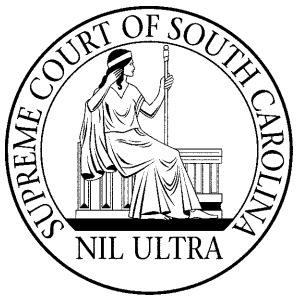
NOTICE

OUR MAILING SERVICE FOR THE ADVANCE SHEETS HAD A PROGRAM PROBLEM WHEN THEY MAILED ADVANCE SHEET #14. THIS PROBLEM CAUSED THE NAMES TO BECOME DISASSOCIATED WITH THE ADDRESSES BEING PUT ON THE ADVANCE SHEET LABELS; THEREFORE, IF YOU RECEIVED A BOOK WITH AN INCORRECT NAME ON IT, KEEP THAT ADVANCE SHEET FOR YOUR FILES. PLEASE NOTIFY THIS OFFICE ONLY IF YOU DID NOT RECEIVE AN ADVANCE SHEET AT ALL.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

April 19, 2004

ADVANCE SHEET NO. 15

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

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

EXTENSION OF TIME TO FILE PETITION FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2004-UP-245-The State v. Phillip Thomas Hullet
(York, Judge Lee S. Alford)

2004-UP-246-The State v. Donoven Autry
(Chesterfield, Judge Paul M. Burch)

2004-UP-247-Carolina Power & Light Company v. Lynches River Electric Cooperative Inc.
(Chesterfield, Judge J. Michael Baxley)

2004-UP-248-Larry Foster v. Bettie Foster
(Florence, Judge Wylie H. Caldwell, Jr.)

2004-UP-249-The State v. Mark Anthony Gause
(Marion, Judge James E. Brogdon, Jr.)

2004-UP-250-The State v. Larry Allen Eubanks
(Spartanburg, Judge Larry R. Patterson)

2004-UP-251-The State v. Arthur Tyrone Davis
(Sumter, Judge Marc H. Westbrook)

2004-UP-252-The State v. Bruce M. Richardson
(Horry, Judge John L. Breeden)

2004-UP-253-The State v. Ann Thorpe
(York, Judge Lee S. Alford)

2004-UP-254-The State v. Anthony Spence
(Anderson, Judge J. C. Buddy Nicholson, Jr.)

2004-UP-255-The State v. Robert D. Wright
(Clarendon, Judge Thomas W. Cooper, Jr.)

2004-UP-256-The State v. Henry Leon Settles
(McCormick, Judge William P. Keesley)

204-UP-257-The State v. Jimmy Arthur Rhinehart
(Union, Judge Lee S. Alford)

PETITIONS FOR REHEARING

3714-State v. Burgess	Pending
3741-Ellie, Inc. v. Miccichi	Pending
3744-Angus v. Burroughs & Chapin	Pending
3745-Henson v. International (H. Hunt)	Pending
3747-RIM Associates v. Blackwell	Pending
3748-Ellis v. Davidson	Pending
3749-Goldston v. State Farm	Pending
3750-Martin v. Companion Health	Pending
3751-State v. Barnett	Pending
3753-Deloitte & Touche, LLP v. Unisys Corp.	Pending
3755-Hatfield v. Van Epps	Pending
3757-All Saints v. Protestant Episcopal Church	Pending
3758-Walsh v. Woods	Pending
3759-QZO, Inc. v. Moyer	Pending
3762-Jeter v. SCDOT	Pending
3763-Fuller v. Blanchard	Pending
3765-InMed Diagnostic v. MedQuest Assoc.	Pending
3766-Craig v. Craig	Pending
3767-Hunt v. S.C. Forestry Comm'n	Pending
3770-Hinds v. Elms	Pending

2003-UP-292-Classic Stair v. Ellison	Pending
2003-UP-481-Branch v. Island Sub-Division	Pending
2003-UP-736-State v. Ward	Pending
2004-UP-024-State v. Foster	Pending
2004-UP-086-State v. Rice	Pending
2004-UP-098-Smoak v. McCullough	Pending
2004-UP-102-State v. Boan	Pending
2004-UP-110-Page v. Page	Pending
2004-UP-111-Phillips v. Cassidy	Pending
2004-UP-114-State v. Bailey	Pending
2004-UP-119-Williams v. Pioneer Machine	Pending
2004-UP-120-State v. Harris	Pending
2004-UP-122-State v. Aiken	Pending
2004-UP-125-State v. Chronister	Pending
2004-UP-131-Ford v. Georgetown County	Pending
2004-UP-134-Herridge v. Herridge (Ginsberg)	Pending
2004-UP-135-Phillips v. Brown	Pending
2004-UP-137-State v. Drayton	Pending
2004-UP-138-State v. Ceasar	Pending
2004-UP-142-State v. Morman	Pending
2004-UP-146-State v. Gainey	Pending

2004-UP-147-KCI Management v. Post	Pending
2004-UP-148-Lawson v. Irby	Pending
2004-UP-149-Hook v. Bishop	Pending
2004-UP-151-State v. Baskin	Pending
2004-UP-153-Walters v. Walters	Pending
2004-UP-186-State v. Randolph	Pending
2004-UP-200-Krenn v. State Farm	Pending
2004-UP-211-State v. Anderson	Pending
2004-UP-216-Arthurs v. Brown	Pending
2004-UP-221-Grate v. Bone	Pending
2004-UP-229-State v. Scott	Pending
2004-UP-236-State v. Skanes	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3596-Collins Ent. v. Coats & Coats et al.	Pending
3602-State v. Al-Amin	Pending
3606-Doe v. Baby Boy Roe	Denied 4/8/04
3607-State v. Parris	Pending
3610-Wooten v. Wooten	Pending
3614-Hurd v. Williamsburg	Granted 4/8/04
3623-Fields v. Regional Medical Center	Pending
3627-Pendergast v. Pendergast	Denied 4/8/04

3635-State v. Davis	Pending	
3639-Fender v. Heirs at Law of Smashum	Pending	
3640-State v. Adams	Pending	
3642-Hartley v. John Wesley United	Pending	
3643-Eaddy v. Smurfit-Stone	Pending	
3645-Hancock v. Wal-Mart Stores	Pending	
3646-O'Neal v. Intermedical Hospital	Pending	
3647-State v. Tufts	Pending	
3649-State v. Chisolm	Denied	4/8/04
3650-Cole v. SCE&G	Pending	
3652-Flateau v. Harrelson et al.	Pending	
3653-State v. Baum	Pending	
3654-Miles v. Miles	Pending	
3655-Daves v. Cleary	Pending	
3656-State v. Gill	Pending	
3658-Swindler v. Swindler	Pending	
3661-Neely v. Thomasson	Pending	
3663-State v. Rudd	Pending	
3667-Overcash v. SCE&G	Pending	
3669-Pittman v. Lowther	Pending	
3671-White v. MUSC et al.	Pending	

