND

On October 21, 2000, Respondent Michael Dean Thompson (Thompson) was arrested by City's Police Department for driving under the influence in violation of South Carolina Code Ann. § 56-5-2930 (Supp. 1999). At a pre-trial hearing, City moved Municipal Court Judge Jane Pittman Modla (Judge) to determine the admissibility of Thompson's breathalyzer test results. City claimed the simulator test prior to Thompson's breathalyzer was properly performed in accordance with the amended version of 1998 S.C. Acts 434 (the Act). This version required the simulator test to be performed with an alcohol concentration of .10 percent. Thompson, however, argued the simulator test should have been performed in conformity with the original version of the Act. This version required the simulator test to be performed with an alcohol concentration of .08 percent.[1]

City presented witnesses who offered testimony about the original and amended versions of the Act. After presentation of City's witnesses, City joined Thompson's motion for a continuance to allow Thompson the opportunity to obtain witnesses and other evidence. City and

---

[1]In 2000, the General Assembly revised the Act to provide a ten one-hundredths of one percent simulator test. Act No. 390, 2000 S.C. Acts 3365.

Thompson agreed to coordinate their schedules and attempt to resume the hearing in two weeks. Before the hearing reconvened, the Attorney General filed this petition on behalf of City.

ISSUE

Has City established the elements for issuance of a writ of mandamus?

ANALYSIS

Mandamus is the highest judicial writ and is issued only when there is a specific right to be enforced, a positive duty to be performed, and no other specific remedy. Littlefield v. Williams, 343 S.C. 212, 540 S.E.2d 81 (2000); Willimon v. Greenville, 243 S.C. 82, 132 S.E.2d 169 (1963). A writ of mandamus is a coercive writ that orders a public official to perform a ministerial duty. Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999). Mandamus will issue only to compel a public official to perform a mandatory legal duty. Redmond v. Lexington County School Dist. No. Four, 314 S.C. 431, 445 S.E.2d 441 (1994). The primary purpose of a writ of mandamus is to enforce an established right and a corresponding imperative duty created or imposed by law. Littlefield, supra. When the legal right is doubtful, or the performance of duty rests in discretion, or when there is another adequate remedy, a writ of mandamus cannot rightfully be issued. In the Interest of Lyde, 284 S.C. 419, 327 S.E.2d 70 (1985).

As noted in its Petition for a Writ of Certiorari and in its Conclusion to its Brief, City seeks a writ of mandamus "requiring the Honorable Jane Pittman Modla, Judge of the City of Rock Hill Municipal Court, and all lower courts in which the issue may arise, to apply 1998 Acts 434 as corrected by the Code Commissioner and presently enrolled with the Secretary of State, as the law of the State of South Carolina." City has failed to establish the elements necessary for issuance of the writ.

First, City failed to establish Judge has a ministerial duty to rule the amended version of the Act is the correct law of this State. In at least one

other instance, this Court has recognized that mandamus may lie to compel a judicial officer to perform a ministerial duty. State v. Barbee, 280 S.C. 328, 313 S.E.2d 297 (1984) (suggesting defendant could compel magistrate by mandamus to file record of proceedings with the circuit court). Similarly, the Court could direct a judge to rule on a pending motion because the act of ruling is ministerial in nature.

Here, however, City seeks the writ to compel Judge to rule a particular way (i.e. that the amended version of the Act is the correct version and, therefore, Thompson's breathalyzer test results are admissible). City asserts Judge had no discretion in issuing this ruling. We disagree.

Issuance of a particular decision by a judge is typically a matter of discretion and, therefore, not proper for mandamus. See 55 C.J.S. Mandamus § 83 (1998) (while mandamus may be employed to compel an inferior tribunal to exercise its discretion, ordinarily it may not be used to direct or compel the exercise of the discretion in a particular way); see also Godwin v. Carrigan, 227 S.C. 216, 87 S.E.2d 471 (1955) (ministerial duty is one which a person performs in obedience to a mandate of legal authority without regard to the exercise of his own judgment upon the propriety of the act to be done). Until we issued our recent opinion in State v. Huntley, Op. No. _____ (S.C. Sup. Ct. filed _____) (Shearouse Adv. Sh. No. ___ at ___), it was debatable which of the two versions of the Act was the correct law of the State. Accordingly, this is not a situation where Judge was effectively issuing a ministerial decision because her discretion could *only* be exercised in one way. Cf. 55 C.J.S. Mandamus § 83 (1998) (where discretion of court can be legally exercised in only one way, mandamus will lie to compel court to so exercise it).

