The Supreme Court of South Carolina

In the Matter of
Samuel B. Ingram, Deceased.

ORDER

The Office of Disciplinary Counsel has filed a petition advising the Court that Mr. Ingram passed away on February 20, 2006, and requesting appointment of an attorney to protect Mr. Ingram's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. The petition is granted.

IT IS ORDERED that Janet A. Paschal, Esquire, is hereby appointed to assume responsibility for Mr. Ingram's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Ingram maintained. Ms. Paschal shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Ingram's clients. Ms. Paschal may make disbursements from Mr. Ingram's trust account(s), escrow account(s), operating

account(s), and any other law office account(s) Mr. Ingram maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Ingram, shall serve as notice to the bank or other financial institution that Janet A. Paschal, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Janet A. Paschal, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Ingram's mail and the authority to direct that Mr. Ingram's mail be delivered to Ms. Paschal's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

March 14, 2006

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 12

March 20, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Linda Angus, Respondent,

v.

Burroughs & Chapin Co., Myrtle Beach Herald, Doug Wendel, Pat Dowling, Deborah Johnson, Chandler C. Prosser, Marvin Heyd, Chandler Brigham, and Terry Cooper

Of whom

Burroughs & Chapin Co., Doug Wendel, Pat Dowling, Myrtle Beach Herald and Deborah Johnson are Petitioners.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

Appeal from Horry County
J. Michael Baxley, Circuit Court Judge

Opinion No. 26127
Heard February 1, 2006 – Filed March 20, 2006

REVERSED

Robert L. Widener and Celeste T. Jones, of McNair Law Firm, P.A., of Columbia, for petitioner Burroughs & Chapin Co.

L. Morgan Martin, of Hearn, Brittain & Martin, P.A., of Conway; Thomas C. Brittain, of Hearn, Brittain & Martin, P.A., of Myrtle Beach; and Scott B. Umstead, of Myrtle Beach, for petitioners Doug Wendel and Pat Dowling.

William E. Lawson, of Lawson & Gwin Law Offices, of Myrtle Beach, for petitioner Doug Wendel.

Jay Bender and Holly Palmer Beeson, of Baker, Ravenel & Bender, L.L.P., of Columbia, for petitioners Myrtle Beach Herald and Deborah Johnson.

L. Sidney Connor, IV, of Kelaher, Connell & Connor, of Surfside Beach, for respondent.

JUSTICE MOORE: We granted a writ of certiorari to review the Court of Appeals' decision reversing the grant of summary judgment to petitioners in this civil conspiracy case.[1] We reverse.

FACTS

Respondent Linda Angus was hired as county administrator for Horry County in 1996. Her employment was at the will of the county's governing body, Horry County Council. County Council terminated Angus's employment effective June 22, 1999, and paid her severance

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[1] Angus v. Burroughs & Chapin, 358 S.C. 498, 596 S.E.2d 67 (Ct. App. 2004).

pursuant to her contract, including her annual salary of $117,888.16 plus accrued vacation leave of $10,145.18. Angus subsequently brought this action for civil conspiracy[2] against County Council, petitioners Myrtle Beach Herald and its publisher Deborah Johnson (hereinafter collectively "Newspaper"), and petitioners Burroughs & Chapin Co., Doug Wendel and Pat Dowling (hereinafter collectively "Developer"). Angus alleged that because she objected to several projects in the county proposed by Developer, these parties conspired to have her terminated. The alleged conspiracy included incentives to County Council members and the publication of articles discrediting Angus.

All the defendants moved for summary judgment. The trial judge granted summary judgment on the ground that the termination of at-will employment cannot support a cause of action for civil conspiracy, citing Ross v. Life Ins. Co. of Virginia, 273 S.C. 764, 259 S.E.2d 814 (1979). Angus appealed. The Court of Appeals affirmed summary judgment as to County Council members based on Ross, but reversed as to Newspaper and Developer.

ISSUE

Can a public official who is an at-will employee maintain an action for civil conspiracy?

DISCUSSION

A civil conspiracy is a combination of two or more parties joined for the purpose of injuring the plaintiff, thereby causing her special damages. Lawson v. South Carolina Dep't of Corrections, 340 S.C. 346, 532 S.E.2d 259 (2000); Future Group, II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996). Under Ross, an at-will employee may not maintain a civil conspiracy action against her employer. Where the employment is at-will, the employee may be terminated "at any time

[2] Her causes of action for tortious interference with contract, defamation, and unfair trade practices were dismissed.

for any reason or for no reason at all." 259 S.C. at 765, 259 S.E.2d at 814. Applying Ross, the Court of Appeals affirmed the grant of summary judgment to County Council as Angus's employer but concluded Ross was not applicable to Newspaper and Developer because they were third parties to the employment agreement. It held Angus could therefore maintain a civil conspiracy action against them.

We disagree with the Court of Appeals' analysis and find Ross controlling. The critical factor here is Angus's status as an at-will public official.[3] In our democratic society, a public official is answerable to the public; members of the public are not third-party interlopers. Because of Angus's status as a public official, we conclude her action for civil conspiracy cannot be maintained against any of these defendants. The Court of Appeals' decision overturning the grant of summary judgment to Newspaper and Developer is therefore

REVERSED.

TOAL, C.J., BURNETT, PLEICONES, JJ., and Acting Justice Brooks P. Goldsmith, concur.

[3] Horry County operates under the council-administrator form of government pursuant to S.C. Code Ann. § 4-9-610 (1986). *See* Eargle v. Horry County, 344 S.C. 449, 545 S.E.2d 276 (2001). Under § 4-9-620, the county administrator is the administrative head of county government.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

David Peagler, as personal representative of the Estate of Kathy Marie Thompson, Plaintiff-Appellee,

v.

USAA Insurance Company, Defendant-Appellant.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Clyde H. Hamilton, Judge

Opinion No. 26128
Heard November 2, 2005 – Filed March 20, 2006

CERTIFIED QUESTION ANSWERED

William O. Sweeny, III, and William R. Calhoun, Jr., both of Sweeny, Wingate & Barrow, P.A., of Columbia, for Defendant-Appellant.

J. Calhoun Land, IV, of Land, Parker & Welch, P.A., of Manning, for Plaintiff-Appellee.

Timothy A. Domin and Michael B. McCall, II, both of Clawson & Staubes, LLC, of Charleston, for State Farm Insurance Companies, Amicus Curiae.

JUSTICE BURNETT: We accepted this certified question regarding coverage for an accidental weapon discharge under an automobile insurance policy pursuant to Rule 228, SCACR.

FACTUAL AND PROCEDURAL BACKGROUND

David Peagler (Plaintiff), as personal representative of the Estate of Kathy M. Thompson (Decedent), filed a declaratory judgment action against USAA Insurance Co. (Insurer), seeking a declaration that an automobile insurance policy provided coverage for the accident which occurred in this case. Insurer removed the case from state court to federal district court. From the decision of the district court, Plaintiff effected an appeal to the United States Court of Appeals for the Fourth Circuit. The facts, as stipulated by the parties, are drawn from the Court of Appeal's certification order.

Decedent was fatally injured on August 31, 2001, when her husband, Gregory A. Thompson (Thompson), was unloading two shotguns from the pickup truck Decedent was occupying. On that morning, Decedent and the couple's two sons, ages nine and fourteen, were preparing to depart from home to go to work and school. The automobile customarily driven by Decedent failed to start. Decedent and the boys planned to take Thompson's vehicle, a Ford F-150 4x4 super cab pickup truck.

Decedent entered the pickup truck, closed the door, started the engine, and wrapped the seatbelt around her. The older son got in the front passenger seat, closed the door, and fastened his seatbelt. When the younger son opened the rear driver-side door to enter the truck, he saw two cased shotguns lying on the rear seat, with the barrels facing toward him. Decedent instructed him to go in the house and ask Thompson to come remove the shotguns.

Thompson opened the rear passenger-side door to enter the cab area. He lifted the shotguns off the rear seat and placed the barrel of the guns pointing toward the floor, with the butt ends pointing toward the truck's rear

window. Thompson then helped his younger son load his bookbag and buckle his seatbelt. As Thompson picked up the shotguns and began to exit the vehicle, one of the shotguns discharged, striking Decedent. She died within seconds as a result of wounds received from the accidental discharge of the shotgun.

On the day before the accident, Thompson and the older son had placed the two shotguns into the truck and traveled to a hunting area to scout deer and practice shooting in preparation for the upcoming hunting season. Thompson and the older son returned the shotguns back to their cases and placed them on the rear seat to return home. The guns remained there during a ride of about forty miles over dirt and paved roads. Both shotguns were believed to be unloaded, however, one of them was not and that gun's safety was not engaged.

The parties further stipulate that the fact the truck's engine was running did not cause or contribute to the discharge of the shotgun; that Insurer did not specifically know Thompson was a hunter, but understood and foresaw that pickup trucks are frequently used in hunting; that the terms "transportation," "operation," and "use of vehicle" are not defined in the insurance policy; and that the term "occupying" is defined in the policy as "in, on, getting into or out of."

After entering into a stipulation of facts, both parties filed motions for summary judgment on whether the policy provided coverage under the facts of this case. The federal district court granted Plaintiff's motion, finding that coverage existed, and denied Insurer's motion. Peagler v. USAA Ins. Co., 325 F. Supp. 2d 620 (D.S.C. 2004). Insurer appealed to the Fourth Circuit, which has certified the following question to this Court:

> Did Decedent's fatal injury arise out of the "ownership, maintenance, or use" of a motor vehicle pursuant to S.C. Code Ann. § 38-77-140 (2002), such that the vehicle's insurance policy provides coverage for the accidental discharge of a shotgun which occurred during the unloading of firearms from a stationary,

occupied vehicle which had been used for hunting purposes the previous day?[1]

STANDARD OF REVIEW

In answering a certified question raising a novel question of law, the Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C. Code Ann. § 14-3-320 and -330 (1976 & Supp. 2004), and S.C. Code Ann § 14-8-200 (Supp. 2004)); Osprey, Inc. v. Cabana Ltd. Partnership, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) (same); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (same); Antley v. New York Life Ins. Co., 139 S.C. 23, 30, 137 S.E. 199, 201 (1927) ("In [a] state of conflict between the decisions, it is up to the court to 'choose ye this day whom ye will serve'; and, in the duty of this decision, the court has the right to determine which doctrine best appeals to its sense of law, justice, and right.").

LAW AND ANALYSIS

Insurer argues no coverage exists in this case because its policy does not define "loading and unloading" to be within the definition of "use" of the insured vehicle. Insurer contends it would constitute an erroneous and improper "rewriting" of the liability policy to include loading and unloading as covered uses. Insurer further argues that coverage does not exist under the analysis previously set forth by this Court in State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 503 S.E.2d 744 (1998).

Plaintiff contends that coverage exists in this case based on South Carolina and foreign authority which demonstrate that the loading and unloading of an insured vehicle are covered "uses" under the circumstances

[1] We have redrafted the question to refine the issue before us.

of this case, and further asserts that coverage properly exists under the Aytes analysis.

As an initial matter, we may easily resolve one argument raised by the parties. Insurer asserts that because "use" is not defined in the insurance policy, this Court would have to "rewrite" the policy in order to conclude that the loading and unloading of vehicles is a covered use.

Plaintiff argues this Court's precedent teaches that loading and unloading are covered uses when a vehicle is being used in a normal, foreseeable manner. Thus, coverage exists because Thompson was unloading shotguns from a pickup truck used in hunting activities, an expected and foreseeable use of such a vehicle. Plaintiff relies on Home Indemnity Co. v. Harleysville Mut. Ins. Co., 252 S.C. 452, 166 S.E.2d 819 (1969) (policy which provided that "use of an automobile includes the loading and unloading thereof" included coverage, under the "complete operation doctrine," for injury to person struck by truck being moved for purposes of weighing and unloading it); Wrenn & Outlaw, Inc. v. Employer's Liability Assurance Corp., 246 S.C. 97, 142 S.E.2d 741 (1965) (policy which provided that "use of an automobile includes the loading and unloading thereof" included coverage for injury to customer whose hand was injured when bagboy slammed customer's car door on it; loading of groceries, which required opening the door, was normal and expected use of the car); and Coletrain v. Coletrain, 238 S.C. 555, 121 S.E.2d 89 (1961) (policy which provided that use of an automobile for the purposes stated includes the loading and unloading included coverage for injury to wife whose hand was injured when husband slammed taxicab door on it).[2]

[2] It is our impression from a review of numerous cases that automobile insurance policies routinely provided the loading or unloading of vehicles was a covered use until perhaps the late 1960s. Many insurance carriers apparently began modifying their standard policy forms to delete this provision, which ultimately resulted in courts relying on statutory requirements or other policy language when deciding whether coverage existed in accidental weapon discharge cases.

We reject both parties' reasoning and conclude the present case does not raise an issue of policy revision or interpretation. Unlike the South Carolina cases cited by Plaintiff, the policy in this case is silent on the issue; it simply says nothing about whether loading or unloading a vehicle is a covered use. Therefore, the issue must be resolved based on statutes which mandate coverage for damages arising out of the "ownership, use, or maintenance" of a motor vehicle, and cases arising under those statutes which establish a method of resolving the issue. *Cf.* Hogan v. Home Ins. Co., 260 S.C. 157, 194 S.E.2d 890 (1973) (statute controls when provision in automobile policy excluding coverage conflicts with statute).

Turning to the statute-based question, South Carolina Code Ann. § 38-77-140 (2002) provides that "[n]o automobile insurance policy may be issued or delivered in this State to the owner of a motor vehicle or may be issued or delivered by an insurer licensed in this State upon any motor vehicle then principally garaged or principally used in this State, unless it contains a provision insuring the persons defined as insured against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of these motor vehicles. . . ." See also S.C. Code Ann. § 38-77-30(10.5) (2002) ("'policy of automobile insurance' or 'policy' means a policy or contract for bodily injury or property damage liability insurance issued or delivered in this State covering liability arising from the ownership, maintenance, or use of any motor vehicle . . ."); S.C. Code Ann. § 38-77-142 (2002) (tracking the "ownership, maintenance, or use" language of Section 38-77-140 in requiring certain provisions in automobile insurance policies); S.C. Code Ann. § 38-77-141 (2002) (requiring notice to policyholder of increased premium for uninsured and underinsured motorist coverage "to protect you against liability arising out of the ownership, maintenance, or use of the motor vehicles covered by this policy," unless otherwise rejected by policyholder).