3674-Auto-Owners v. Horne et al.	Pending
3676-Avant v. Willowglen Academy	Pending
3677-The Housing Authority v. Cornerstone	Pending
3678-Coon v. Coon	Pending
3679-The Vestry v. Orkin Exterminating	Pending
3680-Townsend v. Townsend	Pending
3681-Yates v. Yates	Pending
3683-Cox v. BellSouth	Pending
3685-Wooten v. Wooten	Pending
3686-Slack v. James	Pending
3691-Perry v. Heirs of Charles Gadsden	Pending
3693-Evening Post v. City of N. Charleston	Pending
3703-Sims v. Hall	Pending
3706-Thornton v. Trident Medical	Pending
3707-Williamsburg Rural v. Williamsburg Cty.	Pending
3708-State v. Blalock	Pending
3709-Kirkman v. First Union	Pending
3710-Barnes v. Cohen Dry Wall	Pending
3711-G & P Trucking v. Parks Auto Sales	Pending
3712-United Services Auto Ass'n v. Litchfield	Pending
3716-Smith v. Doe	Pending

3718-McDowell v. Travelers Property	Pending
3719-Schmidt v. Courtney (Kemper Sports)	Pending
3721-State v. Abdullah	Pending
3722-Hinton v. SCDPPPS	Pending
3729-Vogt v. Murraywood Swim	Pending
3733-Smith v. Rucker	Pending
3737-West, et al. v. Newberry Electric	Pending
2003-UP-009-Belcher v. Davis	Pending
2003-UP-060-State v. Goins	Pending
2003-UP-111-State v. Long	Pending
2003-UP-112-Northlake Homes Inc. v. Continental Ins.	Pending
2003-UP-135-State v. Frierson	Pending
2003-UP-143-State v. Patterson	Pending
2003-UP-144-State v. Morris	Pending
2003-UP-205-State v. Bohannan	Pending
2003-UP-244-State v. Tyronne Edward Fowler	Pending
2003-UP-277-Jordan v. Holt	Pending
2003-UP-316-State v. Nickel	Pending
2003-UP-324-McIntire v. Cola. HCA Trident	Pending
2003-UP-336-Tripp v. Price et al.	Pending
2003-UP-353-State v. Holman	Pending

2003-UP-358-McShaw v. Turner	Pending
2003-UP-360-Market at Shaw v. Hoge	Pending
2003-UP-396-Coaxum v. Washington et al.	Pending
2003-UP-397-BB&T v. Chewing	Pending
2003-UP-409-State v. Legette	Pending
2003-UP-416-Sloan v. SCDOT	Pending
2003-UP-420-Bates v. Fender	Pending
2003-UP-444-State v. Roberts	Pending
2003-UP-453-Waye v. Three Rivers Apt.	Pending
2003-UP-458-InMed Diagnostic v. MedQuest	Pending
2003-UP-459-State v. Nellis	Pending
2003-UP-462-State v. Green	Pending
2003-UP-467-SCDSS v. Averette	Pending
2003-UP-468-Jones v. Providence Hospital	Pending
2003-UP-470-BIFS Technologies Corp. v. Knabb	Pending
2003-UP-473-Seaside Dev. Corp. v. Chisholm	Pending
2003-UP-475-In the matter of Newsome	Pending
2003-UP-478-DeBordieu Colony Assoc. v. Wingate	Pending
2003-UP-480-Smalls v. Fuji Photo Film	Pending
2003-UP-483-Lamar Advertising v. Li'l Cricket	Pending
2003-UP-489-Willis v. City of Aiken	Pending

2003-UP-490-Town of Olanta v. Epps	Pending
2003-UP-491-Springob v. Springob	Pending
2003-UP-494-McGee v. Sovran Const. Co.	Pending
2003-UP-503-Shell v. Richland County	Pending
2003-UP-515-State v. Glenn	Pending
2003-UP-521-Green v. Frigidaire	Pending
2003-UP-522-Canty v. Richland Sch. Dt.2	Pending
2003-UP-527-McNair v. SCLEOA	Pending
2003-UP-533-Buist v. Huggins et al.	Pending
2003-UP-535-Sauer v. Wright	Pending
2003-UP-539-Boozer v. Meetze	Pending
2003-UP-549-State v. Stukins	Pending
2003-UP-550-Collins Ent. v. Gardner	Pending
2003-UP-556-Thomas v. Orrel	Pending
2003-UP-588-State v. Brooks	Pending
2003-UP-592-Gamble v. Parker	Pending
2003-UP-593-State v. Holston	Pending
2003-UP-633-State v. Means	Pending
2003-UP-635-Yates v. Yates	Pending
2003-UP-638-Dawsey v. New South Inc.	Pending
2003-UP-640-State v. Brown #1	Pending

2003-UP-659-Smith v. City of Columbia	Pending
2003-UP-662-Zimmerman v. Marsh	Pending
2003-UP-678-SCDSS v. Jones	Pending
2003-UP-688-Johnston v. SCDLLR	Pending
2003-UP-689-Burrows v. Poston's Auto Service	Pending
2003-UP-703-Beaufort County v. Town of Port Royal	Pending
2003-UP-705-State v. Floyd	Pending
2003-UP-706-Brown v. Taylor	Pending
2003-UP-711-Cincinnati Ins. Co. v. Allstate Ins.	Pending
2003-UP-715-Antia-Obong v. Tivener	Pending
2003-UP-718-Sellers v. C.D. Walters	Pending
2003-UP-719-SCDSS v. Holden	Pending
2003-UP-723-Derrick v. Holiday Kamper et al.	Pending
2003-UP-735-Svetlik Construction v. Zimmerman	Pending
2003-UP-751-Samuel v. Brown	Pending
2003-UP-755-Abbott Sign Co. v. SCDOT #2	Pending
2003-UP-757-State v. Johnson	Pending
2003-UP-758-Ward v. Ward	Pending
2003-UP-766-Hitachi Electronic v. Platinum Tech.	Pending
2004-UP-001-Shuman v. Charleston Lincoln Mercury	Pending
2004-UP-011-Baird Pacific West v. Blue Water	Pending

2004-UP-012-Meredith v. Stoudemayer et al.	Pending
2004-UP-019-Real Estate Unlimited v. Rainbow Living	Pending
2004-UP-029-City of Myrtle Beach v. SCDOT	Pending
2004-UP-038-State v. Toney	Pending

PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Randolph Singleton, Respondent,

v.

Stokes Motors, Inc. d/b/a Stokes Toyota, Petitioner,

And also Valerie Singleton, Respondent,

v.