Second, City failed to establish it has no adequate remedy at law. City has two adequate legal remedies available. City can await Judge's ruling on its pending motion in limine.[2] In addition, if City's ability to

---

[2]Even if City wanted the writ to simply order Judge to rule, we would decline to issue the writ because Judge has not declined to rule on City's motion in limine. City agreed to a continuance of the hearing, then, within

prosecute Thompson is significantly disadvantaged by Judge's ruling on its motion in limine, City can appeal. State v. McKnight, 287 S.C. 167, 337 S.E.2d 208 (1985) (pre-trial order granting suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable under S.C. Code Ann. § 14-3-330(2)(a) (1976)); see 55 C.J.S. Mandamus § 24 (1998) (generally, mandamus will not lie where adequate remedy by appeal). In fact, the Attorney General appealed the grant of a defendant's motion in limine in which the underlying issue was the same as raised by the Attorney General in his current petition for a writ of mandamus. State v. Huntley, supra.

Finally, City did not serve Judge with its petition for a writ of mandamus. Relying on 52 Am. Jur.2d Mandamus § 394 (2000), City argues "other jurisdictions accept that the judge should not be served and made a party. In fact, it is the preferred practice in federal court that the judge not be named."

City mischaracterizes the American Jurisprudence section. The section states:

> A person seeking a writ of mandamus involving pending litigation must institute the suit for mandamus against the judge upon whom the person seeks the writ to issue and against the other parties to the litigation. Thus, mandamus does not lie to review a court's action where the court was [sic] not been made a party to the proceedings or petition.

Id., p.591.

Thereafter, the section discusses that while some jurisdictions require an application for mandamus to be addressed to the court, others require the judge to be sued by name. Finally, the section notes, in federal

---

the month, filed the petition for a writ of mandamus. Judge's failure to reconvene the hearing within a month is not an indication she refused to issue a ruling.

court practice, where the purpose of mandamus is to secure, in effect, an interlocutory review of the intrinsic merits of a judicial act, the judge against whom mandamus is sought is not an active party. Id. citing A. Olinick and Sons v. Dempster Bros. Inc., 365 F.2d 439 (2nd Cir. 1966); Rapp v. VanDusen, 350 F.2d 806 (3rd Cir. 1965); General Tire & Rubber Co. v. Watkins, 363 F.2d 87 (4th Cir.), cert. denied 385 U.S. 899 (1966). Instead, the judge is a nominal party who need not file an answer or submit a brief. Id. Neither American Jurisprudence nor the cases cited therein state the judge need not be served with the mandamus petition. City was required to serve Judge with its petition for mandamus.

Because City failed to establish the elements required for issuance of a writ of mandamus and failed to serve Judge with its petition, the petition for a writ of mandamus is **DENIED.**

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Beth B. Weaver, as Personal Representative of the Estate of William Scott Weaver,

Respondent/Appellant,

v.

John Luther Lentz, Jr.,

Appellant/Respondent.

Appeal From York County
Lee S. Alford, Circuit Court Judge

Opinion No. 3458
Heard November 8, 2001 - Filed March 4, 2002

AFFIRMED

Julius W. McKay, II and Kathleen Devereaux Schultz, both of McKay, McKay & Settana, of Columbia, for appellant/respondent.

Kenneth M. Suggs, D. Michael Kelly, B. Randall Dong, and Shannon Lee Felder, all of Suggs & Kelly, of Columbia, for respondent/appellant.

STILWELL, J.: In this wrongful death action, the parties filed cross appeals from the jury's award of actual and punitive damages and the trial judge's reduction of the verdict. Dr. Lentz argues the trial court erroneously applied the wrongful death statute of limitations rather than the health care provider statute of limitations, erred in admitting certain evidence, and erred in denying his new trial motions. Weaver argues the trial court improperly reduced the amount of the actual damages based on comparative negligence. We affirm.

BACKGROUND

Weaver initially visited Dr. Lentz, complaining primarily of neck pain and headaches resulting from an auto accident. Dr. Lentz saw Weaver on a regular basis during the ensuing years and tried several drug combinations to manage the pain with overlapping prescriptions and multiple substitutions. Weaver frequently complained of neck muscle pain, muscle spasms, headaches, insomnia, depression, and anxiety. He was hospitalized multiple times for physical problems where overdose or addiction concerns were noted. In December 1993, Weaver was hospitalized for psychiatric evaluation and treatment for addiction to prescription pain medications and was diagnosed with severe major depression and borderline personality disorder. On February 17, 1994, Weaver died from an overdose of Darvocet, a drug which had been prescribed by Dr. Lentz. The parties dispute whether the death was an accident or suicide. Weaver's widow, Beth, brought this wrongful death action as personal representative, alleging Dr. Lentz negligently over-prescribed pain medications under circumstances sufficient to put him on notice Weaver was addicted and abusing them.

One of Weaver's expert witnesses identified and charted the various medications, dosages, and dosage overlaps Weaver had been prescribed over the years. Another expert testified Weaver was addicted to prescription medication at the time of his death, and Dr. Lentz should have been aware of the developing addiction problem. A third expert testified Dr. Lentz was negligent in his prescribing practices, based on the number of medications prescribed at one time, the drug class combinations, the long term use of addictive medications,

and the failure to adequately treat and monitor Weaver as an addict or abuser.