We enunciated a three-part test in Aytes to determine whether an injury arises out of the "ownership, maintenance, or use" of a motor vehicle. The party seeking coverage must show (1) a causal connection exists between the vehicle and the injury, (2) no act of independent significance breaks the causal link between the vehicle and the injury, and (3) the vehicle was being

used for transportation purposes at the time of the injury. Aytes, 332 S.C. at 33, 503 S.E.2d at 745. To date, this issue has been addressed by our appellate courts primarily in the context of various types of assault involving intentional conduct by an assailant; it has not been addressed in the context of an accident involving unintentional conduct, with one exception.[3]

In analyzing whether an injury arose out of the ownership, maintenance, or use of a vehicle, "no distinction is made as to whether the injury resulted from a negligent, reckless, or intentional act." Home Ins. Co. v. Towe, 314 S.C. 105, 107, 441 S.E.2d 825, 827 (1994); Wright v. North Area Taxi, Inc., 337 S.C. 419, 424, 523 S.E.2d 472, 474 (Ct. App. 1999). The three-part test in Aytes applies regardless of whether the injury occurred

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[3] See State Farm Mut. Auto. Ins. Co. v. Bookert, 337 S.C. 291, 523 S.E.2d 181 (1999) (assault involving intentional firing of weapon); Doe v. S.C. State Budget and Control Bd., 337 S.C. 294, 523 S.E.2d 457 (1999) (sexual assault); Aytes, 332 S.C. 30, 503 S.E.2d 744 (assault involving intentional firing of weapon); Home Ins. Co. v. Towe, 314 S.C. 105, 441 S.E.2d 825 (1994) (assault involving intentional throwing of bottle); Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992) (assault involving intentional firing of weapon); Travelers Indemnity Co. v. Auto World of Orangeburg, Inc., 334 S.C. 137, 511 S.E.2d 692 (Ct. App. 1999) (assault involving intentional firing of weapon); Wright v. North Area Taxi, Inc., 337 S.C. 419, 523 S.E.2d 472 (Ct. App. 1999) (assault involving intentional firing of weapon); Carraway v. Smith, 321 S.C. 23, 467 S.E.2d 120 (Ct. App. 1995) (assault involving intentional firing of weapon); Hite v. Hartford Accident & Indem. Co., 288 S.C. 616, 344 S.E.2d 173 (Ct. App. 1986) (assault using a vehicle).

The one exception is Canal Ins. Co. v. Ins. Co. of North America, 315 S.C. 1, 431 S.E.2d 577 (1993). In that case, a truck-mounted crane tipped over and damaged a building. Answering a question we had declined to reach in Howser, we held the accident was not covered by the liability policy on the truck crane because it was not being used for transportation purposes at the time of the injury.

as a result of an intentional assault or an accident. The focus is on the extent of the role, if any, the vehicle played in causing the injuries or damage, or whether a particular activity is a covered use as required by statute or a policy provision. See also Chapman v. Allstate Ins. Co., 263 S.C. 565, 211 S.E.2d 876 (1975) (when an insured is intentionally injured and the injury from insured's viewpoint is unforeseen and not the result of his own misconduct, the general rule is that the injury is accidentally sustained within the meaning of the ordinary accident insurance policy and the insurer is liable therefor in the absence of a policy provision excluding such liability); State Farm Mut. Auto. Ins. Co. v. Moorer, 330 S.C. 46, 56-59, 496 S.E.2d 875, 881-82 (Ct. App. 1998) (fatal injuries that victim suffered when shot by insured, who was a passenger in non-owned vehicle, resulted from an "accident" within meaning of insured's automobile liability insurance policies, thus liability coverage existed; "accident" is defined from point of view of victim rather than insured); S.C. Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 382 S.E.2d 11 (Ct. App. 1989) (insurer may not exclude coverage of intentional acts from statutorily required policies of insurance coverage).

The determination of whether coverage exists in this case rises or falls on the analysis of the first Aytes factor. A causal connection between the vehicle and the injury must exist in order for an injury to be covered by an automobile insurance policy. In this context, we have held that causal connection means: (a) the vehicle was an "active accessory" to the injury; (b) the vehicle was something less than the proximate cause but more than the mere site of the injury; and (c) the injury was foreseeably identifiable with the normal use of the vehicle. State Farm Mut. Auto. Ins. Co. v. Bookert, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (1999) (citing Aytes). "The required causal connection does not exist when the only connection between an injury and the insured vehicle's use is the fact that the injured person was an occupant of the vehicle when the shooting occurred." Aytes, 332 S.C. at 33, 503 S.E.2d at 746.

In Bookert, we found no causal connection between the vehicle and the injury when a soldier fired gunshots from a vehicle which was moving forward while in the traffic lane at a fast food restaurant, injuring a pedestrian. The assault was not foreseeably identifiable with the normal use

of an automobile. Bookert, 337 S.C. at 293, 523 S.E.2d at 182. Similarly, in Aytes, an assailant used a car to transport the victim to a location with the expressed intent of killing the victim. The assailant got out of the car, took from the victim a handgun she had retrieved from the car's glove compartment and shot at the victim as she sat in the car, injuring her. We held, in part, the assault was not covered by the insurance policy because the parked car was not an "active accessory" in the shooting; it was merely the site of the injury. Aytes, 332 S.C. at 33-35, 503 S.E.2d at 746.

Our appellate courts have found no causal connection between the vehicle and the injury in similar assault cases. See Doe v. S.C. State Budget and Control Bd., 337 S.C. 294, 523 S.E.2d 457 (1999) (no causal connection between vehicle and injury where police officer forced female motorist to engage in sexual activity in the officer's parked cruiser and also used the cruiser to drive both to another location to engage in sexual activity; vehicle was not an active accessory in the assault); Travelers Indemnity Co. v. Auto World of Orangeburg, Inc., 334 S.C. 137, 511 S.E.2d 692 (Ct. App. 1999) (no causal connection between vehicle and injury where deaths occurred from gunshots fired by assailant standing outside of parked car; vehicles were not active accessories in the assault); Wright, 337 S.C. 419, 523 S.E.2d 472 (no causal connection between vehicle and injury where taxi driver was fatally shot by two fare-paying passengers; vehicle was not active accessory in the assault, but was merely site of the shooting); Carraway v. Smith, 321 S.C. 23, 467 S.E.2d 120 (Ct. App. 1995) (no causal connection between vehicle and injury where driver of car was injured when bullet fired by bystander on sidewalk shattered his windshield; any causal link was broken by assailant exiting vehicle in front of motorist and conversing on sidewalk with another person for several minutes before shooting occurred); Hite v. Hartford Accident & Indem. Co., 288 S.C. 616, 344 S.E.2d 173 (Ct. App. 1986) (no causal connection between vehicle and injury where insured, an automobile dealership employee, left his idling vehicle and walked fifty feet to instruct another motorist to remain at the dealership because the motorist had backed into a new truck, and motorist's car struck plaintiff as it left the scene; insured's vehicle played no role in the incident); Nationwide Mut. Ins. Co. v. Brown, 779 F.2d 984, 986-89 (4th Cir. 1985) (no causal connection, under South Carolina law, between vehicle and injury when

husband, a passenger in a truck, caused the truck driver to collide with his wife's vehicle and husband jumped out of truck and shot his wife in her vehicle; court concluded use of truck for transportation to scene of crime was merely incidental and not a causative factor in producing wife's death).

There is a distinction between the above cases and those in which coverage exists because the vehicle was actively used to perpetrate an assault or injury on another person. See Towe, 314 S.C. 105, 441 S.E.2d 825 (finding causal connection between vehicle and injury where victim, who was driving an oncoming tractor, suffered injuries when the steering wheel of his tractor was struck by a bottle thrown by passenger in passing car; car was an active accessory that gave rise to the injury); Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992) (finding causal connection between vehicle and injury where insured suffered gunshot wounds during vehicular chase by an unknown assailant using an unidentified vehicle).

We have considered, but decline to follow, precedent in which other courts have found that insurance coverage exists for accidental injuries or deaths which occur during the loading and unloading of a firearm from a vehicle, despite the lack of a policy provision which addressed whether the loading or unloading of a vehicle was a covered use. See Union Mut. Fire Ins. Co. v. Commercial Union Ins. Co., 521 A.2d 308, 310-11 and n. 1 (Me. 1987) (injury which occurred during unloading of shotgun from insured's automobile was covered under automobile policy's "ownership, maintenance or use" clause where automobile was being used to transport insured and his companion on hunting trip, a reasonable and foreseeable use of the vehicle; fact that policy did not define "use" in terms of loading or unloading did not affect the analysis); Kohl v. Union Ins. Co., 731 P.2d 134, 135-37 and n.2 (Colo. 1986) (injuries caused by accidental discharge of weapon as motorist removed it from vehicle's gun rack in order to store it safely for travel arose out of ownership, maintenance, or use of vehicle; motorist was using vehicle in ordinary manner that was not foreign to its inherent purpose and thus injuries were covered under automobile insurance policy); Allstate Ins. Co. v. Truck Ins. Exchange, 216 N.W.2d 205, 210 (Wis. 1974) (injuries caused by accidental discharge of weapon as passenger unloaded the rifle from parked van in order to go hunting were covered by automobile insurance policy; use

of vehicle for hunting purposes was a reasonable and expected use, and the loading and unloading of a firearm was a normal incident to such use); Cameron Mut. Ins. Co. v. Ward, 599 S.W.2d 13, 15-16 (Mo. App. 1980) (analyzing distinctions courts have drawn in accidental weapon discharge cases involving vehicles and concluding courts generally have found insurance coverage to exist when the discharge occurs during loading and unloading of vehicles); Shinabarger v. Citizens Mut. Ins. Co., 282 N.W.2d 301, 306 (Mich. App. 1979) (in cases involving accidental discharge of firearms, courts generally have been more liberal in finding a causal connection between use of the vehicle and injury when accident occurs during the loading or unloading process than when accident simply occurs in or near the vehicle, but not during loading).

We decline to depart from or modify the Aytes analysis in this accidental weapon discharge case. The injury was foreseeably identifiable with the normal use of the pickup truck. Many vehicles in South Carolina, and certainly many pickup trucks, are used for hunting purposes. Using a vehicle to transport firearms to and from hunting grounds is not an abnormal or unanticipated use of a vehicle. However, Plaintiff has not demonstrated the truck was an active accessory to the injury. The truck was not actively used or involved in causing the injury; it was merely the site of the injury. As stated in Aytes, "[t]he required causal connection does not exist when the only connection between an injury and the insured vehicle's use is the fact that the injured person was an occupant of the vehicle when the shooting occurred." Aytes, 332 S.C. at 33, 503 S.E.2d at 746. Plaintiff has failed to show, under the facts as stipulated, that a causal connection exists between the pickup truck and the accidental shooting of Decedent.

Our resolution of the causal connection factor makes it unnecessary to analyze the remaining Aytes factors, *i.e.*, whether an act of independent significance broke the causal link between the vehicle and the injury, and whether the vehicle was being used for transportation purposes at the time of the injury. See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive).

CONCLUSION

We answer "no" to the question certified by the Court of Appeals. Decedent's fatal injury, under the facts as stipulated, did not arise out of the "ownership, maintenance, or use" of a motor vehicle pursuant to Section 38-77-140, such that the vehicle's insurance policy provides coverage for the accidental discharge of a shotgun which occurred during the unloading of firearms from a stationary, occupied vehicle which had been used for hunting purposes the previous day. Plaintiff has not shown that a causal connection exists between the pickup truck and the accidental shooting of Decedent. Consequently, the automobile insurance policy does not provide coverage for Decedent's accidental death.

CERTIFIED QUESTION ANSWERED.

Acting Justices H. Samuel Stilwell and John W. Kittredge, concur. WALLER, J., dissenting in a separate opinion in which PLEICONES, J., concurs.

JUSTICE WALLER (dissenting): I respectfully dissent. I would hold the injury here arose out of the "ownership, maintenance, and use" of the pickup truck.

Under the three-prong test set forth by this Court in State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 503 S.E.2d 744 (1998), the party seeking coverage must first establish a causal connection between the vehicle and the injury. Second, there must exist no act of independent significance breaking the causal link. And third, it must be shown that the vehicle was being used for transportation purposes at the time of the accident. State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 503 S.E.2d 744, 745 (1998).

In my opinion, the unloading of the firearms from the vehicle, in preparation for transportation of the children to school, with the motor running, provides a sufficient causal connection to warrant coverage. See Taliaferro v. Progressive Specialty Ins. Co., 821 So.2d 976, 979-80 (Ala.2001) (because the principal use of an automobile is transportation--being dependent upon the operations of loading and unloading-- the act of removing a rifle was an inherent use of a pickup truck for purposes of insurance coverage); Kohl v. Union Ins. Co., 731 P.2d 134 (Colo. 1986) (where accident occurred as truck owner lifted rifle out of the jeep's gun rack in preparation to unload rifle and store it for journey home, owner's actions were intimately related to his use of the vehicle as transportation for himself and his rifle); Allstate Ins. Co. v. Truck Ins. Exchange, 216 N.W.2d 205 (Wis. 1974) (loading and unloading of guns from van constitutes "use" of the vehicle in spite of the absence of any specific "loading and unloading" clause from the policy).

Other courts have reached similar conclusions in cases of accidental weapon discharges. See Union Mut. Fire Ins. Co. v. Commercial Union Ins. Co., 521 A.2d 308, 310-11 and fn. 1 (Me. 1987) (injury which occurred during unloading of shotgun from insured's automobile was covered under automobile policy's "ownership, maintenance or use" clause where automobile was being used to transport insured and his companion on hunting trip, a reasonable and foreseeable use of the vehicle; fact that policy did not define "use" in terms of loading or unloading did not affect the

analysis); Cameron Mut. Ins. Co. v. Ward, 599 S.W.2d 13, 15-16 (Mo. App. 1980) (analyzing distinctions courts have drawn in accidental weapon discharge cases involving vehicles and concluding that courts generally have found insurance coverage to exist when the discharge occurs during loading and unloading of vehicles); Shinabarger v. Citizens Mut. Ins. Co., 282 N.W.2d 301, 306 (Mich. App. 1979) (in cases involving accidental discharge of firearms, courts generally have been more liberal in finding a causal connection between use of the vehicle and injury when accident occurs during the loading or unloading process than when accident simply occurs in or near the vehicle, but not during loading).

Further, I would hold that no act of independent significance broke the causal link between the vehicle and the injury. There was no intervening cause wholly disassociated from, independent of, or remote from the use of the truck in this case. On the contrary, the injury here occurred due to the insured's foreseeable use of unloading his vehicle of the shotguns loaded in the back. Accord Allstate Ins. Co. v. Truck Ins. Exchange, 63 Wis.2d 148, 216 N.W.2d 205 (1974) (coverage provided where a fatal shooting occurred while a loaded weapon was being removed from a truck during a hunting trip).

Lastly, I would find the pickup truck was being used for transportation purposes when the injury occurred. Kathy Thompson and her children were sitting in the car, ready to leave home and go to work and school. They were preparing to drive away, and the engine was running. As the District Court in this case noted, under "USAA's theory coverage conceivably would not extend to injuries sustained under any factual scenario where a vehicle is parked only momentarily or, far worse, where injuries are sustained while a vehicle is stationary at an intersection during the course of travel." Peagler v. USAA Ins. Co., 325 F.Supp. 2d 620, 627 (D. S.C. 2004). Clearly, the vehicle here was being used for transportation.

I would hold that the "ownership, maintenance, or use" of a vehicle includes the loading and unloading of firearms after the vehicle has been used for hunting purposes, a use which is foreseeably identifiable with normal use

of the vehicle. Accordingly, I would conclude insurance coverage exists in this case. I respectfully dissent.

PLEICONES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

City of Aiken, **Respondent,**

v.

David Michael Koontz, **Appellant.**

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 4094
Submitted March 1, 2006 – Filed March 20, 2006

AFFIRMED

Leon E. Green, of Aiken, for Appellant.

City Solicitor Richard L. Pearce, of Aiken, for Respondent.

ANDERSON, J.: David Michael Koontz was tried in absentia and without counsel. He was convicted of driving under suspension (DUS), third offense. The trial judge sentenced him to six months and a $2,100 fine.

On appeal, Koontz argues the trial judge erred in proceeding with his trial in absentia. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

On May 8, 2004, Koontz drove his children to the public safety headquarters to deliver them to his wife, from whom he was separated. As Koontz drove up, his wife informed Aiken Department of Public Safety Officer Edgar Gonzalez that Koontz should not be driving because his license was suspended. Officer Gonzalez observed Koontz driving a Dodge truck and verified with dispatch that Koontz's license was suspended. He arrested Koontz for DUS, third offense.