Stokes Motors, Inc. d/b/a Stokes Toyota, Petitioner.

Appeal from Beaufort County
Thomas Kemmerlin, Circuit Court Judge

Opinion No. 25804
Heard January 8, 2004 - Filed April 12, 2004

AFFIRMED

H. Fred Kuhn, Jr., of Moss & Kuhn P.A., of Beaufort, for Petitioner.

Philip Fairbanks and Kathy D. Lindsay, both of Fairbanks & Lindsay P.A., of Beaufort, for Respondents.

CHIEF JUSTICE TOAL: This Court granted certiorari to review the Court of Appeals' unpublished opinion (1) affirming the trial judge's decision to award each plaintiff minimum statutory damages under Uniform Commercial Code ("UCC" or "Code") § 36-9-507(1) (Supp. 2000); and (2) reversing the trial judge's finding that the UCC and the South Carolina Unfair Trade Practices Act ("SCUTPA") causes of action were factually inconsistent. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On March 27, 1997, Randolph and Valerie Singleton (Singletons) decided to purchase a used 1993 Chevrolet Silverado pickup truck from Stokes Motors (Stokes) in Beaufort, South Carolina. To carry out the transaction, they signed a note and purchase money security agreement (sales contract). As part of the purchase price, the Singletons were to trade-in their Dodge Dakota and make a cash down payment of $1600. The sales contract did not indicate that the sale was contingent upon credit approval.

That same day, the Singletons signed a second document, a bailment agreement, which unlike the sales contract, provided that they were accepting the Silverado subject to credit approval. If their credit was not approved, the Singletons were required, under the terms of the bailment agreement, to return the Silverado to Stokes "immediately upon notice or verbal communication."

After signing both documents, the Singletons drove off the lot in the Silverado, having given Stokes the Dakota trade-in and only $800 of the $1600 required cash down payment.

Nearly three weeks later, on April 16, 1997, the Singletons returned to Stokes because Stokes claimed that the loan paperwork could not be completed due to Mr. Singleton's failure to produce proof of income. Mrs. Singleton explained that her husband had lost his job but that he would soon be able to produce proof of income from his new job. The Singletons also admitted that they could not afford to pay the remaining $800 of the down payment. The salesperson told the Singletons to "forget about it," and they signed an entirely new sales contract.

The new sales contract, like the initial sales contract, reflected that the Dodge Dakota had been traded in, but it showed $800 as the required cash down payment. And even though the Singletons had yet to produce Mr. Singleton's proof of income, Stokes told them that their credit had been approved. Finally, Stokes never asked the Singletons to sign another bailment agreement during this second meeting. So after signing the new sales contract and paying nothing further in cash, the Singletons were permitted to drive away in the Silverado.

Ultimately, Stokes could not verify Mr. Singleton's employment. In addition, contrary to Stokes's statements at the second meeting, the Singletons' credit was never approved. Therefore, Stokes repossessed the Silverado from the Singleton home before the first payment on the truck was even due.

After the Silverado was repossessed, Mrs. Singleton went to Stokes to demand the return of the $800 down payment and the Dakota trade-in. Stokes refused to return either, claiming that it had already spent approximately $800 repairing the trade-in and had already paid off the Singletons' existing loan on the Dakota. For the return of the Dakota, Stokes told the Singletons that they would need to secure another loan. But because they could not secure a loan, the Singletons were left without a vehicle and without their $800.

Stokes subsequently resold the Silverado to another customer without notifying the Singletons. And eventually, Stokes sold the Dakota trade-in.[1]

[1] Stokes realized a substantial profit on both the re-sale of the Silverado and the sale of the Dakota trade-in. Stokes was able to re-sell the Silverado for $2,595 more than the amount due under the Singleton contract. And the Dakota trade-in was sold for a cash price of $14,000, giving Stokes a $7,326 profit (after Stokes made repairs and paid off the lien). Therefore, Stokes realized a profit of $9,921 by conducting the Singleton transaction in the manner that it did.

The Singletons filed separate, identical complaints, alleging causes of action based on the UCC and the SCUTPA.[2] The UCC claim stemmed from Stokes's failure to notify the Singletons in writing that Stokes intended to sell the repossessed Silverado. Because the Singletons did not receive such notice, they claimed that they were entitled to collect the minimum statutory penalty provided under the UCC. The SCUPTA claim stemmed from Stokes's (1) failure to return the $800 cash down payment and the Dodge Dakota and (2) failure to inform the Singletons that the Silverado was being resold.

The trial judge initially found for the Singletons on both claims. As to the UCC claim, the judge found that the Singletons were entitled to notice of Stokes's disposition of the Silverado. Because they did not receive such notice, the judge awarded Mr. and Mrs. Singleton $10,881 each as directed by the UCC minimum statutory penalty provision. As to the SCUTPA claim, the judge found that Stokes's refusal to return the Dakota and the $800 cash constituted a violation of the act. Therefore, the judge awarded the Singletons $8,029 in actual damages (the $800 cash deposit plus the net value of the Dodge Dakota), then trebled the award for a total of $24,087.

After the order was issued, Stokes filed a motion to reconsider, arguing that the UCC and the SCUTPA causes of action were factually inconsistent. In other words, Stokes argued that the facts required to prove one cause of action necessarily negated the facts necessary to prove the other cause of action. The trial judge agreed with Stokes and issued an order reducing the award in the initial judgment.

In this second order, the trial judge reasoned that for the SCUTPA cause of action to succeed, he must find that the sale of the Silverado to the Singletons was never finalized. If the sale were final, then the Dakota trade-in and the $800 cash down payment belonged to Stokes, and Stokes could dispose of either as it wished. It was impossible, the judge reasoned, for Stokes to violate SCUTPA for refusing to return its own property.

[2] By the parties' consent, the cases were consolidated before trial.

At the same time, for the UCC claim to survive, a sale must have occurred. And because the judge found that a sale had taken place, the Singletons' no longer had a valid SCUTPA claim. Therefore, the trial judge found that the UCC and the SCUTPA claims were factually inconsistent, and he reduced the damages to reflect the UCC award only.

The Court of Appeals affirmed the trial court's award to both Singletons for the UCC violation but reversed the trial court's finding that the UCC and SCUTPA causes of action were factually inconsistent. The court found that the UCC and SCUTPA claims were separate and distinct, permitting the Singletons to recover under both.

This Court granted certiorari to review the Court of Appeals' decision and the following issues:

I. Did the Court of Appeals err in affirming the trial judge's decision to award the minimum statutory penalty under the UCC to both Mr. and Mrs. Singleton?

II. Did the Court of Appeals err in reversing the trial judge's ruling that the UCC and SCUTPA claims were factually inconsistent?