I. Statute of Limitations

Dr. Lentz asserts the trial court erred in ruling the applicable statute of limitations was the wrongful death rather than the health care provider statute. Weaver counters with the argument that the statute of limitations should not be an issue because the court erred in allowing it to be raised as an affirmative defense by an amendment to the pleadings.

A.

We first address Weaver's counter-argument, and find no error in allowing the amendment. The motion to amend was made and granted over objection on the day of trial before the case began. Weaver did not move for a continuance and has not demonstrated that the amendment was prejudicial. Amendments are liberally allowed within the sound discretion of the trial judge, and the opposing party must show prejudice to warrant reversal. See Austin v. Conway Hosp., Inc., 292 S.C. 334, 338, 356 S.E.2d 153, 155-56 (Ct. App. 1987); Foggie v. CSX Transp., Inc., 315 S.C. 17, 22, 431 S.E.2d 587, 590 (1993). "Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action." Ball v. Canadian Am. Exp. Co., 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994). The evidence relevant to the statute was the same evidence relevant to other issues.

B.

Dr. Lentz insists that since the evidence demonstrates both Scott and Beth Weaver knew or should have known that he was addicted to prescription medication before his death based on his hospitalization in December 1993 for treatment of depression and pain medication abuse, the three year statute of limitations should have begun to run by January 1994, at the latest. This argument is based on the premise that this wrongful death cause of action is in reality a medical malpractice case. This argument is unavailing, however,

because the wrongful act complained of is Weaver's death, rather than his addiction. Thus, notice of Weaver's addiction prior to his death is irrelevant in this setting.

The wrongful death statute, commonly referred to as Lord Campbell's Act, created a new cause of action that was not recognized at common law. S.C. Code Ann. §15-51-10 (1976 & Supp. 2001); Crosby v. Glasscock Trucking Co., 340 S.C. 626, 628, 532 S.E.2d 856, 856 (2000). A wrongful death cause of action does not exist before death and arises only upon the death of the injured person. Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 104, 498 S.E.2d 395, 402 (Ct. App. 1998). The statute of limitations applicable to wrongful death actions provides that the period begins to run upon the death of the person. S.C. Code Ann. §§ 15-3-530(6) (1976 & Supp. 2001).

The wrongful death action was served on January 21, 1997, and thus was commenced within three years of Weaver's death. Dr. Lentz argues the language in Garner v. Houck that "wrongful death actions are actions to recover damages for injury to the person, and, therefore, the health care provider statute of limitations is applicable to wrongful death actions" makes it possible to have notice of a claim for wrongful death prior to an actual death. Garner v. Houck, 312 S.C. 481, 488, 435 S.E.2d 847, 850 (1993). This argument misses the point of Garner, which applied the health care provider statute of limitations to extend the discovery period subsequent to death because the autopsy results were necessary to discover the cause of the death and therefore give notice of a possible claim. In this case, the death itself was notice, and the action was timely commenced under either the wrongful death or health care provider statute of limitations.

II. Expert Testimony on Loss of Earnings

As part of the evidence of damages, Weaver presented the testimony of a vocational rehabilitation expert, Dr. William Stewart, and an economics expert, Dr. Oliver Wood. Dr. Lentz contends the court erred in admitting Dr. Wood's testimony about loss of future earnings because it lacked a proper factual foundation. We find no error.

Prior to Dr. Wood's testimony, Dr. Stewart evaluated Weaver's employment records from 1968 to October 1993. According to Dr. Stewart, Weaver's job performance showed a significant change from 1990 to 1991. Prior to that time, he had received good evaluations during his long employment with Springs Industries and his most recent employment with J.P. Stevens Automotive. However, his evaluation in October 1991 showed significant problems. Weaver was fired by J.P. Stevens and his subsequent employers for poor job performance and was last employed from August to October 1993. Dr. Stewart opined Weaver's employment history presented the classic profile of a person with an addiction problem. His peak earning capacity of approximately $51,000 per year was attained in 1989.

Weaver's treating psychiatrist noted in his discharge summary from the 1993 hospitalization that Weaver was "severely impaired with psychotic depression and severe borderline personality disorder," and opined that Weaver was "completely and entirely disabled" and would not be able to return to active work. When asked what effect these conclusions may have upon his opinion of Weaver's future employability, Dr. Stewart testified that if the findings were accepted as correct, Weaver would not be employable. Dr. Stewart indicated his initial opinion was made without reference to Weaver's medical records, but he did not recant his earlier testimony. No motion was made to have Dr. Stewart's testimony stricken, nor was it objected to as lacking factual foundation.

When Dr. Wood was called to testify, Dr. Lentz objected to the admission of his testimony because the economic calculations of future lost earnings were based upon Dr. Stewart's vocational opinion, which was that Weaver had work skills and abilities which qualified him to earn up to at least $50,953 per year as demonstrated by his earnings in 1989. Dr. Lentz argued Weaver had no future earning capacity due to his psychological problems and that there was no evidence to support such testimony based on his more recent poor performance and inability to hold a job. The trial court overruled the objection.