Koontz was charged with DUS, third offense, by South Carolina Uniform Traffic Ticket #70962CT. The traffic ticket set a trial date for June 28, 2004. Between May 8, 2004 and June 28, 2004, Koontz hired an attorney to represent him. In defense counsel's June 25, 2004 notice of representation letter, he notified the municipal judge he was representing Koontz, requested a jury trial, and asked that he be informed of all court dates. The trial was continued from June 28 to another date. Defense counsel was informed of the August 3, September 21, and October 19, 2004, Aiken Municipal Court jury terms.

On October 19, at the start of the October term of jury trials, defense counsel petitioned the municipal court judge to be relieved as attorney for Koontz due to Koontz's failure to: (1) respond to his phone calls; (2) pay him; and (3) otherwise aid in the defense preparation. The Aiken City Solicitor informed the trial judge that defense counsel attended roll call on October 19, 2004 and "indicated that he had notified [Koontz] to be here and that he was going to be relieved as his attorney." In his motion to be relieved, defense counsel declared: "Upon being notified that [Koontz's] case

[1] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

was on the trial roster for the week of October 18, [defense counsel] sent [Koontz] notice of his trial at the address provided by [Koontz]." Koontz did not contact his attorney, the city solicitor, or the municipal judge and did not show up for roll call or jury selection. Defense counsel was relieved from further representation of Koontz on October 19, the same day as roll call and jury selection for Koontz's trial.

On October 20, 2004, Koontz was tried in his absence for DUS, third offense. The jury found Koontz guilty as charged.

Koontz received notice of his conviction the same day. On October 26, 2004, Koontz filed an appeal with the circuit court. Koontz alleged he was entitled to a new trial because he did not receive notice of the trial date and due process was denied him because he was not given the opportunity to defend himself at trial. The circuit judge affirmed the conviction and sentence.

STANDARD OF REVIEW

In criminal appeals from municipal court, the circuit court does not conduct a de novo review, but instead reviews for preserved error raised to it by appropriate exception. State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004); State v. Henderson, 347 S.C. 455, 556 S.E.2d 691 (Ct. App. 2001); see also S.C. Code Ann. § 14-25-105 (Supp. 2005) ("There shall be no trial de novo on any appeal from a municipal court."). The appellate court reviewing the criminal appeal from the circuit court may review for errors of law only. State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973); Henderson, 347 S.C. at 457, 556 S.E.2d at 692. In criminal cases, the court of appeals sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous. State v. Patterson, 367 S.C. 219, 625 S.E.2d 239 (Ct. App. 2006); Landis, 362 S.C. at 101, 606 S.E.2d at 505.

LAW/ANALYSIS

Koontz asserts the trial court "commit[ted] reversible error when it tried [Koontz] in his absence and did not make a factual finding on the issue of whether [Koontz] received notice of the trial." Additionally, Koontz contends "there was no finding of fact by the presiding judge that [Koontz] had in fact waived his right to be present for his trial." We disagree.

A criminal defendant has a constitutional right guaranteed by the Confrontation Clause of the Sixth Amendment to be present at trial. See U.S. Const. amend. VI; Illinois v. Allen, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."). However, Rule 16, SCRCrimP provides:

> Except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court.

Thus, it is well established that a defendant may be tried in his absence. State v. Thompson, 355 S.C. 255, 584 S.E.2d 131 (Ct. App. 2003).

While Rule 16 permits a knowing and intelligent waiver of the right to be present, such a waiver is permitted only in limited circumstances. State v. Patterson, 367 S.C. 219, 625 S.E.2d 239 (Ct. App. 2006). In order for a criminal defendant to be tried in absentia, certain requirements must first be met. State v. Truesdale, 345 S.C. 542, 548 S.E.2d 896 (Ct. App. 2001). A trial judge must determine a defendant voluntarily waived his right to be present at trial in order to try the case in absentia. State v. Ritch, 292 S.C. 75, 354 S.E.2d 909 (1987); State v. Jackson, 288 S.C. 94, 341 S.E.2d 375 (1986); Truesdale, 345 S.C. at 549 n.5, 548 S.E.2d at 899 n.5; State v. Castineira, 341 S.C. 619, 535 S.E.2d 449 (Ct. App. 2000), aff'd, 351 S.C. 635, 572 S.E.2d

263 (2002). Additionally, the trial judge must make findings of fact on the record that the defendant (1) received notice of his right to be present; and (2) was warned that the trial would proceed in his absence should he fail to attend. Jackson, 288 S.C. at 96, 341 S.E.2d at 375; Castineira, 341 S.C. at 623, 535 S.E.2d at 451.

Notice of the term of court for which the trial is set constitutes sufficient notice to enable a criminal defendant to make an effective waiver of his right to be present. State v. Jackson, 290 S.C. 435, 351 S.E.2d 167 (1986); Ellis v. State, 267 S.C. 257, 227 S.E.2d 304 (1976); see also State v. Goode, 299 S.C. 479, 385 S.E.2d 844 (1989) (stating general notice given by courts of general session as to which term an individual will be tried in is sufficient to enable that individual to effectively waive his right to be present). If the record, however, does not include evidence to support a finding that the defendant was afforded notice of his trial, the resulting conviction in absentia cannot stand. Jackson, 290 S.C. at 436, 351 S.E.2d at 167.

When Koontz posted bond on May 9, 2004, the day after his arrest, he was provided an order specifying methods and conditions of release. The order contained, in Paragraph 3, the following language:

> 3. That the defendant **shall** appear at . . . the session of . . . municipal . . . court beginning on . . . 6-28-04 at . . . 8:30 o'clock, A.M., at . . . 251 Laurens Street, Aiken, SC 29801. If no final disposition is made during that session, **the defendant shall appear at such other times and places as ordered by the court**. (Emphasis added).

Koontz specifically initialed this paragraph, which is highlighted on the form by being enclosed in a box. This form contained an "Acknowledgement by Defendant," which read: "I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend the court, the trial will proceed in my absence." Koontz signed his name at the bottom of this form.

On the "Checklist for Magistrates and Municipal Judges" dated May 9, 2004, the judge noted that Koontz "was informed . . . [of] [h]is right and obligation to be present at trial and that trial will proceed in his absence if he fails to attend."

On October 19, prior to jury selection, the judge asked: "Is [Koontz] here?" The city solicitor responded: "No sir, Judge. His lawyer appeared and he has a motion on your desk to be relieved as his counsel. We are ready to proceed with the trial in his absence." After the jury was selected and the trial was about to begin on October 20, the judge reviewed Koontz's absence from the courtroom. He advised the jury of Koontz's legal rights and that Koontz was given notice of his right to be present at trial. The judge noted: "Just for a moment to revisit what I told you all last night Mr. Koontz was given a summons and notice to appear yesterday afternoon."

According to defense counsel, Koontz was aware of the October 19 jury trial term and the need for him to be present for roll call and trial. Koontz was on notice early in the process of his need to be at each term of municipal court. More importantly, his retained attorney notified him of the October term when his case was going to be tried.

The record is replete with Koontz's notices to be in court for his trial. He was warned that a failure to appear would result in a trial in his absence and signed a statement that he understood that warning and his obligations. The City complied with Koontz's request for a jury trial and his request to be notified of his court dates through his attorney. Koontz's case was not tried at two city court jury terms, August and September, instead being held over to the October term. Koontz was given ample opportunity to defend himself at trial but he failed to appear for roll call or the trial itself, even after being notified of his trial date by his attorney. He made no effort to contact the City or the court to inform them that defense counsel was no longer his attorney and that further notices should be sent to him personally or to request an extension after his attorney petitioned to be and was relieved from representation.

The municipal judge fully complied with the mandates of Rule 16, SCRCrimP. The trial court correctly proceeded with a trial in Koontz's absence after making appropriate factual findings on the issue of whether Koontz had notice of the trial and whether he was warned the trial would proceed in his absence. Further, Koontz's former attorney noted that Koontz had received the proper notice.

CONCLUSION

Accordingly, Koontz's conviction and sentence are

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cindy Barrett Garnett,	Plaintiff,
v.	
WRP Enterprises, Inc. & Revmax, Inc. d/b/a Thrifty Car Rental, and Philadelphia Indemnity Insurance Company,	Defendants,
Of whom Philadelphia Indemnity Insurance Company is the,	Appellant,
and Cindy Barrett Garnett, WRP Enterprises, Inc. & Revmax, Inc. d/b/a Thrifty Car Rental are the,	Respondents.

Appeal From Sumter County
Clifton Newman, Circuit Court Judge

Opinion No. 4095
Submitted February 1, 2006 – Filed March 20, 2006

AFFIRMED

James Edward Bradley, of West Columbia, and James E. Green, Jr. and Mark E. Dreyer, both of Tulsa, Oklahoma, for Appellant.

Nelson Russell Parker, of Manning, and William Pearce Davis, of Columbia, for Respondents.

GOOLSBY, J.: Cindy Barrett Garnett brought this declaratory judgment action to determine the amount of liability insurance available to a Thrifty Car Rental customer who collided with a vehicle in which Garnett was riding. The trial court found Philadelphia Indemnity Insurance Co.,[1] the rental company's commercial liability carrier, was responsible for coverage. Philadelphia appeals, arguing the trial court erred in interpreting the clear terms of the insurance policy, in failing to consider the entire contract, and in ignoring relevant parol evidence in the event the contract is deemed ambiguous. We affirm.[2]

FACTS

At the time this action arose in 1999, WRP Enterprises, Inc. and Revmax, Inc., d/b/a Thrifty Car Rental, (collectively, "Thrifty") owned and operated a Thrifty Car Rental agency in Savannah, Georgia.

Thrifty purchased a commercial lines insurance policy from Philadelphia Indemnity Insurance Company that provided liability coverage for their rental vehicles for the period of June 1, 1999 to June 1, 2000. The policy contains a "Dual Interest Endorsement," which provides for differing

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[1] Philadelphia Indemnity Insurance Company is also referred to as the "Philadelphia Insurance Company" in some of the trial records, but all parties state in their briefs that this is a misnomer. Further, Philadelphia Indemnity Insurance Company is the name listed on the insurance policy that is the subject of this appeal.

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

rates of liability coverage depending on the amount of insurance provided by the automobile rental contract:

> It is hereby understood and agreed that Item Two – "Schedule of Coverages and Covered Autos – Liability Limit, The most we will pay" of the Business Auto Coverage Form Declarations is amended to read as follows:
>
> > When the Insured's rental contract provides the renter with minimum state financial responsibility limits, the following limits of liability are applicable to this policy:
> >
> > | | | |
> > |---|---|---|
> > | Bodily Injury Liability | $15,000.00 | each person |
> > | | $30,000.00 | each accident |
> > | Property Damage Liability | $10,000.00 | each accident |
> >
> > When the rental contract provide[s] the renter with limits in excess of the minimum state financial responsibility laws, the following limits of liability are applicable to this policy:
> >
> > | | | |
> > |---|---|---|
> > | Bodily Injury Liability | $100,000.00 | each person |
> > | | $300,000.00 | each accident |
> > | Property Damage Liability | $50,000.00 | each accident |

On or about July 10, 1999, while this policy was in effect, Bierdie L. Williams rented a car from Thrifty in Savannah, Georgia. Williams's rental contract indicates that she purchased optional Supplemental Liability Insurance (SLI) coverage and paid a daily premium of $8.95. This premium was to provide Williams with excess liability coverage against third-party claims up to a limit of $1,000,000; it was supplemental coverage for the difference between the amount under the state minimum financial responsibility law and $1,000,000.[3]

[3] Section 10(A)(1) and (2) of Williams's rental contract provided the following regarding SLI coverage:

While driving the Thrifty rental car in South Carolina, Williams struck a vehicle in which Garnett was a passenger. Garnett subsequently brought an action against Williams for injuries she allegedly sustained in the accident.

Garnett brought this declaratory judgment action against Thrifty and Philadelphia, seeking a determination of the amount of liability insurance coverage available on Williams's rental vehicle. Philadelphia contended only the minimum limits of $15,000/$30,000/$10,000 (i.e., $15,000 bodily injury per person, $30,000 bodily injury per accident, and $10,000 property damage

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Footnote 3 continued:

> 10. OPTIONAL SUPPLEMENTAL LIABILITY INSURANCE (WHERE AVAILABLE).
>
> A. Where available, and for an additional daily charge, if I have initialed that I accept the optional SLI at the beginning of the rental, I am entitled to the following:
>
> 1. Thrifty will protect Me against third-party liability claims arising out of the use or operation of the Car for (i) bodily injury or death of another (excluding any of My or Additional Renter's family members related by blood or marriage or adoption residing with Me or them) and (ii) Property damage other than to the Car. This protection is limited to an amount equal to the minimum limits specified by the compulsory insurance or financial responsibility laws relating to automobile liability insurance in the state in which the Car is rented and shall be referred to as Primary Protection; and,
>
> 2. SLI provides Me with a separate policy providing excess coverage against such claims for the difference between the Primary Protection and a maximum combined single limit of $1,000,000 (U.S.) per occurrence for bodily injury, including death and property damage, for other than the Car while the Car is on rent to Me.

per accident) are available to Williams. Thrifty contended that, pursuant to the Dual Interest Endorsement, Williams was entitled to liability limits of $100,000/$300,000/$50,000 because the rental contract provided for limits in excess of the minimum state financial responsibility law. Both Philadelphia and Thrifty moved for summary judgment.

The trial court granted Thrifty's motion for summary judgment, finding the unambiguous terms of the insurance policy mandated the higher limits of coverage. The court ruled the rental contract between Thrifty and Williams provided for coverage over the minimum imposed by the state financial responsibility law, thus invoking the higher coverage of $100,000/$300,000/$50,000 pursuant to the Dual Interest Endorsement in the Philadelphia policy that insured Thrifty. Philadelphia appeals.

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue."[4] An action to construe a contract is at law.[5] In an action at law, the trial court must be affirmed when there is "any evidence" to support the court's findings.[6]

Under the South Carolina Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[7]

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[4] Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991).

[5] Id.

[6] Id. (citing Townes Assocs. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976)).

[7] Rule 56(c), SCRCP.

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP."[8] "In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party."[9]

LAW/ANALYSIS

On appeal, Philadelphia argues the trial court erred in finding it is required to provide coverage of $100,000/$300,000/$50,000 on the rental vehicle. Philadelphia asserts the court erred in interpreting the clear terms of the insurance policy, in failing to consider the entire contract, and in ignoring relevant parol evidence in the event the contract is deemed ambiguous. We disagree.

"Unless the parties agree to a different rule, the validity and interpretation of a contract is ordinarily to be determined by the law of the state in which the contract was made."[10] In the case before us, the trial court found the vehicle rental was entered into in Georgia; therefore, Georgia law applies.[11]

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[8] Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002); see also Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) ("Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.").

[9] Summer v. Carpenter, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997).

[10] Unisun Ins. Co. v. Hertz Rental Corp., 312 S.C. 549, 551-52, 436 S.E.2d 182, 184 (Ct. App. 1993).

[11] No one disputes the court's determination that Georgia law applies. We note, however, as did the trial court, that Georgia and South Carolina law regarding the interpretation of a contract are virtually identical. Thus, if South Carolina law applied, the analysis would be the same.