LAW/ANALYSIS

I. UCC AWARD TO BOTH SINGLETONS

Stokes argues that the Court of Appeals erred in affirming the trial judge's decision to award UCC damages to both Mr. and Mrs. Singleton. We disagree.

The UCC outlines the rights, remedies, and duties of parties to secured transactions. In particular, Article 9, Part 5,[3] prescribes the procedures that a

[3] Unless otherwise stated, the Code sections refer to the *former* Article 9, the law applicable at the time the underlying lawsuit was filed. In July 2001, Article 9 was significantly revised, and we address the applicable revisions when appropriate.

secured party must follow when a debtor defaults under a security agreement. S.C. Code Ann. § 36-9-501 – 36-9-607 (Supp. 2000). Upon default, a secured party may re-sell the collateral. S.C. Code Ann. § 36-9-504(1) (Supp. 2000). In most circumstances, a debtor is entitled to reasonable notification of the time and place of sale or other intended disposition of repossessed collateral is to be made. S.C. Code Ann. § 36-9-504(3) (Supp. 2000).[4] If no such notice is given, the debtor has a statutory right to recover. S.C. Code Ann. § 36-9-507(1) (Supp. 2000).

This right to recover and the formula used to calculate the amount of recovery are outlined in the Code as follows:

> If the disposition has occurred **the debtor or any person entitled to notification or whose security interest has been made known to the secured party** prior to the disposition **has a right to recover** from the secured party any loss caused by a failure to comply with the provisions of this part. **If the collateral is consumer goods**, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten percent of the principal amount of the debt or the time price differential plus ten percent of the cash price.

S.C. Code Ann. § 36-9-507(1) (Supp. 2000) (emphasis added).

Further, the Code defines "debtor" as "the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral . . . ." S.C. Code Ann. § 36-9-105(d) (Supp. 2000).

In the present case, Stokes concedes that it violated the Code's notice requirement by failing to notify the Singletons that it was re-selling the Silverado. Stokes also concedes that the Singletons were entitled to recover

---

[4] Reasonable notification may not be required when the "collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market" or when the debtor has signed, after default, "a statement renouncing or modifying his right to notification of sale." S.C. Code Ann. § 36-9-504(3) (Supp. 2000).

the minimum statutory damages according to the formula set forth in section 36-9-507(1) above. But what Stokes argues is that *both* Singletons should not have been able to recover for violations concerning *one* secured transaction.

Consequently, the issue before this Court is whether the term "debtor" includes *each* debtor in a secured transaction, such that both Mr. and Mrs. Singleton were entitled, individually, to recover damages under the Code.

The statutory language of section 36-9-507(1) (Supp. 2000), on its face, suggests that as debtors, both Singletons were entitled to recover. The statute plainly states that "the debtor or anyone" who is entitled to notice, or whose security interest the secured party knows of, "has a right to recover." Because both Mr. and Mrs. Singleton signed the sales contract and were designated as "purchaser-debtors," *both* were entitled to notice and therefore *both* were entitled to recover under the Code.

Additionally, this Court has held that co-obligators or guarantors to a loan constitute "debtors" for purposes of recovery. *Crane v. Citicorp Nat'l Serv., Inc.*, 313 S.C. 70, 437 S.E.2d 50 (1993). Therefore, the Court found that the Code's penalty provision applied "to co-obligators of consumer goods security agreements." *Id.* at 74, 437 S.E.2d at 53. Further, the Court described the rationale behind the penalty provision as follows:

> the statutory penalty is evidence of the legislature's recognition that the small amount of compensatory damages that may be proven in a consumer goods repossession and sale would be insufficient to ensure creditor compliance with the Code's provisions.

Id. at 74-75, 437 S.E.2d at 53 (citation omitted).

Also in *Crane*, the Court addressed the creditor's concern that because an unlimited number of co-obligators could be liable on a contract, the creditor's liability could be significant if there were multiple guarantors. *Id.* The Court's response to this concern was that "the number of guarantors is within the creditor's control." *Id.* This response implies that creditors cannot

expect to receive the benefit of having multiple guarantors without also bearing the risk of having multiple claimants. Should there be a default, the creditor could recover from any single guarantor. Likewise, if the creditor violated the Code, any or all guarantors could sue the creditor. Therefore, *Crane* stands for the proposition that multiple guarantors to one secured transaction are entitled to recover.[5]

In the present case, both Mr. and Mrs. Singleton signed the sales contract, making each of them a "purchaser-debtor" and each jointly and severally liable for the debt. If the Singletons had secured a loan and subsequently defaulted, Stokes could have sought payment from *either* Mr. or Mrs. Singleton. In other words, Stokes benefited from having two people, instead of one, fully liable for the debt. When Stokes failed to notify the Singletons that the Silverado was to be sold, it became subject to claims from either Singleton or both. Both parties filed complaints because both parties were entitled to notice, and therefore, we hold that *both* parties were entitled to minimum statutory damages.

We recognize that the outcome in this case would be different if the underlying action were brought today. In July 2001, the South Carolina General Assembly enacted revised Article 9, which included substantial changes, including an entirely new section entitled, "Nonliability and limitation on liability of secured party; liability of secondary obligor." This new section contains a provision which states "[a] secured party is not liable under Section 36-9-625(c)(2) more than once with respect to any one secured obligation." S.C. Code Ann. § 36-9-628(e) (2003).

The South Carolina Reporter's Comment to section 36-9-628(e) explains that while all debtors and guarantors are entitled to bring claims for minimum damages, the secured party's aggregate liability is limited to a single recovery. Comment to S.C. Code. Ann. § 36-9-628 (Supp. 2001).

---

[5] The South Carolina Reporter's Comment in revised Article 9 confirms that *Crane* had the following effect: "a secured party can be liable to multiple debtors and secondary obligors for minimum damages with respect to a single secured obligation." Comment to S.C. Code. Ann. § 36-9-625 (Supp. 2001).

Accordingly, the Comment states, this new section effectively overrules the *Crane* holding with respect to recovery of statutory minimum damages. *Id.*

But the law in effect at the time the cause of action accrued controls the parties' legal relationships and rights. *Stephens v. Draffin*, 327 S.C. 1, 5, 488 S.E.2d 307, 309 (1997). In addition, legislative intent is paramount in determining whether a statute has a prospective or retroactive application. *Jenkins v. Meares*, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990) (citation omitted).

Revised Article 9 was not effective until July 1, 2001, nearly four years after the Singletons sued. Moreover, revised Article 9 clearly states that "[t]his act does not affect an action, case, or proceeding commenced before this act takes effect." S.C. Code. Ann. § 36-9-702 (Supp. 2001). Because the underlying lawsuit arose before July 2001, revised Article 9 does not apply in the instant case.