"The decision to admit or exclude expert testimony rests within the trial court's sound discretion and will not be reversed absent an abuse of that discretion." Gazes v. Dillard's Dep't Store, 341 S.C. 507, 512, 534 S.E.2d 306,

309 (Ct. App. 2000). Dr. Wood's testimony unquestionably met the standard for admissibility, and any question as to its factual basis goes to its credibility, not its admissibility. The credibility of evidence is properly a question for the jury. The standard of admissibility for evidence of future damages is "'any evidence which tends to establish the nature, character, and extent of injuries which are the natural and proximate consequences of [the] defendant's acts . . . if otherwise competent.'" Pearson v. Bridges, 344 S.C. 366, 372, 544 S.E.2d 617, 620 (2001) (quoting Martin v. Mobley, 253 S.C. 103, 109, 169 S.E.2d 278, 281-282 (1969)).

Dr. Stewart's testimony provides sufficient foundation for Dr. Wood's economic calculations. Questions as to the accuracy of conclusions drawn go solely to the weight of the testimony, rather than its admissibility. See Martin v. Mobley, 253 S.C. 103, 109, 169 S.E.2d 278, 281 (1969) (fact that doctor had not had opportunity to examine particular patient's circumstance went "only to the weight and not the admissibility of the proffered evidence."). Additionally, there is some evidence independent of Dr. Stewart's testimony that Weaver's employment decline stemmed from his prescription drug addiction and that the addiction contributed to his psychiatric condition but was recoverable. The weight to be accorded Dr. Wood's testimony was a matter for the jury's determination. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

> [I]t is not unusual for a case to have contradictory evidence and inconsistent testimony from a witness. In a law case tried before a jury, it is the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve. Under such circumstances, it is not the function of this Court to weigh the evidence and determine the credibility of the witnesses.

Small v. Pioneer Machinery, Inc., 329 S.C. 448, 465, 494 S.E.2d 835, 843-44 (Ct. App. 1997) (citations omitted).

III. New Trial Motions

Dr. Lentz contends the verdict lacks evidentiary support and the trial court erred in denying his motions for a new trial absolute or new trial nisi remittitur. His argument is premised primarily on his contention that Dr. Wood's testimony is not admissible. Having already addressed the issue of the admissibility of Dr. Wood's testimony, we find no error in the denial of the new trial motions.

The jury returned a verdict of $792,577 in actual damages, the exact amount testified to by Dr. Wood. His calculation of financial loss did not include other legitimate elements of damages that are recoverable in a wrongful death action, such as funeral expenses, grief, and sorrow. Beth Weaver testified she had to borrow money from her mother for funeral expenses and to make house payments immediately after Weaver's death. Wrongful death encompasses other elements of damages besides loss of earnings, and the court has no way to determine what significance the jury ascribed to these other factors. See Pearson at 372 n.5, 544 S.E.2d at 619 n.5; Case Notes to S.C. Code Ann. § 15-51-40 (1976 & Supp. 2001); Mishoe v. Atlantic Coast Line R.R. Co., 186 S.C. 402, 197 S.E. 97 (1938) (elements of damage in wrongful death action); Hawkins at 114, 498 S.E.2d at 407 (Damages under wrongful death statute are not directed toward the value of the life lost but the damages sustained by the beneficiaries from the death; setting forth general elements of recoverable damages.).

This evidence provided a factual basis for the verdict. Therefore, it was not error to deny the new trial motions. "The decision to grant a new trial is left to the sound discretion of the trial court and ordinarily will not be disturbed on appeal." Rush v. Blanchard, 310 S.C. 375, 380, 426 S.E.2d 802, 805 (1993) (also, to grant new trial absolute, verdict must be so grossly excessive as to shock the conscience and be the result of caprice, passion, or improper motive). The verdict is not grossly excessive considering the evidence of employability and other damages before the jury. See O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (1993).

Likewise, the decision to grant a new trial nisi remittitur based on a verdict that is merely excessive is addressed to the sound discretion of the trial court. "Where the amount of a verdict bears a reasonable relationship to the character and extent of the injury sustained, it is not excessive." Howle v. PYA/Monarch, Inc., 288 S.C. 586, 601, 344 S.E.2d 157, 165 (Ct. App. 1986).

> The trial court has wide discretionary power to reduce the amount of a verdict which in his or her judgment is excessive. The decision of the trial judge to reduce the verdict will not be disturbed unless it clearly appears that the exercise of discretion was controlled by a manifest error of law. The trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than this Court.

Rush at 381, 426 S.E.2d at 806 (citations omitted). Although the evidence of loss of earnings may be contradicted or proven less likely by other evidence, "it is well within the discretion of the jury, given the injuries and damages suffered and proved. . . ." Howle at 602, 344 S.E.2d at 165. We find sufficient evidence of damages recoverable under the wrongful death statute to justify the jury's award of actual damages.