"Under Georgia law, contracts of insurance are interpreted by ordinary rules of contract construction."[12] " 'Three well known rules . . . apply. Any ambiguities in the contract are strictly construed against the insurer as drafter of the document; any exclusion from coverage sought to be invoked by the insurer is likewise strictly construed; and insurance contracts are to be read in accordance with the reasonable expectations of the insured where possible.' "[13] "Where the terms are clear and unambiguous, and capable of only one reasonable interpretation, the court is to look to the contract alone to ascertain the parties' intent."[14]

Philadelphia asserts the higher limits of coverage in the Dual Interest Endorsement are not triggered here because the rental contract "clearly" states that the SLI is to be provided under a "separate policy"; therefore, excess coverage was not provided for in the rental contract itself. Alternatively, Philadelphia asserts that it is undisputed that, at the time Williams executed the rental contract, Thrifty did not maintain an SLI policy with Philadelphia or any other carrier.

We find no error in the trial court's ruling. The Dual Interest Endorsement provision clearly and unambiguously states that "[w]hen the Insured's rental contract provide[s] the renter with limits in excess of the minimum state financial responsibility laws," the bodily injury limits are $100,000 for each person and $300,000 for each accident, and the property damage limit is $50,000 per accident. [Emphasis added.] The rental contract in this case provides that renters who accept SLI coverage for an additional daily charge are "entitled to" protection against third party liability claims

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[12] Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 498 S.E.2d 492, 494 (Ga. 1998).

[13] Id. (quoting Richards v. Hanover Ins. Co., 299 S.E.2d 561, 563 (Ga. 1983)) (citations omitted in original).

[14] Id.

equal to the minimum limits in Georgia, "and [ ] SLI provides [the renter] with a separate policy providing excess coverage" up to $1,000,000.

Williams accepted and paid for SLI from Thrifty; thus, Thrifty, through the rental contract, agreed to provide Williams with limits in excess of the minimum state financial responsibility law. The fact that the rental contract states a separate policy is the source of the insurance does not negate the fact that the rental contract was the mechanism by which Thrifty became obligated to provide additional coverage. Further, although Thrifty admits its employee was not authorized to sell SLI because Thrifty did not have a carrier for a policy at that time, this does not change our analysis. Thrifty obligated itself to provide supplemental coverage, regardless of whether it was through an insurance policy or out-of-pocket. Thrifty's counsel acknowledged this point at the hearing: "[T]here is no question but having sold [Williams] that coverage, we must provide it. . . . [T]he rental contract provides that she's purchased a million dollars in single limit coverage . . . [a]nd she paid for it. So there is no question but that it's there." Thus, regardless of the source of the coverage, Thrifty's rental contract with its customer does, on its face, provide for coverage in excess of the minimum financial responsibility law. This, in turn, triggers the higher coverage in the policy Thrifty carried with Philadelphia on its fleet of vehicles. Accordingly, we find the trial court did not err in holding Philadelphia is responsible for providing coverage on the rental vehicle of up to $100,000/$300,000/$50,000.[15]

AFFIRMED.

HUFF and STILWELL, JJ., concur.

[15] Having found there is no ambiguity in the provisions in question, we need not address Philadelphia's remaining argument in this regard.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Auto-Owners Insurance Company, Respondent,

v.

Darnasai Hamin and Vermelle Simmons, her Conservator, Appellants.

Appeal From Sumter County
Howard P. King, Circuit Court Judge

Opinion No. 4096
Heard February 8, 2006 – Filed March 20, 2006

AFFIRMED

Michael Stuart Davenport, of Wilmington, NC, and Shannon Lee Felder, of Columbia, for Appellants.

Thomas E. Player, Jr., of Sumter, for Respondent.

STILWELL, J.: Darnasai Hamin appeals a circuit court order finding Auto-Owners Insurance Company not liable to provide coverage under Hamin's homeowners' insurance policy for a fire that occurred in her home. We affirm.

FACTS

Hamin, a minor, owns a house insured by Auto-Owners. Numerous family members reside in the house including Hamin's mother, Melissa Stinnett, Hamin's sister, Vermica Grant, two other siblings, and Hamin's conservator and grandmother, Vermelle Simmons.

At the time of the fire, Grant was fifteen years old. A few hours before the fire, Grant returned to the house after an unexplained absence. Upon her return, Stinnett and Grant argued. Stinnett threatened to place Grant in the custody of the Department of Juvenile Justice if she continued her behavior. Grant replied that if she had to leave the house, she would see that "nobody lived in the house."

Later that night, the house was severely damaged in a fire. Grant admitted she started the fire. Grant stated she did so because she was upset with her mother, was jealous of her infant brother, and wanted to get her mother's attention. Grant alleged she did not believe the house would ignite. After its investigation, Auto-Owners concluded Grant started the fire by pouring gasoline in the basement and then lighting a piece of paper.

Auto-Owners filed this declaratory judgment action alleging the policy's intentional loss exclusion barred the claim. The exclusion prevents coverage for any loss "caused directly or indirectly by . . . [a]n action by or at the direction of any **insured** committed with the intent to cause a loss." The policy defines insured as "**you, your relatives**; and any other person under the age of 21 residing with **you** who is in **your** care or the care of a **relative**."

Hamin moved for summary judgment or, in the alternative, a judicial finding of coverage. Hamin argued, inter alia, Grant was not an "insured" under the policy because she possessed no insurable interest in the house, and the phrase "intent to cause a loss" in the policy was ambiguous.

The circuit court denied Hamin's motion for summary judgment and found no coverage. The court reasoned Grant was an insured and her lack of an insurable interest in the property was immaterial. Further, the court held

the phrase "intent to cause a loss" was not ambiguous and found Grant intended to cause a loss when she set the fire. Finally, the court held a malicious mischief provision of the policy did not provide coverage.

STANDARD OF REVIEW

Declaratory judgment actions are neither legal nor equitable, and therefore, the standard of review depends on the nature of the underlying issues. Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003). When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law. Horry County v. Ins. Reserve Fund, 344 S.C. 493, 497, 544 S.E.2d 637, 639-640 (Ct. App. 2001). In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings. Id.

LAW/ANALYSIS

I. Insurable Interest

Hamin contends Grant was not an insured under the policy because Grant had no insurable interest in the house. We disagree.

The policy defines an "insured" as "**you, your relatives**; and any other person under the age of 21 residing with **you** who is in **your** care or the care of a **relative**." Under the plain terms of the policy, Grant was an insured as she is Hamin's relative and a resident of the household. In South Carolina Farm Bureau Mutual Insurance Co. v. Kelly, this court found the policy definition of "insured" rendered the issue of whether the adult son had an insurable interest immaterial because the adult son was a relative and lived in the house, and thus was an insured under the policy. 345 S.C. 232, 240, 547 S.E.2d 871, 875 (Ct. App. 2001). We likewise find the issue of whether Grant possessed an insurable interest immaterial because Grant is an insured under the terms of the policy. See Pennell v. Foster, 338 S.C. 9, 18, 524

S.E.2d 630, 634 (Ct. App. 1999) (stating the terms of the policy govern the scope of the coverage, unless in conflict with statutory requirements).

II. Ambiguity in the Intentional Loss Exclusion

Hamin also argues the phrase "intent to cause a loss" in the intentional loss exclusion of the policy is ambiguous. Again applying Kelly, we find no ambiguity.[1]

In Kelly, the insurer initiated an action to recover money for two claims previously paid to the insured after the insured's adult son confessed to starting the fires. Kelly, 345 at 235-36, 547 S.E.2d at 873. The intentional acts exclusion in Kelly mirrored the exclusion in this case, providing the insurer does "not insure for loss caused directly or indirectly . . . out of any act committed by any insured with the intent to cause a loss." Id. at 241, 547 S.E.2d at 876. The Kelly court held the language clear and unambiguous. Id. We likewise find no ambiguity.[2]

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[1] Because we find the exclusion unambiguous, we find no merit to Hamin's argument that we must apply the malicious mischief provision to interpret the meaning of the exclusion. See Sphere Drake Ins. Co. v. Litchfield, 313 S.C. 471, 474, 438 S.E.2d 275, 277 (Ct. App. 1993) ("While a policy should be liberally construed in favor of coverage and against exclusion, courts are not permitted to torture the ordinary meaning of language to extend coverage expressly excluded by the terms of the policy.").

[2] We need not apply the Miller two-prong test of intent because the circuit court never explicitly ruled on the second prong of the test, and the parties neither argued the Miller test in their briefs nor raised the issue on appeal until their reply argument before this court. See Miller v. Fidelity-Phoenix Ins. Co., 268 S.C. 72, 75, 231 S.E.2d 701, 702 (1977) (explaining the two prongs of the test as: 1) whether the act causing the loss was intentional, and 2) whether the result of the act was intended). Therefore, the issue is not preserved for appellate review. See Hunter v. Staples, 335 S.C. 93, 103, 515 S.E.2d 261, 267 (Ct. App. 1999) (finding that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled

III. Capacity to Form Intent

Hamin next argues Grant did not have the mental or legal capacity to form the intent to cause a loss. This argument was not ruled upon by the circuit court and, therefore, is not preserved for appeal. See Harris v. Bennett, 332 S.C. 238, 245, 503 S.E.2d 782, 786 (Ct. App. 1998) (stating an issue must have been raised to and ruled upon by the circuit court to be preserved for appellate review).

IV. Public Policy

Lastly, Hamin contends public policy considerations prevent enforcement of the intentional loss exclusion. This issue, having not been ruled upon by the circuit court, is not preserved. Id.

AFFIRMED.

GOOLSBY and HUFF, JJ., concur.

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upon by the trial judge to be preserved for appellate review); Continental Ins. Co. v. Shives, 328 S.C. 470, 474, 492 S.E.2d 808, 811 (Ct. App. 1997) (An appellant may not use the reply brief to argue issues not raised in the initial brief.).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Interest of Terrence M., a Juvenile under the age of Seventeen, Respondent.

Appeal From Charleston County
Frances P. Segars-Andrews, Family Court Judge

Opinion No. 4097
Heard March 8, 2006 – Filed March 16, 2006

REVERSED and REMANDED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General David A. Spencer, Office of the Attorney General; all of Columbia; and Solicitor Ralph E. Hoisington, of Charleston, for Appellant.

Assistant Appellate Defender Eleanor Duffy Cleary, Office of Appellate Defense, of Columbia, for Respondent.

HEARN, C.J.: The State of South Carolina appeals from a family court order in which the court found it did not have jurisdiction to order a juvenile to pay restitution because the juvenile was no longer on probation. The State argues the family court erred in concluding the juvenile's probation ended when he was committed for an entirely separate crime. We reverse and remand for a de novo hearing.

FACTS

On November 21, 2002, Terrence M. was adjudicated delinquent for possession of a stolen motor vehicle, failure to stop for a blue light, and probation violation. Prior to making a final disposition, the family court sent Terrence to the Coastal Evaluation Center. After Terrence was evaluated, the family court sentenced him to be committed to the Department of Juvenile Justice for an indeterminate period not to exceed his twenty-first birthday, suspended upon alternative placement and probation for an indefinite period. The family court reserved the issue of restitution at that time.[1]

At some point thereafter, the State informed Terrence of the amount the victim sought in restitution. Terrence never agreed to the amount, and no restitution hearing was set.

In 2004, Terrence was charged with possession of crack and disturbing schools. The possession of crack charge was dismissed without prosecution, and Terrence admitted to disturbing schools. He also admitted he was in contempt of court for failing to comply with his home detention agreement. Terrence was adjudicated delinquent and ultimately committed to the Department of Juvenile Justice (DJJ) for an indeterminate period not to exceed his twenty-first birthday. In the commitment order, the family court also directed the solicitor's office to schedule a restitution hearing to

[1] Restitution was sought because of damage to the stolen car.

determine restitution owed on the 2002 possession of a stolen motor vehicle charge.

On January 20, 2005, a restitution hearing was finally held. By this time, Terrence had been released from DJJ, was no longer on parole for his 2004 adjudication, and was incarcerated as an adult. Prior to the restitution hearing, Terrence argued the family court lacked jurisdiction to order restitution because he was no longer on probation. The family court initially disagreed, held the restitution hearing, and ordered Terrence to pay $1,184.62 in restitution.[2] Terrence simultaneously filed a notice of appeal and made a motion for reconsideration, reiterating his argument regarding jurisdiction. Ultimately, the family court agreed, finding that because Terrence was no longer on probation, it did not have jurisdiction to order restitution. This appeal followed.

LAW/ANALYSIS

Both parties agree there is no statutory authority for the family court to impose restitution except as a condition of probation. See S.C. Code Ann. § 20-7-7805(A)(3) (Supp. 2005) ("[T]he court may impose monetary restitution . . . as a condition of probation."). However, the State argues Terrence's 2002 probationary sentence for an "indefinite period" had not terminated at the time of the restitution hearing. We agree.

The family court has the authority to place a child on probation for a period of time not to exceed the child's eighteenth birthday. S.C. Code Ann.

[2] After ordering restitution, there was some confusion regarding which agency would be responsible for monitoring the case. A representative from DJJ stated that Terrence's probation ended once he was committed, and since then, his parole had ended from the crime for which he was committed. According to the representative, DJJ had no jurisdiction over Terrence because he was no longer on probation or parole. To circumvent that problem, the court ordered the solicitor's office to track Terrence's restitution payments, and in the event Terrence failed to pay, the solicitor's office could file a contempt of court charge.

§ 20-7-7805(A)(3) (Supp. 2005). "A child placed on probation by the court remains under the authority of the court only until the expiration of the specified term of the child's probation." Id.

In 2002, Terrence was placed on probation for an indefinite period. Two years after being placed on probation, Terrence was committed to DJJ on new charges. Although we recognize the practical difficulty Terrence's probation officer would have had supervising Terrence during his commitment, we cannot ignore the lack of a family court order revoking Terrence's probation. Because Terrence's probation was never revoked and Terrence has not yet attained the age of eighteen, the language of section 20-7-7805(A)(3) constrains us to find his sentence of indefinite probation continued even after being committed to DJJ. Thus, the family court had jurisdiction to order restitution on January 20, 2005. Accordingly, the order of the family court rescinding its previous order of restitution is reversed. In fairness to Terrence, who never had the opportunity to appeal from the family court's initial order setting the amount of restitution, we decline to reinstate that order and instead remand this case for a de novo restitution hearing.

REVERSED and REMANDED.

ANDERSON and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Doug Proctor d/b/a Anderson Tire Recycling, **Respondent,**

v.

Department of Health and Environmental Control, **Appellant.**

Appeal from Anderson County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 4098
Heard March 8, 2006 – Filed March 20, 2006

AFFIRMED

James W. Logan, Jr. and Stacey T. Coffee, of Anderson, for Appellant.

Jeffrey Falkner Wilkes, of Greenville, for Respondent.

ANDERSON, J.: A jury rendered a $688,503 verdict for Doug Proctor d/b/a Anderson Tire Recycling (Proctor) against the Department of Health and Environmental Control (DHEC). The circuit judge reduced the award to $300,000 pursuant to S.C. Code Ann. § 15-78-120(a)(1). DHEC contends Proctor failed to prove gross negligence; the trial court incorrectly charged the jury; and the damages awarded were so unduly liberal or grossly excessive as to require a new trial. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Proctor owns and operates a waste tire processing and disposal facility in Anderson County, South Carolina. South Carolina law endows DHEC with the authority to issue permits to waste tire facilities. In 1993, when DHEC became involved in the regulation of waste tires, Proctor timely applied for all required permits. Proctor became a permitted facility for both waste tire processing and waste tire disposal.