Therefore, given the plain meaning of S.C. Code Ann. § 36-9-507(1) (Supp. 2000) and this Court's ruling in *Crane*, we hold that Mr. and Mrs. Singleton were entitled, individually, to recover the minimum statutory penalty from Stokes.

II. FACTUAL INCONSISTENCY/UCC AND SCUTPA CLAIMS

Stokes argues that the Court of Appeals erred in reversing the trial judge's ruling that the UCC and the SCUTPA causes of action were factually inconsistent. We disagree.

The South Carolina Unfair Trade Practices Act declares unfair or deceptive acts or practices in trade or commerce unlawful. S.C. Code Ann. § 39-5-20(a) (2002). The Act provides that:

> [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice … may bring an action … to recover actual damages.

S.C. Code Ann. § 39-5-140(a) (2002). Plaintiffs must allege and prove that the defendant's actions adversely affected the public interest. *Daisy Outdoor Adver. Co., Inc. v. Abbott*, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996) (citations omitted). An impact on the public interest may be shown if the acts or practices have the potential for repetition. *Crary v. Djebelli*, 329 S.C. 385, 387, 496 S.E.2d 21, 23 (1998) (citation omitted). The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts. *Id.* at 388, 496 S.E.2d at 23. (citation omitted).

Initially, the trial judge found that Stokes violated SCUTPA by knowingly and willfully retaining the cash down payment and the Dakota trade-in. The judge also found that Stokes's actions were part of its standard business practices, and accordingly, were capable of repetition and impacted the public interest.

But in a subsequent order, the trial judge dismissed the SCUTPA claim, finding that the UCC and SCUTPA claims were factually inconsistent. The judge agreed with Stokes's argument that once Stokes sold the Silverado to the Singletons, Stokes became the rightful owner of the $800 cash down payment and the Dakota trade-in. Therefore, Stokes could not have violated the SCUTPA for retaining its own property.

The Court of Appeals reversed the lower court and found that the UCC and the SCUTPA claims were not factually inconsistent because the allegations concerning Stokes's unfair trade practices were separate and distinct from the UCC claim. As to the SCUTPA claim, the court pointed to fact that (1) Stokes repossessed the Silverado before payments became due, and (2) Stokes profited from reselling the Silverado for an amount in excess of the Singletons' purchase price and from retaining the Singletons' down payment, including the trade-in vehicle. The UCC claim, however, was based on a statutory provision requiring notice.

We agree with the Court of Appeals' decision that the UCC and SCUPTA claims are not factually inconsistent. In addition to the facts

highlighted by the Court of Appeals, we base our decision on additional wrongdoing by Stokes, namely (1) having customers sign both an unconditional sales contract and a conditional bailment agreement; and (2) misleading customers to believe that their credit has been approved. The facts necessary to demonstrate both of these practices do not negate the facts necessary to make the UCC claim, since such wrongdoing occurred *before* the Silverado sale was finalized. Moreover, we hold that these practices, by themselves, constitute SCUPTA violations.

First, Stokes's practice of having customers sign two contradictory documents—an unconditional sales contract and a conditional bailment agreement—is an essential part of conducting what is commonly referred to as a "yo-yo" sale. The "yo-yo" or "spot-delivery" sale typically proceeds in the following way:

> The consumer believes a vehicle's installment or sale is final and the dealer gives the consumer possession of the car "on the spot." The dealer later tells the consumer to return the car because the financing has fallen through. If the consumer does not return the vehicle or agree to rewrite the transaction on less favorable terms, the dealer repossesses the vehicle.

National Consumer Law Center, *Unfair and Deceptive Acts and Practices* 316 (5th ed. 2001).

Yo-yo sales are unlawful in at least seven states and several other states have issued regulations and administrative interpretations to car dealers on the subject. *Id.* at 317. Such transactions are fundamentally unfair because they give all of the power to the dealer, and none to the customer:

> On the one hand, once the customer drives the car off the lot, the consumer is locked into the sale. The dealer does not want the consumer to think about the deal overnight—it wants the deal closed on the spot while the consumer has just undergone hours of sales pressure.

> On the other hand, the dealer wants to retain its options when the consumer drives off the lot with the car. It does not want to be rushed into a hasty deal. It wants time for its personnel to review the profit margin, the consumer's credit rating, and the chances of selling the vehicle to someone else. It wants time to reflect on whether it can squeeze more out of the consumer or whether it is better off selling the vehicle to someone else.
>
> Usually, the dealer will want to hide the one-sided nature of the transaction. It does not want consumers to think that they can get out of a deal just because the dealer can. So the dealer will not disclose that the deal, from the dealer's point of view, is not final.

Id. at 317.

The manner in which Stokes handled the Singleton transaction mirrored a yo-yo sale. During the first round of negotiations, the Singletons were led to believe that the sale was final and that the Silverado was theirs. At the same time, Stokes retained the option to enforce the bailment agreement—which it did—compelling the Singletons to return to the lot. During this second visit, Stokes told the Singletons that their credit had been approved, renegotiated the sales contract, and allowed the Singletons to drive away in the Silverado once again, believing it was theirs. Yet before the first payment became due, Stokes repossessed the truck. Apparently the financing had not been approved after all.

Stokes's deception concerning credit approval and the practice of having customers sign both an unconditional sales contract and a conditional bailment agreement are patently unfair and deceptive acts. Because Stokes admitted that it was a standard business practice to handle deals in this manner, we find that such acts were capable of repetition, having the requisite impact on the public interest. Therefore, we hold that (1) outright deception concerning credit approval and (2) the practice of having customers sign both an unconditional sales contract and a conditional bailment agreement constitute SCUTPA violations.

Stokes, and other car dealerships, could easily cure the unfairness of such practices by (1) including language in the sales agreement that the sale is conditional upon the buyer obtaining financing and (2) telling customers the truth about their credit.

Finally, given that these instances of wrongdoing are not dependent on the facts required to establish the UCC violation, we hold that the SCUTPA and the UCC claims are not factually inconsistent, entitling the Singletons to bring claims under both statutes.

CONCLUSION

In sum, we find that both debtors were entitled minimum statutory damages under S.C. Code Ann. § 9-507(1) (Supp. 2000). Additionally, we deem (1) the practice of having customers sign both an unconditional sales contract and a conditional bailment agreement and (2) outright deception regarding credit approval SCUTPA violations. Finally, because the facts necessary to establish the SCUTPA violation were not inconsistent with the facts required to establish the UCC violation, we hold that the Singletons could bring claims under both statutes.

AFFIRMED.

WALLER, BURNETT, PLEICONES, JJ., and Acting Justice James R. Barber, III., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Summit Contractors, Inc., Petitioner,

v.