IV. Board of Medical Examiners Stipulation

Dr. Lentz argues the trial court erred in admitting a prior inconsistent statement for impeachment purposes. During cross examination, a stipulation entered into in a disciplinary proceeding before the State Board of Medical Examiners pertaining to Dr. Lentz's treatment of Weaver was used to impeach his trial testimony that he was not negligent in his prescribing practices. Defense counsel objected on the basis that the prejudicial effect of the stipulation outweighed the probative value because the jury would give undue weight to an official document. The court overruled the objection and the written stipulation was admitted into evidence for impeachment purposes only. Dr. Lentz did not request a limiting instruction.

In the stipulation, Dr. Lentz admitted that he violated S.C. Code Ann. §40-47-200(F)(7)(11)& (12) (Supp. 1994) in over-prescribing controlled substances and failing to monitor and control Weaver's use of prescription medication. It further provided that the stipulation would be attached to and incorporated into a final order of the Board and "may be disseminated as a public action of the Board." Dr. Lentz was represented by counsel at the disciplinary proceeding at which he approved and signed the stipulation.

The extrajudicial stipulation was relevant to the disputed issue of whether Dr. Lentz breached a duty of care in his prescribing practices for Weaver. Dr. Lentz put his credibility at issue by testifying. It was appropriate to use the stipulation to test his credibility where he denied at trial that he over-prescribed prescription drugs and violated the statute, facts he had previously admitted. Dr. Lentz was afforded an opportunity to explain that he agreed to the stipulation under duress and that he did not agree with it. Moreover, the trial judge in his ruling noted that when a party witness takes the stand, he puts his credibility at issue and is subject to impeachment on cross examination. He expressly performed the balancing test required by Rule 403, SCRE on the record and found the probative value outweighed the prejudicial effect. The admission of evidence lies within the sound discretion of the trial court, and the court's decision will not be overturned on appeal absent an abuse of discretion. Watson v. Chapman, 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App. 2000) (no error in admission of written agreement between physician and Board of Medical Examiners where physician's alcohol dependency and its effect on decision making was contested issue). We find no error.

V. Reduction of Damages By Comparative Negligence

The jury found both Dr. Lentz and Weaver fifty percent negligent and awarded actual damages of $792,577 and punitive damages of $10,000. Based upon the percentage of Weaver's negligence, the trial judge reduced the actual damages award to $396,288.50. Weaver argues the actual damages award should not be reduced because, in assessing punitive damages, the jury implicitly found recklessness on the part of Dr. Lentz, which cancels out any

comparative negligence on the part of Weaver. The trial judge denied the motion. We find no error.

Prior to 1991, contributory negligence was the law in South Carolina. Under that doctrine, it was generally held that if the negligence of the plaintiff contributed in any respect to his damages, he was completely barred from recovering against a defendant guilty of even greater negligence. Langley v. Boyter, 284 S.C. 162,165-66, 325 S.E.2d 550, 552 (Ct. App. 1984). Under one recognized exception to the contributory negligence rule, simple negligence on the part of the plaintiff was not a defense to reckless or willful misconduct on the part of the defendant. Oliver v. Blakeney, 244 S.C. 565, 569, 137 S.E.2d 772, 774 (1964). Contributory negligence was rejected in favor of comparative negligence in South Carolina in 1991. Nelson v. Concrete Supply Co., 303 S.C. 243, 399 S.E.2d 783 (1991). Under the version of comparative negligence judicially adopted in Nelson, "a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant. The amount of the plaintiff's recovery [is] reduced in proportion to the amount of his or her negligence." Id. at 245, 399 S.E.2d at 784. The rule Weaver asserts had a valid purpose under the very different contributory negligence scheme; however, the validity of this rationale is undercut by the offset inherent in the comparative negligence framework.

Weaver argues the courts of this state have not specifically overruled the principle that simple contributory negligence is no defense to recklessness; thus the trial court erred in reducing the actual damage award by fifty percent. However, the trial judge instructed the jury, without objection, as follows:

> In determining the respective negligence, if any, of the decedent and defendant, you must take the conduct of each party involved as a whole. In making this determination you should consider whether the conduct was merely careless or whether it was done consciously with an awareness that negligence was involved. . . . You must determine whether the negligence—whether the decedent or the defendant was merely negligent or careless or whether they were grossly negligent, reckless or consciously disregarded—consciously

disregarded information that they should've considered in making their decisions.

The jury was instructed to apportion the respective negligence of each party by percentage if they concluded both were negligent and that such joint negligence proximately contributed to the plaintiff's injuries. The jury was given a separate instruction on punitive damages. Additionally, they made no specific finding that the defendant was willful, wanton, or reckless. As instructed, the jury considered the concepts of simple negligence, gross negligence, and recklessness as matters of degree subsumed within the general term "negligence."