The business of waste tire disposal turns on the availability of a per-tire rebate allowed by the South Carolina Department of Revenue. Section 44-96-170(N) requires sellers of new tires to pay a two-dollar fee to the Department of Transportation for every new tire sold. S.C. Code Ann. § 44-96-170(N) (2005). However, section 44-96-170(O) provides, "A wholesaler or retailer required to submit a fee pursuant to subsection (N) who delivers or arranges delivery of waste tires to a permitted or approved waste tire recycling facility . . . may apply for a refund of one dollar for each tire delivered." S.C. Code Ann. § 44-96-170(O) (2005). A tire retailer is entitled to a one-dollar rebate per tire for each used tire delivered to a permitted waste tire facility. Hence, the rebate essentially pays for the new-tire dealer's disposal of waste tires as the dealer pays a dollar to a waste tire disposal facility and gets back a dollar via the rebate.

DHEC maintains a list of approved waste tire recycling facilities. DHEC forwards the list to the Department of Revenue, and the Department of Revenue provides the rebate. The Director of Solid Waste Management,

and later the Director of Solid Waste Reduction and Recycling with the Bureau of Land and Waste Management, William Culler, compiled the rebate list.

In 1998, DHEC found Proctor in violation of his permit and DHEC regulations. DHEC initiated an enforcement action, levied a fine against Proctor, and removed him from the rebate list. The case was eventually heard by this Court and resulted in an unpublished opinion. The underlying facts of the instant action are described in our prior opinion:

> DHEC deferred enforcement action based on Proctor's commitment to build sheds where used tires for sale to the public could be separately stored. However, only one shed was constructed, and site conditions did not improve.
>
> In September 1998, DHEC issued an administrative order to Proctor to take corrective action at the site and pay a civil penalty of $51,330. The order cited Proctor for numerous violations relating to storage of waste tires and removed Proctor from DHEC's Waste Tire Facility Rebate List. . . .
>
> Proctor appealed the order to the Administrative Law Judge Division. The Administrative Law Judge (ALJ) upheld $8,200 of the penalty and ordered Proctor to close out the on-site drain field, clean and maintain fire access lanes, and cease commingling waste and used tires. The ALJ also ordered that Proctor be reinstated to the Waste Tire Rebate List. Both Proctor and DHEC appealed to the DHEC Board. The Board made its own findings of fact that the site exceeded the 1,500 tires allowed. Based on its factual findings, it partially reversed the ALJ, removed Proctor from the Waste Tire Rebate List until he complied with his permit and the regulations, and increased the civil penalty by $500 to $8,700. Proctor appealed to the circuit court, which affirmed the Board's decision.

Doug Proctor d/b/a Anderson Tire Recycling v. South Carolina Dep't of Health and Envtl. Control, 2003-UP-472 (S.C. Ct. App. filed July 24, 2003). We reversed the Board's increase of the fine and removal of Proctor from the rebate list:

> Proctor also argues the Board erred in reversing the ALJ's order by increasing the fine where it was supported by substantial evidence. In a related argument, he contends the Board erred in overturning the ALJ's decision that he should remain on DHEC's Waste Tire Rebate List. We agree and reverse those portions of the Board's order.
>
> Under South Carolina Code Annotated § 44-96-170(O) (2002), any retailer that sells new tires and delivers collected waste tires to a permitted facility is entitled to a refund of one dollar per waste tire delivered. If a tire retailer does not deliver its waste tires to a licensed waste tire facility, it is not eligible to claim the refund. Although DHEC's administrative order took Proctor off the rebate list, the ALJ ordered that Proctor be restored to the list. The Board then ordered Proctor's facility to be removed from the list until Proctor demonstrated "full compliance with this Order, his permits, and applicable law and regulation." The Board erred in doing so.
>
> The ALJ found Proctor violated waste tire laws, but also found DHEC did not provide sufficient evidence to establish that he exceeded his storage limits or that he was indifferent to regulatory requirements. As substantial evidence supports the ALJ's decision to restore Proctor to the rebate list and supports the fine imposed, the Board erred in reversing the ALJ. Further, section 44-96-170(O), which sets forth the rebate system, indicates that as long as a wholesaler or retailer delivers waste tires to a permitted or approved waste tire recycling facility, he may apply for the refund. All permitted facilities are thus on the rebate list. There is no authority for the ALJ, or any other entity, to remove a licensed business from the list; only by revoking or

> suspending its license can an entity be removed from the list. As a licensed entity, Proctor is entitled to remain on the Waste Tire Rebate List.

Proctor, 2003-UP-472 (S.C. Ct. App. filed July 24, 2003).

Proctor subsequently was restored to the rebate list. Proctor initiated this action, maintaining DHEC was grossly negligent under section 15-78-60(12) of the South Carolina Code by keeping his facility off of the rebate list from 2000 until after this Court's decision in 2003. DHEC moved for a directed verdict on the ground Proctor failed to establish DHEC exercised a power or function in a grossly negligent manner. The trial court denied the directed verdict motion, and the jury awarded actual damages to Proctor in the amount of $688,503. Pursuant to Section 15-78-120(a)(1) of the South Carolina Code, the award was reduced to the statutory maximum of $300,000. DHEC moved for a judgment not withstanding the verdict (JNOV), or, in the alterative, a new trial or new trial nisi remittitur. The trial court denied these motions.

LAW/ANALYSIS

I. Tort Claims Act

A. Waiver of Immunity

"The Tort Claims Act governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees." Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 280, 607 S.E.2d 711, 714 (Ct. App. 2005) (citing Flateau v. Harrelson, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003); Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998)); Hawkins v. City of Greenville, 358 S.C. 280, 291, 594 S.E.2d 557, 563 (Ct. App. 2004). "Notwithstanding any provision of law, this chapter, the 'South Carolina Tort Claims Act', is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the

employee's official duty." S.C. Code Ann. § 15-78-200 (2005); see also Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 544 S.E.2d 38 (2001) (observing the Tort Claims Act is the exclusive remedy for tort claims against governmental entities), aff'd, 354 S.C. 161, 580 S.E.2d 440 (2003).

The Act provides: "The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." S.C. Code Ann. § 15-78-40 (2005). Section 15-78-30(d) defines "governmental entity" as "the State and its political subdivisions." S.C. Code Ann. § 15-78-30(d) (2005); see Hawkins, 358 S.C. at 292, 594 S.E.2d at 563; Flateau, 355 S.C. at 204, 584 S.E.2d at 416. "The Tort Claims Act waives sovereign immunity for torts committed by the State, its political subdivisions, and governmental employees acting within the scope of their official duties." Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 121, 542 S.E.2d 736, 739 (Ct. App. 2001).

However, the Act's waiver of governmental immunity is limited. Hawkins, 358 S.C. at 293, 594 S.E.2d at 564. Section 15-78-60 currently contains forty exceptions to the waiver of immunity. See S.C. Code Ann. § 15-78-60 (2005 & Supp. 2005). Moreover, the provisions of the Act "must be liberally construed in favor of limiting the liability of the State." S.C. Code Ann. § 15-78-20(f) (2005); see also Steinke v. S.C. Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999) ("Provisions establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed in favor of limiting liability."); Baker v. Sanders, 301 S.C. 170, 391 S.E.2d 229 (1990); Staubes v. City of Folly Beach, 331 S.C. 192, 500 S.E.2d 160 (Ct. App. 1998), aff'd, 339 S.C. 406, 529 S.E.2d 543 (2000); Rakestraw v. S.C. Dep't of Highways and Public Transp., 323 S.C. 227, 473 S.E.2d 890 (Ct. App. 1996). The Act expressly preserves all existing common-law immunities. S.C. Code Ann. § 15-78-20(b) ("The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein. All other immunities applicable to a governmental entity, its

employees, and agents are expressly preserved."); see also Williams v. Condon, 347 S.C. 227, 246, 553 S.E.2d 496, 507 (Ct. App. 2001) ("The Tort Claims Act expressly preserves all existing common law immunities."); O'Laughlin v. Windham, 330 S.C. 379, 498 S.E.2d 689 (Ct. App. 1998). "The Act does not create a cause of action." Bayle, 344 S.C. at 121, 542 S.E.2d at 739. "The Act does not create a new substantive cause of action against a governmental entity." Hawkins, 358 S.C. at 292, 594 S.E.2d at 563 (citing Moore v. Florence Sch. Dist. No. 1, 314 S.C. 335, 339, 444 S.E.2d 498, 500 (1994)).

"The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense." Steinke, 336 S.C. at 393, 520 S.E.2d at 152; accord Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 430, 445 S.E.2d 439, 440 (1994); Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 324, 566 S.E.2d 536, 540 (2002) ("The governmental entity claiming an exception to the waiver of immunity under the Tort Claims Act has the burden of establishing any limitation on liability.") (citation omitted).

B. Section 15-78-60(12)

DHEC contends the trial court erred in denying its motions for directed verdict, JNOV, and a new trial because Proctor failed to prove gross negligence under section 15-78-60(12). We disagree.

1. Standard of Review

"When reviewing the denial of a motion for directed verdict or JNOV, an appellate court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004) (citing Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 445 S.E.2d 439 (1994)); Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002); see The Huffines Co., LLC v. Lockhart, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2005)

("In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt."). If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created and the motion should be denied. Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995); Bailey v. Segars, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001). However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury. Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997); Small v. Pioneer Mach., Inc., 329 S.C. 448, 461, 494 S.E.2d 835, 848 (Ct. App. 1997). In essence, the court must determine whether a verdict for the opposing party "would be reasonably possible under the facts as liberally construed in his favor." Harvey v. Strickland, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (2002). If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should have been denied. Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003); Adams, 320 S.C. at 277, 465 S.E.2d at 85.

On appeal from the denial of a motion for a directed verdict, the appellate court may only reverse if there is no evidence to support the trial court's ruling, or where the ruling was controlled by an error of law. Clark v. S.C. Dep't of Public Safety, 362 S.C. 377, 382-83, 608 S.E.2d 573, 576 (2005); Abu-Shawareb v. S.C. State Univ., 364 S.C. 358, 613 S.E.2d 757 (Ct. App. 2005); S.C. Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 521, 548 S.E.2d 880, 884-85 (Ct. App. 2001). The rule in South Carolina is that on motions for nonsuit, directed verdict, JNOV, and new trial, the evidence and all reasonable inferences which have to be drawn from it must be viewed in a light most favorable to the nonmoving party and if there is any testimony tending to prove allegations of the complaint, the motions must be refused. This rule is especially strong in South Carolina where the "scintilla of evidence rule" is applied. Sweatt v. Norman, 283 S.C. 443, 446, 322 S.E.2d 478, 480 (Ct. App. 1984). If there is any evidence which could support the jury's findings of gross negligence against DHEC, then the motions for directed verdict, JNOV, and new trial were properly denied. Cf. Jackson v.

S.C. Dept. of Corrections, 301 S.C. 125, 127, 390 S.E.2d 467, 468 (Ct. App. 1989), aff'd, 302 S.C. 519, 397 S.E.2d 377 (1990).

2. DHEC's Gross Negligence

At trial, Proctor proceeded on the theory of gross negligence under section 15-78-60(12), which provides:

> The governmental entity is not liable for loss resulting from:
>
> . . . .
>
> (12) licensing powers of functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority, **except when the power or function is exercised in a grossly negligent manner**. . . .

S.C. Code Ann. § 15-78-60(12) (emphasis added).

"Gross negligence is the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." Clyburn v. Sumter County Sch. Dist. No. 17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994); accord Jinks v. Richland County, 355 S.C. 341, 344, 585 S.E.2d 281, 283 (2003); Worsley Cos., Inc. v. Town of Mount Pleasant, 339 S.C. 51, 57, 528 S.E.2d 657, 661 (2000); Marietta Garage, Inc. v. S.C. Dep't of Public Safety, 337 S.C. 133, 522 S.E.2d 605 (Ct. App. 1999). It is the failure to exercise even the slightest care. Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 331-32, 566 S.E.2d 536, 544 (2002); Rakestraw v. S.C. Dep't of Highways and Public Transp., 323 S.C. 227, 473 S.E.2d 890 (Ct. App. 1996). "Gross negligence . . . means the absence of care that is necessary under the circumstances." Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000); accord Hicks v. McCandlish, 221 S.C. 410, 70 S.E.2d 629 (1952); see also Jinks, 355 S.C. at 344, 585 S.E.2d 283 ("Gross negligence has also been

defined as a relative term and means the absence of care that is necessary under the circumstances.") (citing Hollins v. Richland County School Dist. 1, 310 S.C. 486, 427 S.E.2d 654 (1993)). "Negligence is the failure to exercise due care, while gross negligence is the failure to exercise slight care." Clyburn, 317 S.C. at 53, 451 S.E.2d at 887.

Gross negligence is ordinarily a mixed question of law and fact. Clyburn, 317 S.C. at 53, 451 S.E.2d at 887; Pack v. Associated Marine Institutes, Inc., 362 S.C. 239, 245, 608 S.E.2d 134, 138 (Ct. App. 2004); Faile, 350 S.C. at 332, 566 S.E.2d at 545. "In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury." Faile, 350 S.C. at 332, 566 S.E.2d at 545. "[W]hile gross negligence ordinarily is a mixed question of law and fact, when the evidence supports but one reasonable inference, the question becomes a matter of law for the court." Etheredge, 341 S.C. at 310, 534 S.E.2d at 277; see also Staubes v. City of Folly Beach, 331 S.C. 192, 205, 500 S.E.2d 160, 168 (Ct. App. 1998) ("Gross negligence is a mixed question of law and fact and should be presented to the jury unless the evidence supports only one reasonable inference."), aff'd, 339 S.C. 406, 529 S.E.2d 543 (2000).

Pursuant to S.C. Code Ann. section 44-96-170(O) (2002), any retailer that sells new tires and delivers waste tires to a permitted facility is entitled to a one-dollar rebate for every waste tire delivered. All permitted waste tire facilities are thus on the rebate list. As held in our prior unpublished opinion, DHEC erroneously removed Proctor from the rebate list. Further, DHEC violated 25 S.C. Code Ann. Regs. 61-72.205(A) (Supp. 2005), which provides, "A petition for review of an order stays the order." DHEC did not stay its decision to remove Proctor from the rebate list even though he filed an appeal.

At trial, Proctor questioned former DHEC employee, George Tomlin, on the protocol for inspecting his tire disposal facility:

> Q. Okay. Mr. Tomlin, are you familiar with the inspection procedures that DHEC does, in other

words, the frequency, how often they do an inspection?

A. Yes, I'm familiar with it.

Q. In the solid waste section, I believe, is where Mr. Simpson worked; is that correct?

A. That is correct.

Q. And Mr. Simpson was the person while you were there who inspected Anderson Tire Recycling's facility; is that correct?

A. That's correct.

Q. Okay. Did you know if he—was he required to make inspections?

A. Yes, he was.

Q. Okay. Was there a policy that he make inspections periodically?

A. It was a policy for him to follow the requirements of the program to make inspections on a monthly basis.

DHEC's policy was to inspect facilities on a monthly basis. However, once DHEC removed Proctor from the list, it refused to inspect his facility, even though a favorable inspection was a prerequisite to his being restored to the list. DHEC did not inspect Proctor's facility for over four years, despite his requests for an inspection. DHEC employee Arthur Braswell could not explain the entity's failure to inspect:

Q. . . . . What's the purpose of not coming to the facility for four years and four months?

A. I can't answer that. I don't know why our inspections weren't done.

Q. Who would be to blame for not doing these inspections?

A. Well, not to blame, but our districts are responsible for doing inspections at facilities.

On appeal, DHEC argues that Proctor would not have been put back on the list even if he had obtained a clear inspection because he had not paid the fine. The evidence at trial suggests otherwise. Proctor questioned Arthur Braswell on this very point:

Q. When Mr. Shissias told you to go to the facility and check it out, did he tell you to discuss that Mr. Proctor should pay the fine before he could get back on the list?