General Heating & Air Conditioning, Inc., Respondent.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

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

Opinion No. 25805
Heard February 18, 2004 - Filed April 19, 2004

AFFIRMED

Charles E. Carpenter, Jr., and S. Elizabeth Brosnan, all of Richardson, Plowden, Carpenter & Robinson, P.A., of Columbia; and William D. Marvin and Steven L. Smith, both of Kessler, Cohen & Roth, P.C., of Philadelphia, Pennsylvania, for petitioner.

John L. Choate and Allan Levin, both of Cozen O'Connor, of Atlanta, Georgia, for respondent.

JUSTICE MOORE: Petitioner (Contractor) brought this action on behalf of its insurer, Crum & Forster (Insurer),[1] asserting Insurer's right to be subrogated to Contractor's claim against respondent (Subcontractor) for fire damage to a construction site. Subcontractor asserted as a defense the waiver of subrogation clause found in its contract with Contractor. We granted a writ of certiorari to review the Court of Appeals' unpublished opinion holding the waiver of subrogation clause valid. We affirm.

FACTS

Subcontractor's employee/sub-subcontractor allegedly caused the fire by negligent soldering. For purposes of this appeal, Subcontractor's liability is assumed. Insurer paid Contractor $935,000[2] under its property loss policy. The trial judge granted Subcontractor a directed verdict based on the waiver of subrogation clause and the Court of Appeals affirmed.

ISSUES

1. Are Schedules A and B of the contract controlling over other form provisions of the contract?

2. Is the contract ambiguous?

3. Is the waiver of subrogation clause ambiguous and against public policy?

DISCUSSION

1. Validity of form provisions

In the course of negotiating the contract with Contractor, Subcontractor submitted a standard form contract developed by the

[1]There is no dispute that the insurer is the real party in interest.

[2]This is the amount paid after a $1,000 deductible.

American Institute of Architects, hereinafter referred to as the "AIA form." This form contains the waiver of subrogation provision at issue. In response, Contractor submitted Schedule A and Schedule B as additional contract terms. Subcontractor made some handwritten changes to these Schedules before agreeing. The AIA form and Schedules A and B together became the agreement between the parties.

Contractor argues that Schedules A and B of the contract control over the AIA form which includes the waiver of subrogation clause. Contractor relies on provisions in these Schedules that hold Subcontractor liable for damage caused by faulty workmanship and argues these provisions invalidate the waiver of subrogation clause.[3]

The Court of Appeals found the provisions of the Schedules do not override the provisions of the AIA form because these Schedules are themselves essentially boilerplate. We agree. Michael Rodgers, Contractor's vice-president, testified Schedules A and B were Contractor's "standard" agreement form used for subcontracting. Contractor is not relying on any of the handwritten changes made to these Schedules during the parties' negotiations but points to provisions included in the standard form part of the Schedules. These standard form provisions do not control as a matter of law simply because they are not industry-wide forms like the AIA form. *Cf.* Riverside Bldg. Supply, Inc. v. Fed. Emergency Management Agency, 723 F.2d 1159 (4th Cir. 1983) (typewritten terms inserted in preprinted form reflect more exactly the agreement of the parties).

In any event, as discussed below, the waiver of subrogation clause found in the AIA form and the liability provisions of Schedules A and B are not inconsistent. Even if the provisions of the Schedules were to be given more weight, they would not invalidate the subrogation clause.

[3]These provisions are discussed in detail in Issue 2.

2. Whether the contract as a whole is ambiguous

Contractor contends the provisions of Schedules A and B conflict with the waiver of subrogation clause rendering the contract ambiguous. It argues because the contract is ambiguous, its terms must be determined by the fact-finder and a directed verdict was inappropriate. The Court of Appeals found the contract is not ambiguous and concluded the waiver of subrogation clause is enforceable. We agree.

The relevant provisions of the contract are as follows. Paragraph 13.5 of the AIA form provides:

> **13.5 Waivers of Subrogation.** The Contractor and Subcontractor waive all rights against (1) each other . . . for damages caused by fire . . . to the extent covered by property insurance . . . applicable to the Work. . . . The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

Schedule A includes the following provisions:

> 4. SUBCONTRACTOR acknowledges and agrees that it has the sole responsibility for compliance with all of the requirements of the Occupational Safety and Health Act of 1970 and agrees to indemnify and hold harmless CONTRACTOR against any legal liability or loss which CONTRACTOR may incur due to SUBCONTRACTOR's failure to comply with the above referenced Act.

7. SUBCONTRACTOR will be liable for any actions or damages caused by its material suppliers and sub-subcontractors. SUBCONTRACTOR will be responsible for damages caused by SUBCONTRACTOR, its suppliers or sub-subcontractors to the work.

32. SUBCONTRACTOR shall be held responsible for all damages to the building or the work of others resulting from his negligence.

33. SUBCONTRACTOR is to maintain all amounts of insurance listed in Specifications for the duration of the project. If no requirement is listed in Specifications, SUBCONTRACTOR is to maintain the amounts of insurance required by law for the State in which the work is being performed.

Schedule B includes the following:

1. Before work commences, the SUBCONTRACTOR shall submit an original insurance certificate indicating General Liability Coverage and Limits and Worker's Compensation Coverage. . . .

5. SUBCONTRACTOR shall be held responsible for all damages to property or the Work of others resulting from his/her Work, including consequential damages resulting therefrom.

6. Where damages to buildings and/or furnishing occur due to faulty Workmanship or faulty materials, said damages will be backcharged to the SUBCONTRACTOR including any consequential damages resulting therefrom.

Contractor contends that Subcontractor's agreement to be "held responsible" for damages and to carry liability insurance conflict with the waiver of subrogation clause. We find no conflict. Reading the contract as a whole, the waiver of subrogation clause provides that subrogation is waived <u>to the extent damages are covered by property insurance</u>. Under the provisions of Schedules A and B, Subcontractor

remains liable for any excess damages not covered by property insurance. The requirement that Subcontractor carry liability insurance would apply to excess damages and other damages not covered by property insurance.

Since there is no ambiguity, the trial court properly directed a verdict based on the waiver of subrogation clause.

3. The waiver of subrogation clause

Contractor contends the waiver of subrogation clause is itself ambiguous and should not be enforced. We disagree.

The relevant part of the waiver of subrogation clause provides as follows:

> A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

(emphasis added). The Court of Appeals interpreted this language as consistent with the liability language of Schedules A and B. Contractor contends to the contrary that the "otherwise" provision renders the waiver confusing and unenforceable.

We find no internal conflict in the clause when read with another provision of the AIA form which specifically addresses indemnification:

> 4.5 INDEMNIFICATION
> 4.6.1 To the fullest extent permitted by law, the Subcontractor shall indemnify . . . Contractor . . . from and against losses . . . arising out of or

> resulting from performance of the Subcontractor's Work . . . attributable to . . . destruction of tangible property (other than the Work itself). . . .