In similar fashion, other concepts well recognized under the doctrine of contributory negligence have been held to have been subsumed within the concept of comparative negligence. Davenport v. Cotton Hope Plantation, 333 S.C. 71, 86-87, 508 S.E.2d 565, 573-74 (1998) ("[A]bsolute defense of assumption of risk is inconsistent with South Carolina's comparative negligence system. . ."; unless assumption of risk can be characterized as express or primary implied assumption, plaintiff is not barred from recovery if degree of fault arising from assumed risk is less than defendant's negligence.). Spahn v. Town of Port Royal, 330 S.C. 168,173, 499 S.E.2d 205, 208 (1998) (Doctrine of "last clear chance has been subsumed by adoption of comparative negligence such that it remains a factor for the jury's consideration" in determining the respective fault of the parties but "does not totally relieve a plaintiff of his or her negligence."). See F. Patrick Hubbard & Robert L. Felix, Comparative Negligence in South Carolina: Implementing *Nelson v. Concrete Supply Co.*, 43 S.C. L. Rev. 273, 282-283 (1992).

The jury performed its duties consistent with the unobjected-to instructions of the trial court, and the trial court appropriately exercised its duties pursuant to the concept of comparative negligence.

AFFIRMED.

HOWARD and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lake Frances Properties,

A South Carolina General Partnership,

Appellant,

v.

City of Charleston,

Respondent.

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

Opinion No. 3459
Heard February 6, 2002 - Filed March 4, 2002

AFFIRMED

Paul A. Dominick and David J. Parrish, both of Nexsen, Pruet, Jacobs, Pollard & Robinson, of Charleston, for appellant.

William B. Regan and Frances I. Cantwell, both of Regan, Cantwell & Stent, of Charleston, for respondent.

PER CURIAM: Lake Frances Properties ("LFP") instituted this action seeking damages attributed to the rezoning of its property from multi-family to single family development. The trial court found the rezoning did not constitute an unconstitutional taking and granted summary judgment in favor of the City of Charleston (the "City"). LFP appeals. We affirm.

FACTS/PROCEDURAL BACKGROUND

LFP is a partnership that was created for the purpose of purchasing and developing approximately 43.12 acres of land known as Area "C", located on James Island, South Carolina in the City of Charleston. The contract to sell from Lawton Bluff Co. to LFP required LFP to construct a road and sewer system on the property in contemplation of a multi-family development of not more than 547 units. The total purchase price for the property was $1,210,000.

Area "C" was one of four tracts of land involved in a highly publicized zoning dispute in the 1970s when Lawton Bluff sought to have the property zoned for multi-family residential housing. A compromise was reached whereby Area "C" was allowed to be zoned for multi-family residential use upon Lawton Bluff's assent to place restrictive covenants on the entire property. Lawton Bluff filed its restrictive covenants in April 1980 and the City ratified its rezoning ordinance in May.

LFP paid almost $100,000 for the infrastructure for the property before 1988 and according to LFP it has paid property taxes based on the multi-family residential zoning throughout its ownership of the property. LFP marketed the property for sale as zoned for multi-family residential throughout the 1980s and 1990s. In July 1984, LFP sold a portion of its property to Leslie Land Company, Inc., which constructed Harbor Oaks, a condominium complex.

On August 16, 1996, LFP contracted to sell 17.5 acres to a third party. This contract was contingent on the prospective buyer's ability to build 222 multi-family residential units on the tract. In response to a letter written by the

prospective buyer, Lee Batchelder, the Charleston zoning administrator, wrote on November 8, 1996, that he "determined that 492 residential units may be developed within the 31.6 acre parcel accessed off Lake Frances Drive."

On November 26, 1996, the Charleston City Council passed a resolution requesting the Planning Commission consider rezoning the subject property to single-family residential (SR-1) because such restriction would "be compatible and responsive to current housing trends, uses and traffic patterns so as to protect and preserve property values, enhance traffic safety, and promote the economic well being, health and safety of the public." No compromise regarding the proposed rezoning was reached. Thereafter, the Planning and Zoning Commission held a public meeting on February 19, 1997. At the conclusion of this meeting, the planning commission voted to recommend the rezoning.

Following a public hearing on April 22, 1997, the City Council adopted Ordinance 1997-120, which rezoned the subject property to SR-1. LFP's attorney later explained that "as a result of the City's down zoning, the first contract fell through. It totally went away."

On June 6, 1997, LFP contracted to sell the remaining 31.59 acres to Shawn W. Howell and Martin H. Shulken ("Howell & Shulken") for $1,100,000. In August 1997, Howell & Shulken made variance requests to the city's zoning board. However, by letter dated September 16, 1997, Batchelder explained that "due to the opposition from the surrounding residents, the staff will not be recommending in favor of [Howell & Shulken's] variance application for the 31.6 acre tract on Lake Francis [sic] Drive." Thereafter, Howell & Shulken voluntarily withdrew its variance request and terminated the purchase contract with LFP.