A. No. He—he discussed exactly what I told you during the meeting, or our inspection, that if you were in compliance, there was a good chance you would be put back on the list that week

Q. So the supervisors . . . were the ones that were more concerned about getting the money, is that correct, than the compliance?

. . . .

A. The money wasn't—they were willing to let the money go in order for some additional conditions at the site to improve the compliance of the facility. We discussed those issues during my inspection with you

on April 10th, just as ideas of what would make the site better.

Q. But they weren't your conditions that you related to Mr. Proctor to be able to go back on the rebate list.

A. They were not stated as conditions during the inspection; they were in that letter that was sent to you.

Proctor remained a permitted facility, yet DHEC did not perform an inspection, as it was its policy to do. Further, DHEC ignored Proctor's requests for an inspection. Proctor could not return to the rebate list without an inspection, and DHEC, without explanation, refused to give him an inspection for over four years.

There is sufficient evidence to support the jury's finding of intentional, conscious failure by DHEC to do that which it ought to have done. The record supports the trial court's denial of DHEC's motions for a directed verdict, JNOV, and a new trial.

II. Section 15-78-60(1)-(5); (13) (2005)

A. Exceptions to the Waiver of Immunity

DHEC contends the trial court erred in denying its motion in limine and motion for a directed verdict regarding charging the jury on subsections (1), (2), (3), (4), (5), and (13) of S.C. Code Ann. § 15-78-60 (2005). We disagree.

The exceptions DHEC claims provide:

The governmental entity is not liable for a loss resulting from:

(1) legislative, judicial, or quasi-judicial action or inaction;

> (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature;
>
> (3) execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process;
>
> (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies;
>
> (5) the exercise of discretion or judgment by the governmental entity or employee of the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee;
>
> . . .
>
> (13) regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, of any property to determine whether the property complies with or violates any law, regulation, code or ordinance or contains a hazard to health or safety[.]

S.C. Code Ann. § 15-78-60 (2005).

Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004), addressed the exception found in subsection (1) of section 15-78-60. Louie Hawkins sued the city of Greenville for improper and negligent design and maintenance of its municipal drainage system. Hawkins alleged the City's malfeasance caused his property to flood. This Court affirmed the trial court's grant of summary judgment in favor of the City. We noted that among other applicable exceptions to the waiver of immunity, "the City [wa]s not liable for loss resulting from: 'legislative, judicial, or quasi-judicial action or inaction[.]'" Id. at 293, 594 S.E.2d at 564. We instructed:

For each of these specific provisions, the determination of immunity from tort liability turns on the question of whether the acts in question were discretionary rather than ministerial. A finding of immunity under the Act "is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards." Wooten ex rel. Wooten v. South Carolina Dep't of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999). "The governmental entity bears the burden of establishing discretionary immunity as an affirmative defense." Sabb v. South Carolina State Univ., 350 S.C. 416, 428, 567 S.E.2d 231, 237 (2002).

Although our courts have not applied the Tort Claims Act to facts similar to those of the present case, the Supreme Court of Texas has held that municipalities are not liable for the design and planning of their sewage and drainage systems because these acts are considered quasi-judicial, discretionary functions for which a government entity is not liable. City of Tyler v. Likes, 962 S.W.2d 489, 501 (Tex. 1997). The court in City of Tyler opined:

> The duties of the municipal authorities in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion in the selection and adoption of a general plan or system of drainage is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land.

> Id. We find a comparable degree of discretion was granted to the City in the present case to exercise the measured policy judgments required to build and maintain an adequate municipal sewer and drainage system in Greenville. Accordingly, the City is immune from liability for negligence claims arising out of the design and maintenance of the drainage system in the Laurel Creek Basin.

Hawkins, 358 S.C. at 293-94, 594 S.E.2d at 564.

Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002), involved a suit against the Department of Juvenile Justice by the parents of Brandon Faile, a nine-year-old boy who was attacked by a twelve-year-old named Fredrico. Fredrico had a substantial record with DJJ, and had recently been put on probation with a one year suspended commitment to DJJ. The Department removed Fredrico from his parents' home and placed him in a therapeutic foster home. This arrangement was short-lived, however, as Fredrico was expelled from the foster home after threatening his foster mother with a gun he had stolen from a school police officer. Fredrico's DJJ probation counselor, Dorsey, returned Fredrico to the care of his biological mother, claiming no alternative placement was available.

Dorsey then filed a Rule to Show Cause with the family court to show why Fredrico's probation should not be revoked, and Dorsey informed the judge that he would recommend Fredrico be committed to DJJ. Dorsey did not tell the judge that Fredrico's current placement with his mother was in violation of a prior order. The judge scheduled a hearing, but Fredrico assaulted Faile before the court heard the matter.

Faile's parents maintained the Department was grossly negligent in placing Fredrico back in his family home. The trial court granted summary judgment for the Department, ruling it was immune from suit under section 15-78-60(1). This Court reversed, finding a question of fact whether the trial judge ratified Dorsey's administrative act of placing Fredrico with his biological mother. The supreme court affirmed, edifying:

The issue of whether juvenile probation officers are entitled to quasi-judicial immunity under the Tort Claims Act is one of first impression in South Carolina. Section 15-78-60(1) provides: "[t]he governmental entity is not liable for a loss resulting from: legislative, judicial, or quasi-judicial action or inaction." In addition to the judicial immunity under the Tort Claims Act, common law judicial immunity was expressly preserved in South Carolina under the Tort Claims Act. O'Laughlin v. Windham, 330 S.C. 379, 498 S.E.2d 689 (Ct. App. 1998), cert. denied 1999 Shearouse Adv. Sh. No. 10 at p. iv.

South Carolina recognizes three exceptions to judicial or quasi-judicial immunity. Judges and other officials are not entitled to judicial immunity if: (1) they did not have jurisdiction to act; (2) the act did not serve a judicial function; or (3) the suit is for prospective, injunctive relief only. Id. at 385, 498 S.E.2d at 692. The second exception, which emphasizes the importance of the act, as opposed to the actor, is relevant here. Under the second exception, even judges are not insulated by judicial immunity when they act in an administrative capacity. Id. (citing Forrester v. White, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988)). In determining whether an act is judicial, the Court looks to the nature and function of the act. Id.; Mireles v. Waco, 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991); Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978).

Therefore, we must determine whether probation officer Dorsey's placement of Fredrico had the nature and function of a judicial act, thereby entitling him, and thus DJJ, to quasi-judicial immunity.

Much of the analysis of judicial immunity has been made in the federal arena. Several federal circuits have granted probation officers quasi-judicial immunity, but only when carrying out certain functions the courts have deemed to be judicial. The Tenth Circuit has held that federal probation officers are absolutely immune when the action challenged is "intimately

associated with the judicial phase of the criminal process." Tripati v. United States Immigration & Naturalization Serv., 784 F.2d 345 (10th Cir. 1986) (finding probation officer immune for damages resulting from reporting plaintiff's conviction to immigration authorities). The Tenth Circuit has made clear the immunity arises from protected functions, not from protected individuals. Mee v. Ortega, 967 F.2d 423 (10th Cir. 1992); Forrester, supra. The key element is whether the officer was engaged in adjudicatory duties when the challenged act occurred. Harper v. Jeffries, 808 F.2d 281 (3d Cir. 1986).

Other federal circuit courts have granted probation officers absolute immunity in preparing pre-sentencing reports, and in other situations when they act "as an arm of the court." Gant v. United States Probation Office, 994 F.Supp. 729, 733 (S.D. W.Va. 1998) (citations omitted). Many of these courts, however, find no absolute immunity for the same type of officer when the officer is acting in his executive capacity. Gant, supra; Ray v. Pickett, 734 F.2d 370 (8th Cir. 1984); Ortega, supra; see also Harper v. Jeffries, 808 F.2d 281 (3d Cir. 1986) (denying absolute immunity of probation officer for charging appellant and presenting evidence against him at a parole hearing, because those were his duties as a parole officer).

If the individual is acting pursuant to a direct court order, courts are more likely to grant quasi-judicial immunity for that action. In Babcock v. Tyler, 884 F.2d 497 (9th Cir. 1989), a father sued the state for the actions of two social workers who placed his daughters in a home where they were sexually abused. The social workers placed the girls temporarily in the abusive home in April 1982. Id. at 449. The juvenile court confirmed the placement by order in May 1982. The sexual abuse did not occur until sometime after May. Id. Plaintiffs argued the social workers were not entitled to immunity for the temporary placement of the girls before the court order was issued. The court discounted this argument as irrelevant, however, on the

grounds the abuse did not occur until **after** the court had confirmed the placement. Id.

Respondents argue the court's confirmation of the placement was essential to the court's finding of judicial immunity in Babcock. Conversely, DJJ cites Babcock as holding that placement is a judicial act even if not made pursuant to a direct court order. DJJ's argument, however, overlooks that the judge formally confirmed the placement **before** the injury took place. In the present case, Judge Barrineau's mere knowledge that Fredrico was placed in his family's home, in the absence of any further act by him, does not amount to confirmation or ratification of Dorsey's act.

Viewing the facts and all inferences that can be drawn in the light most favorable to Respondents, as the non-moving party, the trial court erred in granting summary judgment to DJJ on this ground. We agree with our Court of Appeals' conclusion that the placement of juveniles by a probation counselor is an administrative function. We find persuasive the precedent discussed above from other jurisdictions which supports this analysis. Just as police officers are not granted absolute immunity when they apply for arrest warrants, probation officers generally are not immune in performing their enforcement duties. See Gant, supra; Acevedo v. Pima County Adult Prob. Dep't, 142 Ariz. 319, 690 P.2d 38 (1984) (holding that supervision of probationers is an administrative task, unconnected with the performance of a judicial function). Dorsey's placement of Fredrico was administrative. The Family Court's mere knowledge that Dorsey placed Fredrico with his family, without more, is insufficient to convert that placement into a judicial act.

For the forgoing reasons, we conclude DJJ is not entitled to quasi-judicial immunity.

Faile, 350 S.C. at 324-27, 566 S.E.2d at 540-42 (footnotes omitted).

Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001), construed subsections (1) and (2) of section 15-78-60 in the context of a suit against a solicitor and the Attorney General of South Carolina. The Williams court affirmed the trial court's dismissal of the case, in part, pursuant to subsections (1) and (2):

> In 1985, our Supreme Court decided McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741. This case is significant because the Court largely abolished the doctrine of sovereign immunity. Certain exceptions to this holding, however, were carved out:
>
> > [T]he abrogation of the rule will not extend to legislative, judicial and executive acts by individuals acting in their official capacity. These discretionary activities cannot be controlled by threat of tort liability by members of the public who take issue with the decisions made by public officials. We expressly decline to allow tort liability for these discretionary acts. The exercise of discretion includes the right to be wrong.
>
> Id. at 246, 329 S.E.2d at 742.
>
> When the General Assembly enacted the Tort Claims Act, it codified the McCall exceptions. See S.C. Code Ann. § 15-78-60(1)(2) (Supp. 2000) (stating "The governmental entity is not liable for a loss resulting from (1) legislative, judicial, or quasi-judicial action or inaction; and (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature").

Williams, 347 S.C. at 248-49, 553 S.E.2d at 508.

We determined that the "duties of a prosecutor fall into the exceptions enumerated by McCall and § 15-78-60." Id. at 249, 553 S.E.2d at 508.

> The case law cited throughout this opinion clearly supports the proposition that a prosecutor's typical duties are "judicial" or "quasi-judicial" in nature. Accordingly, this Court finds a prosecutor, in his official capacity, is immune from a Tort Claims Act suit involving "judicial" or "quasi-judicial" acts, provided a defendant prosecutor raises the affirmative defense of sovereign immunity in his return. See Tanner v. Florence City-County Bldg. Comm'n, 333 S.C. 549, 511 S.E.2d 369 (Ct. App. 1999) (holding sovereign immunity is an affirmative defense that must be pled).

Williams, 347 S.C. at 249, 553 S.E.2d at 508.

Wortman v. Spartanburg, 310 S.C. 1, 425 S.E.2d 18 (1992), analyzed subsections (3) and (4) of section 15-78-60. Police arrested Wortman for possession of out-of-state lottery tickets, but the arresting officer dismissed the charges on the day of trial. Wortman sued the City claiming his arrest was unlawful because possession of lottery tickets was not illegal. The City obtained summary judgment, in part, on the trial judge's finding section 15-78-60(3) and (4) exempted the City from liability. The supreme court reversed, holding the City was not entitled to summary judgment under the claimed exceptions:

> The facts in the record establish that Wortman was arrested before the City obtained a warrant from a magistrate. Thus, the actions of the police did not occur during the execution or enforcement of the order of any court or during the lawful implementation of any process, as contemplated by section 15-78-60(3). As to section 15-78-60(4), the City cannot claim that Wortman's arrest for possession of lottery tickets resulted from its attempt to enforce a law absent a showing that a law exists that prohibits the possession of lottery tickets.
>
> We conclude that the actions of the City do not fall within the exception provisions of sections 15-78-60(3) and (4). Consequently, we hold that the trial judge erred in granting

> summary judgment on the ground that the City was immune from liability under the Tort Claims Act.

Wortman, 310 S.C. at 3-4, 425 S.E.2d at 20.

At issue in Adkins v. Varn, 312 S.C. 188, 439 S.E.2d 822 (1993), was whether section 15-78-60(4) provided immunity to Greenville County for its failure to enforce an ordinance. The case arose when several vicious dogs chased a young girl on a bicycle into a street. The girl was struck and killed by an automobile as she attempted to flee from the dogs. Local residents had complained about the dogs to county animal control, and one neighbor had called the County at least five times just prior to the accident. The trial court dismissed the action, finding the County was immune from liability for failure to enforce an ordinance. The supreme court agreed:

> The present facts establish that the County had notice that several vicious dogs were at large in the neighborhood. The facts also show that the County, for whatever reason, did not enforce the ordinance on these particular animals. It is undisputed that the County is a governmental entity within the meaning of the South Carolina Torts Claim Act, and therefore, is subject to the provisions of S.C. Code Ann. § 15-78-60(4).
>
> The provisions of Section 15-78-60(4) are clear and unambiguous on their face, and are not subject to judicial interpretation. The statute clearly exempts from liability any loss resulting from the failure to enforce an ordinance; therefore, the County is immune from suit for any loss as a result of their non-enforcement of the animal control ordinance.

Adkins, 312 S.C. at 191-92, 439 S.E.2d at 824.

In Clark v. S.C. Dep't of Public Safety, 353 S.C. 291, 578 S.E.2d 16 (Ct. App. 2002), Amy Clark was killed when Charles Johnson crossed the centerline and hit her head-on. Police were chasing Johnson when the accident occurred. Trooper Lonnie Plyler was the supervisor at the time of the chase, but did not monitor the pursuit because he was administering a

breathalyzer examination. Clark's father sued the Department and Johnson, and a jury returned a verdict of $3.75 million in damages against them. The Department's $750,000 share of the damages was reduced to $250,000—the statutory maximum in place at the time. At some point the jury submitted a note, which read: "The Vehicle [and] Foot Pursuit Policy of SCDPS [the Department] dictates supervision of all pursuits. During this pursuit no supervisors were present or notified until after the pursuit was ended. It is our decision that this designates gross neglect on the behalf of SCDPS." Id. at 298, 578 S.E.2d at 19-20. Among its arguments on appeal, the Department contended "it was entitled to absolute immunity as a matter of law under section 15-78-60(4) of the Tort Claims Act." Id. at 306, 578 S.E.2d at 24.