(parentheses in original). The "otherwise" language included in the waiver of subrogation refers back to this provision regarding indemnification for damage to property other than the Work itself. In other words, under the terms of the AIA form, even though Subcontractor must fully indemnify Contractor for damage to the property of others, Contractor waives subrogation for damage to the construction site to the extent covered by property insurance. There is no conflict within the waiver of subrogation clause.

Contractor further contends it is against public policy to enforce the waiver of subrogation clause because it unconscionably relieves Subcontractor of liability for its negligence. As noted by the Court of Appeals, other courts have upheld waiver of subrogation clauses because they apply only to property loss, they waive subrogation only to the extent covered by first party insurance, and they merely give effect to the parties' agreement to allocate risk. *See* IRMA v. O'Donnell, Wicklund, Pigozzi & Peterson Architects, Inc., 692 N.E.2d 739 (Ill. App. 1998); Viacom Internat'l, Inc. v. Midtown Realty Co., 193 A.D.2d 45 (N.Y. 1993). We decline to find such a waiver against public policy.

AFFIRMED.

TOAL, C.J., WALLER and PLEICONES, JJ., and Acting Justice Alexander S. Macaulay, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Southeast Resource Recovery, Inc., Appellant,

v.

South Carolina Department of Health and Environmental Control, Involved Citizens of the Helena Community, Rev. Nura Ray Matthews, Chairman, Little Beaver Dam Baptist Church, John L. Hunter, Paul Herbert, Eugene Maybin, Jr., John and Jessie Reeder, Lillie May Washington, William W. Parr, Sr., Eliza M. Parr and Bill Parr, Jr., Respondents.

Appeal From Richland County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 25806
Heard March 16, 2004 - Filed April 19, 2004

REVERSED

W. Thomas Lavender, Jr., of Nexsen, Pruet, Jacobs, & Pollard, of Columbia, for appellant.

Samuel Leon Finklea, of South Carolina Department of Health and Environmental Control; and Robert Guild, both of Columbia, for respondents.

PER CURIAM: This appeal concerns an industrial solid waste permit sought by Appellant, Southeast Resource Recovery, Inc. (SRRI). Respondent, South Carolina Department of Health and Environmental Control (DHEC), initially issued and later withdrew Solid Waste Landfill Permit No. 362624-1601 (the "permit"), thereby preventing SRRI's construction and operation of an industrial waste landfill in the Helena Community of Newberry County. The Involved Citizens of the Helena Community and others (Citizens), are also respondents in this proceeding.

FACTS

Before SRRI applied for an industrial waste landfill permit, SRRI submitted a written request to the Newberry County Council for a determination the proposed landfill was consistent with the Newberry County Solid Waste Management Plan (the Plan). Pursuant to S.C. Code Ann. § 44-96-290(F) (2002),[1] an applicant's proposed facility must be consistent with local land use ordinances. On August 17, 1995, the Newberry County Council determined that the proposed landfill was consistent with the Plan and issued a letter of consistency (LOC) to SRRI.

After receiving the LOC, SRRI began planning its proposed facility. During September and October 1995, SRRI performed a hydrogeologic characterization of the site at DHEC's request. In December 1995, SRRI submitted its permit application to DHEC's Bureau of Solid and Hazardous Waste. In 1996, SRRI conducted a wetlands delineation and in September of that year SRRI received a letter authorizing fill of the wetland. In June 1997, SRRI undertook another wetlands delineation after the U.S.

---

[1] This section was formerly § 44-96-290(G) and was redesignated as § 44-96-290(F) with the 2000 amendment.

Army Corps of Engineers changed the threshold for issuance of a permit to fill the wetlands. As a result of the 1997 delineation, SRRI decided to eliminate the portion of the landfill that would occupy wetland areas and voluntarily established a 200-foot buffer around the wetland.

During the 1997 legislative session, the General Assembly enacted Act No. 100, 1997 S.C. Acts 487 (Act 100), which prevents a commercial industrial solid waste landfill from being constructed within 1,000 feet of a residence. Act 100 does not define "residence."

Following the enactment of Act 100, Bill and Eliza Parr, named respondents in this action, placed a mobile home on their property, which is adjacent to SRRI's landfill site. SRRI redesigned the landfill to establish the 1,000-foot buffer from the mobile home prior to making a final permit decision.

After conducting a thorough analysis of the facility, DHEC issued the permit on September 5, 1997. DHEC applied the requirements of 25 S.C. Code Ann. Reg. 61-66 (1976) relating to Industrial Waste Landfills. One day prior to DHEC issuing SRRI its permit, a recreational camper was moved onto another area of the Parr property. DHEC did not require SRRI provide a 1,000-foot buffer from the camper.

Citizens requested a contested case hearing to challenge the issuance of the permit. SRRI also appealed DHEC's requirement that SRRI establish a 1,000-foot buffer to the mobile home. After the conclusion of the hearing, but before the issuance of a written order by the Administrative Law Judge (ALJ), the Newberry County Council revoked its LOC. In June 1998, DHEC and Citizens filed separate motions requesting the ALJ re-open the record to consider additional evidence on the County's revocation. By order dated January 4, 1999, the ALJ concluded the revocation of the LOC precluded issuance of the permit.

SRRI sought review of the ALJ order and the Board of the South Carolina Department of Health and Environmental Control affirmed the ALJ decision in its order dated June 29, 1999. SRRI petitioned for judicial review

of the Board's order. The circuit court upheld the ALJ decision, but modified the holdings. The court concluded (1) Act 100 did not apply to a recreational camper placed on the property and (2) the provision of the Newberry County Solid Waste Management Act relied upon by the ALJ did not support the finding. However, the court concluded Section 10.2 of the Plan supported the ALJ's finding. On appeal, SRRI requests this Court hold the permit be issued and effective.

ISSUES

I. Did the circuit court err in holding that the revocation of the consistency determination compelled denial of the permit?

II. Did the circuit court properly conclude the proposed facility is inconsistent with Newberry County's plan?

ANALYSIS

In environmental permitting cases, the ALJ presides as the finder of fact. S.C. Code Ann. § 1-23-600(B) (Supp. 2003). The Board, on the other hand, sits as a quasi-judicial tribunal in reviewing the final decision of the ALJ. S.C. Code Ann. § 1-23-610(A) (Supp. 2003). As the reviewing tribunal, the Board is not entitled to make findings of fact. Id. The Board's findings are based on the ALJ's findings.[2]

On appeal, the ALJ's findings must be affirmed if they are supported by substantial evidence in the record. Substantial evidence is "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." Lark v. Bi-Lo, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). A reviewing court may reverse or modify the decision of any agency if substantial rights of the appellant have been prejudiced because the findings or decisions of the agency are:

---

[2] Marlboro Park Hosp. v. South Carolina Dep't of Health and Envtl. Control, Op. No. 3774 (S.C. Ct. App. filed April 12, 2004) (Shearouse Adv. Sh. No. __ at __).