LFP filed its summons and complaint alleging four causes of action for (1) breach of contract, (2) uncompensated taking, (3) equitable estoppel, and (4) tortious interference with contractual relations. Approximately one year after the City answered the complaint, LFP sold the entire 31.59 acre tract to Bonnie and Anthony McAlister for $1,100,000. The parties subsequently consented to

refer the case to the master in equity. Thereafter, the City moved for summary judgment. The Master granted the City's motion for summary judgment on all counts. LFP appeals the grant of summary judgment on its taking cause of action.

STANDARD OF REVIEW

Summary judgment is a drastic remedy that should be cautiously invoked so no person will be improperly deprived of a trial of disputed factual issues. Baughman v. AT&T, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Toomer v. Norfolk S. Ry., 344 S.C. 486, 489, 544 S.E.2d 634, 635 (Ct. App. 2001). Summary judgment is not appropriate, however, where further inquiry into the facts of the case is desirable to clarify the application of the law. Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing & Regulation, 337 S.C. 476, 484, 523 S.E.2d 795, 799 (1999).

In determining whether any triable issue of fact exists as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 59, 518 S.E.2d 301, 304 (Ct. App. 1999).

DISCUSSION

A.

LFP contends the master incorrectly deemed that a building permit is required to vest a nonconforming use, arguing the "Judge's Order cites 38 A.L.R.5th 737 § 2 for the proposition that a building permit is needed to vest a nonconforming use, and then observes that Lake Frances never applied for a building permit."

We disagree with LFP's characterization of the master's order. A review of the master's order demonstrates he did not find that a building permit is a prerequisite to obtaining a vested right to a nonconforming use. Rather, he found that the absence of a permit application was only one factor of many that, when viewed as a whole, demonstrates LFP's "actions do not rise to the level of a prior nonconforming use as that term is recognized by South Carolina courts." As more fully explained below, we find it unnecessary under the facts presented here to find that a building permit is a *per se* prerequisite to a vested, nonconforming use.

B.

LFP avers the zoning reclassification of its property more than a decade after it was acquired caused the property to be sold at a discount of at least one million dollars. LFP argues it acquired a vested right to develop the subject property under the original multi-family zoning classification when it incurred expenses for developing the infrastructure of the property. We disagree.

A landowner acquires a vested right to continue a nonconforming use already in existence at the time his property is zoned in the absence of a showing that the continuance of the use would constitute a detriment to the public health, safety or welfare. Whaley v. Dorchester County Zoning Bd. of Appeals, 337 S.C. 568, 578-79, 524 S.E.2d 404, 409-10 (1999) (citing Daniels v. City of Goose Creek, 314 S.C. 494, 497, 431 S.E.2d 256, 258 (Ct. App. 1993)). The burden of proving a nonconforming use is on the party claiming a prior nonconforming use. Whaley, 337 S.C. at 579, 524 S.E.2d at 410.

The record reflects that LFP made limited improvements to the subject property during the approximate thirteen years it owned it. In fact, the City does not dispute that LFP built-up the infrastructure for the property to sustain a multi-family development. However, the infrastructure designed for the property was not limited to multi-family use, but could also be used to support single family development. In addition, since the completion of the infrastructure, the property has remained dormant since at least May of 1988.

We find no suggestion in the record that LFP ever intended or attempted to construct structures on the property. Instead, LFP continued to market the property for sale for over a decade. LFP apparently only entered into contracts to sell the property to prospective buyers who would then develop the property as they desired. As the master noted, LFP never sought or obtained any building permits for actual construction of structures on the property. Had LFP sought or obtained permits for work beyond the mere preparation of the property for future multi-family development, this fact might weigh heavily in favor of granting a vested right to continue any projects that have already begun. See F.B.R. Investors v. County of Charleston, 303 S.C. 524, 527, 402 S.E.2d 189, 191 (Ct. App. 1991) (developer only obtained a vested right to complete development of Phase I of a project in a concurrently rezoned area under the James Island Land Use Plan before any substantial improvement or expenses were incurred to develop Phase II of the project); Friarsgate, Inc. v. Town of Irmo, 290 S.C. 266, 349 S.E.2d 891 (Ct. App. 1986) (developer acquired a vested right to complete only one building, comprised of fourteen out of a total 108 condominium units, because Friarsgate had only obtained building permits for and actually began constructing the first building when Irmo adopted a comprehensive zoning ordinance which, in part, precluded condominiums).

Generally, a zoning ordinance adopted subsequent to a party's investment in real property, which at the time of purchase is free of restrictions, is not per se invalid. See Talbot v. Myrtle Beach Bd. of Adjustment, 222 S.C. 165, 172, 72 S.E.2d 66, 69 (1952). That is, the mere *contemplated* use of property by a landowner on the date a zoning ordinance becomes effective precluding such use is not protected as a nonconforming use. Daniels v. City of Goose Creek, 314 S.C. 494, 497, 431 S.E.2d 256, 258 (Ct. App. 1993) (emphasis added).