> In 1996, the Department adopted the South Carolina Department of Public Safety Policy Directive, Vehicle and Foot Pursuit Policy, which addresses the duties of troopers and their supervisors. The Pursuit Policy requires a supervisor to monitor all pursuits and states in relevant part: "The supervisor will continuously evaluate pursuit and will order termination of the pursuit when it appears to constitute an unreasonable risk."
>
> Citing section 15-78-60(4), the Department asserts it is immune from liability for failing to enforce any written policy, in this case, the Pursuit Policy's guideline that a supervisor monitor all pursuits.
>
> In denying the Department's directed verdict motion at the end of the plaintiff's case, the trial court found the Department was not entitled to absolute immunity under section 15-78-60(4) for the failure to enforce any law or written policy, stating, "I don't think it was a policy violation. I think it was a violation of the standard of care that they are supposed to provide to the public."
>
> We hold the trial court properly refused to grant the Department judgment as a matter of law because the actions of the Department do not fall within the parameters of section 15-

> 78-60(4). As noted by Clark, the Pursuit Policy was merely a statement of generally accepted law enforcement guidelines. This broad provision is not the kind of written policy that should be afforded the protection of absolute immunity under the Tort Claims Act.

Clark, 353 S.C. at 307, 578 S.E.2d at 24 (footnotes omitted).

In addition, the Department claimed discretionary immunity under section 15-78-60(5). The court disagreed:

> Clark presented the testimony of his expert in high-speed chases, Samuel Killman, that the Department's employees did not properly balance the competing considerations of capturing a fleeing suspect versus maintaining the public's safety and that they disregarded appropriate standards in failing to terminate the pursuit. The Department attempted to rebut this evidence with Bradley's testimony that he did weigh these competing concerns. This created a question of fact that could not be resolved by the trial court. Accordingly, we hold the trial court properly denied the Department's motions for judgment as a matter of law on the ground of discretionary immunity.
>
> Moreover, we question whether the discretionary immunity provision is applicable to this case in any event. Some jurisdictions determine whether an act is discretionary by considering if it can best be described as planning or operational. In this case, we believe the function of the Department's employees in carrying out a general pursuit policy is operational in nature and is not the type of discretionary act contemplated in the Tort Claims Act. The fact that the employees had to make decisions or exercise some judgment in their activities is not determinative. To read the exception that broadly would encompass virtually all traffic stops made by the Department's employees, as they all involve some degree of decision-making,

> but they are not the type of discretionary act envisioned under the Tort Claims Act.

Clark, 353 S.C. at 305-06, 578 S.E.2d at 23 (footnotes omitted).

Jackson v. S.C. Dep't of Corrections, 301 S.C. 125, 390 S.E.2d (Ct. App. 1989), aff'd, 302 S.C. 519, 397 S.E.2d 377 (1990), was a suit against the Department of Corrections for the wrongful death of inmate Stroman Jackson. Jackson was killed by another inmate, Wilson Atkinson. Atkinson had an extensive history of attacking inmates and officers and had killed an inmate on a prior occasion. A jury returned a verdict for Jackson, but the trial court granted the Department's JNOV. The Department claimed immunity under section 15-78-60(5) for what it claimed was "the exercise of discretion or judgment" in its decision to move Atkinson from a maximum-security facility to the facility where Jackson was killed. We reversed the JNOV and remanded for the entry of the jury's verdict:

> While Atkinson's transfer was admittedly an act requiring the discretion and judgment of the Department, Section 15-78-60(25) provides an exception to immunity where the governmental entity exercises its responsibility or duty in a grossly negligent manner. Section 15-78-60(5) must be read in light of this exception. If discretion is exercised in a grossly negligent manner, the exception to the normal rule of immunity applies.

301 S.C. at 128, 390 S.E.2d at 468.

In Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002), after ruling the Department was not immune from liability under section 15-78-60(1), the court turned to the Department's claim of discretionary immunity under section 15-78-60(5). The court concluded DJJ was not entitled to immunity under that provision:

> A governmental entity is not liable for losses resulting from an exercise of discretion by its employees. Section 15-78-60(5) of the South Carolina Tort Claims Act exempts governmental

entities from liability for losses resulting from "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." Discretionary immunity is an affirmative defense requiring DJJ to prove Dorsey evaluated competing alternatives and made a "judgment" call based on applicable professional standards. Foster v. South Carolina Dep't of Highways & Pub. Transp., 306 S.C. 519, 413 S.E.2d 31 (1992).

In determining whether Dorsey's action was discretionary, it is helpful to compare the two classifications for the duties of public officials. The duties of public officials are generally classified as either ministerial or discretionary. Jensen v. Anderson County Dep't of Soc. Servs., 304 S.C. 195, 403 S.E.2d 615 (1991). "The duty is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts." Id. at 203, 403 S.E.2d at 619. The duty is discretionary if the governmental entity proves it actually weighed competing considerations, faced with alternatives, and made a conscious decision based upon those considerations. Id. (citing Niver v. Dep't Highways & Pub. Transp., 302 S.C. 461, 395 S.E.2d 728 (Ct. App. 1990)).

In Jensen, this Court affirmed the Court of Appeals' finding that insufficient evidence was submitted to determine whether the Department of Social Services ("DSS") made a discretionary decision. Id. In the case, a teacher reported a potential child abuse case to DSS. A DSS social worker interviewed the child, and noted the presence of bruises and the child's fear of the mother's boyfriend. However, the social worker failed to follow up on the interview and eventually closed the file. One month later, the child's brother was beaten to death in the home. The Court held that DSS had a duty to conduct a thorough investigation before deciding to close the file. The Court concluded that conducting the investigation was ministerial but

closing the file was discretionary because it required applying facts discovered through investigation to reach a decision. Id. Despite the fact that closing the file is discretionary, the Court held that there was insufficient evidence to grant discretionary immunity, because the decision was due to failure to complete the investigation, an administrative function, rather than a weighing of competing considerations. Id.

In the present case, DJJ claims Dorsey's decision to place Fredrico in his home after he was expelled from his foster home was a discretionary decision. Respondents claim Dorsey placed Fredrico in his family home because he thought no one else would take him. However, Respondents argue there was alternative placement available in the Greenville Group Home, which had agreed earlier to take Fredrico in an emergency. Therefore, Respondents claim if Dorsey had weighed competing alternatives, he would have placed Fredrico in the Greenville Group home. Based on our holding in Jensen and the evidence before us, DJJ is not entitled to discretionary immunity.

In addition, even if we held Dorsey exercised discretion, the performance of discretionary duties does not give rise to immunity if the public official acted in a grossly negligent manner. See Jackson v. South Carolina Dep't of Corr., 301 S.C. 125, 390 S.E.2d 467 (Ct. App. 1989) aff'd, 302 S.C. 519, 397 S.E.2d 377 (1990). "Gross negligence is the intentional, conscious failure to do something which is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." Richardson v. Hambright, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988). It is the failure to exercise even the slightest care. Hollins v. Richland County Sch. Dist. One, 310 S.C. 486, 427 S.E.2d 654 (1993). This Court has also defined it as a relative term that "means the absence of care that is necessary under the circumstances." Hicks v. McCandlish, 221 S.C. 410, 415, 70 S.E.2d 629, 631 (1952).

> Gross negligence is ordinarily a mixed question of law and fact. See Clyburn v. Sumter County School District # 17, 317 S.C. 50, 451 S.E.2d 885 (1994). When the evidence supports but one reasonable inference, it is solely a question of law for the court, otherwise it is an issue best resolved by the jury. Id. In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury.
>
> In Jackson, supra, a jury found the Department of Corrections grossly negligent for placing a prisoner with strong violent tendencies into a minimum security prison, where he killed a fellow inmate. The Court of Appeals found the Department of Corrections transferred the inmate even though they knew he had multiple disciplinary violations, including the killing of a fellow inmate. The Court of Appeals held the jury could view the transfer as gross negligence since it demonstrated a "conscious indifference to the threat posed to the safety of other inmates." Jackson, 301 S.C. at 125, 390 S.E.2d at 468.
>
> In the instant case, Dorsey placed Fredrico into a home where DJJ workers noted there was no proper supervision. Furthermore, Dorsey knew of Fredrico's violent tendencies. He even wrote before the incident that he "wouldn't give (Fredrico) two weeks with his mother before he would get into big trouble."
>
> Based on the facts before us, DJJ is not entitled to discretionary immunity as a matter of law. At a minimum, Faile has presented enough evidence to overcome DJJ's summary judgment motion on the matter.

Faile, 350 S.C. at 330-32, 566 S.E.2d at 544-45.

B. Denial of Motion In Limine and Request to Charge

"When instructing the jury, the trial court is required to charge only the current and correct law of South Carolina." Cohens v. Atkins, 333 S.C. 345,

349, 509 S.E.2d 286, 289 (Ct. App. 1998). "The substance of the law is what must be instructed to the jury, not any particular verbiage . . . . A jury charge which is substantially correct and covers the law does not require reversal." Burroughs v. Worsham, 352 S.C. 382, 391, 574 S.E.2d 215, 220 (Ct. App. 2002). When reviewing a jury charge for alleged error, the appellate court must consider the charge as a whole in light of the evidence and issues presented at trial. Daves v. Cleary, 355 S.C. 216, 224, 584 S.E.2d 423, 427 (Ct. App. 2003). If the charge is reasonably free from error, isolated portions which might be misleading do not constitute reversible error. Id. "To warrant reversal for refusal to give a requested instruction, the refusal must have not only been erroneous, but prejudicial as well." Cohens, 333 S.C. at 349, 509 S.E.2d at 289; see also Daves, 355 S.C. at 224, 584 S.E.2d at 427 (stating a circuit court's refusal to give a properly requested charge is reversible error only when the requesting party can demonstrate prejudice from the refusal).

When a governmental entity asserts multiple exceptions to the waiver of immunity and at least one of the exceptions contains a gross negligent standard, we must interpolate the gross negligence standard into the other exceptions. In Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999), our supreme court explained:

> This Court and the Court of Appeals previously have recognized that the correct approach, when a governmental entity asserts various exceptions to the waiver of immunity, is to read exceptions that do not contain the gross negligence standard in light of exceptions that do contain the standard. Duncan v. Hampton County School Dist. # 2, 335 S.C. 535, 517 S.E.2d 449 (1999) (reading discretionary immunity exception in light of exception to immunity in which governmental entity exercises its duty in a grossly negligent manner, such that discretionary immunity will not protect the government if it exercises that discretion in a grossly negligent manner); Etheredge v. Richland School Dist. I, 330 S.C. 447, 463, 499 S.E.2d 238, 246 (Ct. App. 1998) (when an action is brought alleging gross negligence by a governmental entity pursuant to an exception contained in

> Section 15-78-60, all other applicable exceptions must be read in light of the exception containing the gross negligence standard), cert. granted on other grounds, April 8, 1999. The principles expressed in Duncan and Etheredge are drawn from Jackson v. South Carolina Dep't of Corrections, 301 S.C. 125, 390 S.E.2d 467 (Ct. App. 1989), aff'd, 302 S.C. 519, 397 S.E.2d 377 (1990).
>
> While provisions establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed to limit liability, we also must presume in construing a statute that the Legislature did not intend to perform a futile thing. See Gaffney v. Mallory, 186 S.C. 337, 195 S.E. 840 (1938). We are constrained to avoid a construction that would read a provision out of a statute, and must reconcile conflicts if possible. Ballard v. Ballard, 314 S.C. 40, 443 S.E.2d 802 (1994).

Steinke, 336 S.C. at 395-96, 520 S.E.2d at 153-54. Accordingly, the Steinke court held:

> [T]he inspection powers exception must be read in conjunction with the key exception at issue in this case, Section 15-78-60(12), the licensing powers exception. Department must inspect an amusement device before deciding whether to issue, suspend, or revoke a license. S.C. Code Ann. §§ 41-18-70 and 41-18-80. Department also has an implicit duty to investigate potentially hazardous substantial modifications when it learns of them. It would make no sense to say Department may be found grossly negligent in a licensing decision, yet allow Department to escape liability because the inspection powers exception does not contain a gross negligence standard. The logical way to read these closely related provisions when both are at issue is that a governmental entity may be liable if it is grossly negligent in licensing or inspecting a particular device or activity.

Id. at 395-96, 520 S.E.2d at 153-54.

Therefore, because Proctor proceeded under a theory of gross negligence as provided in section 15-78-60(12), the other subsections of that statute do not provide immunity from DHEC's acts of gross negligence. Accordingly, the trial court did not err in denying DHEC's motion in limine, motion for a directed verdict, or in its jury charge.

III. Evidence of Events Prior to 2000

DHEC contends the trial court erred in allowing evidence of events and damages prior to the Board's 2000 order, because this evidence was barred by the statute of limitations. We disagree.

The admission of evidence is within the trial court's discretion. Seabrook Island Prop. Owners' Ass'n v. Berger, 365 S.C. 234, 241, 616 S.E.2d 431, 435 (Ct. App. 2005) (citing Gamble v. Int'l Paper Realty Corp. of South Carolina, 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996); Hofer v. St. Clair, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989)); Floyd v. Floyd, 365 S.C. 56, 81-82, 615 S.E.2d 465, 479 (Ct. App. 2005); R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000) (citing Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1994)); Haselden v. Davis, 341 S.C. 486, 534 S.E.2d 295 (Ct. App. 2000), aff'd, 353 S.C. 481, 579 S.E.2d 293 (2003); Cudd v. John Hancock Mut. Life Ins. Co., 279 S.C. 623, 310 S.E.2d 830 (Ct. App. 1983). The court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law. Elledge v. Richland/Lexington Sch. Dist. Five, 352 S.C. 179, 185, 573 S.E.2d 789, 792 (2002); R & G Construction, 343 S.C. at 439, 540 S.E.2d at 121; see also Whaley v. CSX Transp., Inc., 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005) (observing admission of evidence will not be reversed absent an abuse of discretion); Gamble, 323 S.C. at 373, 474 S.E.2d at 441 (noting admission or exclusion of evidence will not be disturbed on appeal absent clear abuse). The trial court's decision will not be reversed on appeal unless it appears the trial court clearly abused its discretion and the objecting party was prejudiced by the decision. S.C. Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 524, 548 S.E.2d 880, 886 (Ct. App. 2001); Sullivan v. Davis, 317 S.C. 462, 465, 454 S.E.2d 907, 909 (Ct. App. 1995); Cudd, 279 S.C. at 629, 310 S.E.2d at

833; see also Stevens v. Allen, 336 S.C. 439, 448, 520 S.E.2d 625, 629 (Ct. App. 1999) ("For this Court to reverse a case based on the admission of evidence, both error and prejudice must be shown."), aff'd, 342 S.C. 47, 536 S.E.2d 663. "The trial judge has wide discretion in determining the relevancy of evidence, and his decision to admit or reject evidence will not be reversed on appeal absent an abuse of that discretion." Moore v. Moore, 360 S.C. 241, 258, 599 S.E.2d 467, 476 (Ct. App. 2004); accord Hoeffner v. The Citadel, 311 S.C. 361, 365, 429 S.E.2d 190, 192 (1993); Davis v. Traylor, 340 S.C. 150, 155, 530 S.E.2d 385, 387 (Ct. App. 2000); Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 108, 498 S.E.2d 395, 404 (Ct. App. 1998).