In DeStefano v. City of Charleston, our supreme court found, under similar facts, that a property owner who held his land for investment and who "made only those kind of preliminary improvements to the land which serve to give him flexibility to resell [the lots]" did not have a vested right to the original zoning classification of the property. 304 S.C. 250, 254, 403 S.E.2d 648, 651 (1991). DeStefano's actual development planning consisted of the installation of the utilities, developing the layout of the road, and trying to file various final

plats in conformance with the then existing zoning classification. However, DeStefano never commenced to construct buildings on the property; instead, the court found that what was ultimately constructed on the lots was to be solely determined by those persons and entities to whom DeStefano eventually sold the property. Id. at 255, 403 S.E.2d at 651.

Like DeStefano, LFP had no building plans, specifications, or particular development scheme which would be binding on any of its purchasers or prospective purchasers. The fact that LFP expended money to build the infrastructure of the property, including constructing roads, and installing water, sewer and a drainage system on the property, was not enough to commit the property to multi-family use. See DeStefano, 304 S.C. at 255, 403 S.E.2d at 651.

The general rule is that "a taking involves the actual interference with, or the disturbance of, property rights, resulting in injuries which are not merely consequential or incidental." Brabham v. City of Sumter, 275 S.C. 597, 598, 274 S.E.2d 297, 297 (1981). As LFP's interest in the subject property was merely as an investment, no vested right attached to the original zoning of the property; therefore, there was no taking of LFP's property.

CONCLUSION

For the foregoing reasons, the decision of the trial court is

AFFIRMED.

CURETON, GOOLSBY and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Roger Dale Cobb,

Appellant.

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

Opinion No. 3460
Heard February 4, 2002 - Filed March 11, 2002

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of SC 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 Senior

Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for respondent.

GOOLSBY, J.: Roger Dale Cobb appeals his sentence for distribution of marijuana, arguing the trial judge erred in failing to sentence him pursuant to S.C. Code Ann. section 44-53-460 (2002). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

The victim, a sixteen year old minor, testified that Cobb drove her and a girlfriend, also a minor, to his home in August of 1998. At the victim's request, Cobb permitted her to take marijuana from a black tin can on his coffee table. The victim smoked approximately three marijuana cigarettes. Cobb gave both girls wine.

During the course of the evening, the girls took off their clothes and had sex with each other. Cobb photographed the nude girls performing a sexual act.

The next day, police took the victim into custody because she was a runaway. The victim recounted the events of the preceding night to officers, who obtained a warrant to search Cobb's home. Police found the black tin can, almost four ounces of marijuana, and the photos of the nude girls.

A jury found Cobb guilty of possession of marijuana with intent to distribute, distribution of marijuana, and the sexual exploitation of a minor. The judge sentenced Cobb to twenty years imprisonment on the distribution conviction, one year on the possession with intent to distribute conviction, and five years on the sexual exploitation conviction.

DISCUSSION

Cobb's sole argument on appeal is that the trial court should have considered the distribution as an accommodation sale and mitigated his sentence

accordingly. S.C. Code Ann. section 44-53-460 permits a person convicted of a distribution charge to be sentenced as though convicted of simple possession when he or she presents clear and convincing evidence that the controlled substance was delivered as an accommodation to another and without the intent to profit therefrom or cause addiction.[1]

A reviewing court must affirm the trial judge's finding regarding an accommodation sale if there is any evidence in the record to support it.[2] The State argued below and argues on appeal that the distribution did not amount to an accommodation sale because there is evidence Cobb obtained something in return, i.e., gratification of his prurient interest.

Cobb benefitted from his furnishing of the marijuana to the victim because he watched the girls undress and engage in a sexual act. Cobb also used the opportunity to take nude pictures of the girls. We find this evidence supports the trial judge's finding that the distribution was not merely an accommodation sale.[3]

---

[1] S.C. Code Ann. § 44-53-460 (2002); Porter v. State, 290 S.C. 38, 348 S.E.2d 172 (1986).

[2] State v. Martin, 278 S.C. 427, 298 S.E.2d 87 (1982).

[3] Cf. Iowa v. McDaniel, 265 N.W.2d 917 (Iowa 1978) (holding defendant's delivery of drugs in exchange for sex is an accommodation sale under that state's statute). The McDaniel court concluded:

> We do not believe the legislature intended the furnishing of drugs to a paramour to be legally equivalent to selling them for profit or to induce addiction. Instead, this case presents a plain situation of accommodation. The fact the jury could find defendant and Edington were involved in an exchange of favors is insufficient to permit a finding that the drug deliveries were something more than furnishing, "as a favor to the recipient, something the recipient desires."

AFFIRMED.

HEARN, C.J., and HUFF, J., concur.

Id. at 924-25 (citation omitted).