All that is required for evidence to be relevant is that it have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE; see Hoeffner, 311 S.C. at 365, 429 S.E.2d at 192; Davis, 340 S.C. at 155, 530 S.E.2d at 387; Gulledge v. McLaughlin, 328 S.C. 504, 510, 492 S.E.2d 816, 819 (Ct. App. 1997). "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Rule 402, SCRE; see Pike v. South Carolina Dep't of Transp., 332 S.C. 605, 613, 506 S.E.2d 516, 520 (Ct. App. 1998), aff'd as modified, 343 S.C. 224, 540 S.E.2d 87 (2000). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE; In re Robert R., 340 S.C. 242, 246-47, 531 S.E.2d 301, 303 (Ct. App. 2000); Haselden, 341 S.C. at 497 n.12, 534 S.E.2d at 301 n.12; Hunter v. Staples, 335 S.C. 93, 101-02, 515 S.E.2d 261, 266 (Ct. App. 1999); see Watson ex rel Watson v. Chapman, 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App. 2000) ("The dictates of Rule 401 are subject to the balancing requirement of Rule 403, SCRE, which requires a court to exclude relevant evidence upon a showing that its admission would be more prejudicial than probative.").

The evidence at issue here was necessary as a means of introducing the jury to the background events leading up to the period of time from 2000 through the date of the trial. For example, an e-mail referenced by Proctor served to show that DHEC officials were in a position to interact directly with retail sellers and would have knowledge of the rebate list's impact on a facility's business. Moreover, the facts surrounding this e-mail and any other acts prior to 2000 were excluded from consideration by the jury for damages. The trial court specifically charged that "[t]he period here for which you are concerned with is that period commencing with July the 27th, 2000." The information relating to what happened prior to the issues in this case was relevant to the questions to be decided at trial. Furthermore, the trial court properly charged the jury that they should consider only those acts occurring after July 27th, 2000. Accordingly, we find no error.

IV. Lost Profits/Damages

DHEC asserts three issues dealing with lost profits and damages: (1) that the court erred in denying DHEC's directed verdict motion as to damages and in charging the jury as to lost profits; (2) that the court erred in refusing DHEC's request for a jury instruction limiting Proctor's damages to $9,500; and (3) that the damages were so excessive as to require a new trial absolute, or a new trial nisi remittitur.

A. Reasonable Certainty Standard

DHEC did not request the trial court to submit a special verdict form to determine whether the actual damages were for lost profits, loss of goodwill, or some other measure. Without a special verdict form, it would be speculative for this Court to determine what portion of the award the jury attributed to lost profits as opposed to other tort damages. See Moore v. Moore, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct. App. 2004). Even so, the law does not require absolute certainty of data upon which lost profits are to be determined, but requires such reasonable certainty that damages are not based upon speculation and conjecture. It is sufficient if there is a certain standard or fixed method by which profits may be estimated and determined

with a fair degree of accuracy. Beck v. Clarkson, 300 S.C. 293, 298-99, 387 S.E.2d 681, 684 (Ct. App. 1989) (quoting South Carolina Fin. Corp. of Anderson v. West Side Fin. Co., 236 S.C. 109, 113 S.E.2d 329 (1960)).

"'Profits' have been defined as the 'net pecuniary gain from a transaction, the gross pecuniary gains diminished by the cost of obtaining them.'" Moore, 360 S.C. at 253, 599 S.E.2d at 473 (quoting Restatement of Contracts § 331, Comment B (1932)); see also Mali v. Odom, 295 S.C. 78, 367 S.E.2d 166 (Ct. App. 1988) (defining profits as the net of income over expenditures during a given period).

Drews Co., Inc. v. Ledwith-Wolfe Assocs., Inc., 296 S.C. 207, 371 S.E.2d 532 (1988), offers an erudite and comprehensive analysis of the standards governing recovery of lost profits:

> The crucial requirement in lost profits determinations is that they be "established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative." South Carolina Finance Corp., supra, at 122, 113 S.E.2d at 336. "The proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn." 22 Am.Jur.2d Damages § 641 (1988).
>
> Numerous proof techniques have been discussed and accepted in different factual scenarios. See, e.g., Upjohn v. Rachelle Laboratories, Inc., 661 F.2d 1105, 1114 (6th Cir. 1981) (proof of future lost profits based on marketing forecasts by employees specializing in economic forecasting); Petty v. Weyerhaeuser Co., supra (skating rink's projected revenues compared to those of another arena in a nearby town); see also Restatement (Second) of Contracts § 352, at 146 (1981) (proof of lost profits "may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and

> the like."); Note, supra, 48 Ohio St. L.J. at 872-3 (means of proving prospective profits include (1) "yardstick" method of comparison with profit performance of business similar in size, nature, and location; (2) comparison with profit history of plaintiff's successor, where applicable; (3) comparison of similar businesses owned by plaintiff himself, and (4) use of economic and financial data and expert testimony).

Drews Co., 296 S.C. at 213-14, 371 S.E.2d at 535-36. The Drews Co. case dealt specifically with lost profits in the context of a new business. The court explained: "While the factual contexts in which new business/lost profits cases arise will undoubtedly vary, these methods of proof and the 'reasonable certainty' requirement bear an inherent flexibility facilitating the just assessment of profits lost to a new business due to contractual breach." Id. at 214, 371 S.E.2d at 536. Although the instant case does not involve lost profits of a new business, the court's comment that the reasonable certainty requirement bears an inherent flexibility facilitating the just assessment of lost profits holds true here as well.

In Whisenant v. James Island Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981), our supreme court observed:

> Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required. Piggy Park Enterprises, Inc. v. Schofield, 251 S.C. 385, 162 S.E.2d 705 (1968); Gray v. Southern Facilities, Inc., 256 S.C. 558, 183 S.E.2d 438 (1971).

Accord Armstrong v. Collins, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005); Collins Entm't, Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005); see also Sterling Dev. Co. v. Collins, 309 S.C. 237, 242, 421 S.E.2d 402, 405 (1992) ("In claiming lost profits, the degree of proof required is that of

reasonable certainty. . . . The proof must pass the realm of conjecture, speculation or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn.") (citations omitted). In Piggy Park Enterprises, Inc. v. Schofield, 251 S.C. 385, 162 S.E.2d 705 (1968), the supreme court inculcated:

> It is, of course, true that the existence or amount of damages cannot be left to conjecture, guess or speculation.
>
> > 'As a general rule, the evidence should be such as to enable the court or jury to determine * * * the amount of damages with reasonable certainty or accuracy; and it is sufficient if they are so established.
> >
> > 'Proof of the amount of loss with absolute or mathematical certainty is not required, and it does not matter that the determination of damages depends to some extent on the consideration of contingent events. So, it had been held sufficient if a reasonable basis of computation is afforded, even though the result may be only approximate, or to adduce evidence which is the best the case is susceptible of under the circumstances and which will permit a reasonably close estimate of the loss.' 25A C.J.S. Damages § 162(2), p. 80. Cf. Powers v. Calvert Fire Ins. Co., 216 S.C. 309, 57 S.E.2d 638, 16 A.L.R.2d 1261; S. C. Electric & Gas Co. v. Aetna Ins. Co., 233 S.C. 557, 106 S.E.2d 276.

Piggy Park Enterprises, 251 S.C. at 391-92, 162 S.E.2d at 708. "The problematic nature of proving damages for loss of profits in a tort action will not prevent recovery where . . . the plaintiff can present evidence from which the court can make 'fair and reasonable approximation of them.'" Petty v.

Weyerhaeuser Co., 288 S.C. 349, 355-56, 342 S.E.2d 611, 615-16 (Ct. App. 1986) (citations omitted).

1. Directed Verdict

DHEC contends the trial court should have directed a verdict in its favor for failure to prove damages. At the close of trial, DHEC moved for a directed verdict on damages, arguing:

> And also the third ground for my motion for directed verdict is the failure to prove his damages in this case by evidence that the jury can look at and not engage in speculation or conjecture, and there's been no proper proof of damages in this case.

In its brief, DHEC reiterates, "Proctor failed to introduce any evidence that a jury could use to determine an amount of damages." We disagree.

In this case, the evidence advanced at trial supports the jury's award of damages. The evidence showed there are three million tires discarded in South Carolina each year and there are fewer than ten waste tire facilities in the State. Because Proctor was not on the rebate list, he was unable to sustain contracts with his major customers and lost the dollar he would have received for every tire he took into the facility. Proctor's customers disposed of over 15,000 tires per quarter, each of which was subject to the one-dollar rebate. Moreover, Proctor testified that "thirty-three to forty percent of the tires we got [from Sam's Club] we could sell them and make a profit[.]" Thus, from 2000 until the time Proctor was returned to the list, he lost the rebate for each tire he would have received from Sam's Club, plus lost profits from thirty-three to forty percent of the tires he would have sold as used tires. Further, Proctor sold chips from tires for playgrounds, carpet backing, and septic systems.

Proctor demonstrated that between 2000 and 2001, his company paid approximately $9,500 to take tires to another processing facility after he was removed from the rebate list. Proctor presented evidence of the number of

tires his business processed per year from 1995 through 2004, which included 30,000 tires in 1995, and 60,000 tires in 1996. Proctor asseverated that as a result of DHEC's actions, Anderson Tire Recycling's business reputation had been damaged and had not yet recovered.

We find sufficient evidence of damages to support the trial judge's submitting this case to the jury. See S.C. Prop. & Guar. Ass'n v. Yensen, 345 S.C. 512, 521, 548 S.E.2d 880, 884-85 (Ct. App. 2001) (noting on appeal from the denial of a motion for a directed verdict, the appellate court may only reverse if there is no evidence to support the trial court's ruling).

2. Jury Instructions

Similarly, we reject DHEC's argument that the court erred by not charging the jury that Proctor's damages, if any, were limited to $9,500. "When instructing the jury, the trial court is required to charge only the current and correct law of South Carolina." Cohens v. Atkins, 333 S.C. 345, 349, 509 S.E.2d 286, 289 (Ct. App. 1999). In reviewing a jury charge for alleged error, the appellate court must consider the charge as a whole in light of the evidence and issues presented at trial. Daves v. Cleary, 355 S.C. 216, 224, 584 S.E.2d 423, 427 (Ct. App. 2003). If the charge is reasonably free from error, isolated portions which might be misleading do not constitute reversible error. Id. "To warrant reversal for refusal to give a requested instruction, the refusal must have not only been erroneous, but prejudicial as well." Cohens, 333 S.C. at 349, 509 S.E.2d at 289. Proctor proffered evidence of damages beyond the $9,500 he paid to another facility to take tires. Therefore, the trial judge did not err by rejecting DHEC's request to charge.

B. Excessive Damages—New Trial Absolute/New Trial Nisi Remittitur

Finally, DHEC contends the amount of damages found by the jury was so unduly liberal or grossly excessive as to require a new trial nisi remittitur or a new trial absolute. We disagree.

"A new trial nisi is one in which a new trial will be granted unless the party opposing it complies with a condition set by the court." Waring v. Johnson, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000) (citing Elliot v. Black River Elec. Coop., 233 S.C. 233, 104 S.E.2d 357 (1958)). The grant or denial of new trial motions rests within the discretion of the trial judge, and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. Chapman v. Upstate RV & Marine, 364 S.C. 82, 88-89, 610 S.E.2d 852, 856 (Ct. App. 2005); Waring, 341 S.C. at 256, 533 S.E.2d at 910; Vinson v. Hartley, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996). The trial court alone has the power to grant a new trial nisi when he finds the amount of the verdict to be merely inadequate or excessive. Chapman, 364 S.C. at 89, 610 S.E.2d at 856 (citing McCourt v. Abernathy, 318 S.C. 301, 457 S.E.2d 603 (1995)); see also Evans v. Taylor Made Sandwich Co., 337 S.C. 95, 99, 522 S.E.2d 350, 352 (Ct. App. 1999) (noting that when the jury's verdict is inadequate or excessive, the trial judge has the discretionary power to grant a new trial nisi); Hawkins v. Greenwood Development Corp., 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997) (same). However, compelling reasons must be given to justify invading the jury's province by granting a new trial nisi remittitur. Cf. Pelican Bldg. Ctrs. v. Dutton, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993). The consideration for a motion for a new trial nisi remittitur requires the trial judge to consider the adequacy of the verdict in light of the evidence presented. Cf. Vinson, 324 S.C. at 405, 477 S.E.2d at 723. Great deference is given to the trial judge "who heard the evidence and is more familiar with the evidentiary atmosphere at trial," and who thus "possesses a better-informed view of the damages than this Court." Id. at 405-06, 477 S.E.2d at 723 (citing Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993)); accord Waring, 341 S.C. at 257, 533 S.E.2d at 911.

"When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004); accord Evans, 337 S.C. at 99-100, 522 S.E.2d at 352. "If the amount of the verdict is **grossly** inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other

influence outside the evidence, the trial judge must grant a new trial absolute." Harrison v. Bevilacqua, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003) (internal quotation marks omitted) (quoting O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993)).

"The decision to grant or deny a new trial absolute based on the excessiveness of a verdict rests in the sound discretion of the trial court and will not ordinarily be disturbed on appeal." Elam, 361 S.C. at 27, 602 S.E.2d at 781; see Crawford v. Charleston-Isle of Palms Traction Co., 126 S.C. 447, 120 S.E. 381 (1923) (observing the refusal to grant a new trial on the ground that the verdict was excessive was addressed to the sound discretion of the trial judge). "In deciding whether to assess error when a new trial motion is denied, the appellate court must consider the testimony and reasonable inferences therefrom in the light most favorable to the nonmoving party." Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 635-36, 529 S.E.2d 758, 761-62 (Ct. App. 2000) (footnote omitted). "The jury's determination of damages, however, is entitled to substantial deference." Harrison, 354 S.C. at 140, 580 S.E.2d at 115.

As stated by the Vinson court:

> A trial court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993). The jury's determination of damages, however, is entitled to substantial deference. Id. The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives. See Cock-n-Bull Steak House, Inc. v. Generali Ins. Co., ___ S.C. ___, 466 S.E.2d 727 (1996); McCourt by and Through McCourt v. Abernathy, 318 S.C. 301, 457 S.E.2d 603 (1995); Allstate Ins. Co. v. Durham, 314 S.C. 529, 431 S.E.2d 557 (1993); O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (1993); Rush, supra. The failure of the trial judge to grant a new trial absolute in this situation amounts to an abuse

> of discretion and on appeal this Court will grant a new trial absolute. Weir v. Citicorp Nat'l Servs., Inc., 312 S.C. 511, 435 S.E.2d 864 (1993); Allstate, supra; O'Neal, supra.
>
> The grant or denial of new trial motions rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. Umhoefer v. Bollinger, 298 S.C. 221, 379 S.E.2d 296 (Ct. App. 1989). See also Boozer v. Boozer, 300 S.C. 282, 387 S.E.2d 674 (Ct. App. 1988) (Court of Appeals has no power to review trial court's ruling unless it rests on basis of fact wholly unsupported by evidence or is controlled by error of law). In deciding whether to assess error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party. Umhoefer, supra.

Vinson, 324 S.C. at 404-05, 477 S.E.2d at 723; see also Welch v. Epstein, 342 S.C. 279, 302, 536 S.E.2d 408, 420 (Ct. App. 2000) ("[T]o warrant a new trial absolute, the verdict reached must be so 'grossly excessive' as to clearly indicate the influence of an improper motive on the jury."). If the verdict is grossly inadequate or excessive, such that it is the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial court must grant a new trial absolute. O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 55, 56 (1993); Waring v. Johnson, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000).

The decision to grant a new trial nisi remittitur is left to the sound discretion of the trial judge. This record contains sufficient evidence to support his ruling. Because the evidence supports the jury's verdict, we disagree that the damages are grossly excessive so as to suggest the jury was motivated by passion, caprice, or prejudice. The trial court did not abuse its discretion in denying DHEC's motions for a new trial nisi remittitur and a new trial absolute.

CONCLUSION

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

AFFIRMED.

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