(a) in violation of the constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable probative and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(D) (Supp. 2003).

We reverse the decision of the circuit court because substantial rights of SRRI have been prejudiced. The finding of the circuit court the revocation of the consistency determination compelled denial of the permit is affected by error of law.

I.

The South Carolina Solid Waste Policy and Management Act, S.C. Code Ann. § 44-96-10, *et seq*. (2002) (the SWPMA), requires a person obtain a permit from DHEC before operating a solid waste management facility. S.C. Code Ann. § 44-96-290(A). Permits are issued based upon local need for the requested facility and the consistency of the proposed facility with local ordinances. S.C. Code Ann. § 44-96-290(E). DHEC cannot issue a permit unless the proposed facility is consistent with "local zoning, land use, and other applicable ordinances." The SWPMA does not specify procedures for DHEC to follow in making need and consistency determinations.

DHEC's practice has been to delegate to the counties the authority to determine consistency through the counties' issuance of LOCs. We conclude this delegation of authority is impermissible. S.C. Code Ann. § 44-96-290(F) does not give a county veto authority over decisions made by DHEC. There is no statutory authority providing a county's consistency determination is determinative of the ultimate permitting decision. Although Section 44-96-290(F) requires a proposed facility comply with local

standards, it does not designate the county as the final arbiter on whether the proposed facility complies with its local zoning, land use, and other ordinances.

In this case, DHEC withdrew its initial decision to issue the permit in error because it based its decision solely on Newberry County's withdrawal of the LOC. The SWPMA authorizes DHEC to "issue, deny, revoke or modify permits, registrations, or orders under such conditions as the department may prescribe…for the operation of solid waste management facilities." S.C. Code Ann. § 44-96-260(2) (2002). DHEC, not the county, is charged with ensuring such facilities meet the requirements for permitting.

II.

Under the facts of this case, there is no basis for concluding the proposed landfill is inconsistent with the Newberry County Solid Waste Management Plan. The ALJ relied on Section 4.1.3 of the Plan. Section 4.1.3 of the plan "Industrial Collection" provides:

> In Newberry County, industries are responsible for their own solid waste collection and disposal. There are several private haulers operating in the County under separate contracts with different industries. This stream of solid waste is completely outside the operation, direct knowledge or control of Newberry County.

We agree with the circuit court that Section 4.1.3 of the Plan refers only to private haulers who are operating in the County under contracts with different industries. Therefore, this provision has no application to the prohibition of the establishment of an industrial waste landfill.

Instead of relying on Section 4.1.3 of the Plan, the circuit court relied on Section 10.2 in finding the proposed facility inconsistent with the

Plan.[3] Section 10.2 discusses the goals associated with Newberry County's solid waste disposal. Section 10.2 states, in relevant part, that one of the goals is to "preserve, protect, and enhance the environmental quality of Newberry County." This broad, general statement of goals cannot serve as a basis for concluding the proposed facility is inconsistent with Newberry County's plan. To hold otherwise would invite a reviewing court to conclude, on an arbitrary and capricious basis, any proposed landfill facility falls within the ambit of such general language. Therefore, the circuit court erred in relying on Section 10.2 in holding the proposed facility inconsistent with the Plan.

Having determined the facility is not inconsistent with Newberry County's SWPMA, we conclude the permit should be issued and effective. Before issuing the initial permit in September 1997, DHEC experts determined the facility met all regulatory requirements based on a meticulous study of SRRI's proposed facility. DHEC properly applied the requirements of 25 S.C. Code Ann. Reg. 61-66 (1976) relating to Industrial Waste Landfills. A public hearing concerning the proposed facility was conducted in March 1997. DHEC received comments both during and after the hearing. These comments were addressed by DHEC in a document entitled "Responsiveness Summary." DHEC made specific findings including, but not limited to, groundwater protection, excavation procedures, and the design of disposal cells as related to the SRRI facility. Based on DHEC's thorough analysis of the proposed facility, they concluded, and we agree, the facility is not inconsistent with the County SWPMA or DHEC's regulatory requirements.

Our resolution of this matter makes unnecessary a consideration of the remaining issues presented by SRRI. The permit complies with Act 100 in that it imposes a 1,000-foot setback from the mobile home.

---

[3] Section 10.2 of the Plan appears only once in the Record. In a letter from the Newberry County attorney to the County Administrator, the County's attorney indicated the proposed landfill would violate Section 10.2.

Because DHEC's revocation of the permit was based solely on Newberry County's withdrawal of its LOC and the proposed facility is not inconsistent with the Newberry County Plan, we reverse and order the permit issued and effective.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Tamera Jean Bergstrom, Petitioner,

v.

Palmetto Health Alliance d/b/a Palmetto Baptist Medical Center of Columbia and d/b/a Baptist Medical Center, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
Costa M. Pleicones, Circuit Court Judge
Alison R. Lee, Circuit Court Judge

Opinion No. 25807
Heard January 22, 2004 - Filed April 19, 2004

VACATED IN PART; AFFIRMED IN PART

William Isaac Diggs, of Diggs & Danielsen, LLC, of Myrtle Beach, for Petitioner.

William L. Pope, of Pope & Rodgers, of Columbia, for Respondent

---

JUSTICE BURNETT: We granted the petition of Tamera Jean Bergstrom (Petitioner) for a writ of certiorari to review the Court of Appeals' decision in Bergstrom v. Palmetto Health Alliance, 352 S.C. 221, 573 S.E.2d 805 (Ct. App. 2002). We vacate the Court of Appeals' opinion in part and affirm in part.

FACTS / BACKGROUND

Petitioner was born November 16, 1979, at Baptist Medical Center (Hospital) to a 17-year-old unwed mother (Mother). Hospital and Mother's obstetrician records reflect that, prior to Petitioner's birth, Mother intended to place Petitioner for adoption. Mother, a resident of Myrtle Beach, S.C., who was estranged from her own mother due to the out-of-wedlock pregnancy, was taken by a friend's mother to see a Columbia attorney where they discussed the adoption process. Thereafter, Mother moved to Columbia and, at the suggestion of the attorney and the friend's mother, resided with Claire Rayhorn.[1]

Mother testified she had no recollection of signing any documents concerning the adoption and none were produced at trial. Further, Claire paid her living expenses and either Claire or the attorney selected her obstetrician and the hospital for the birth.

In 1979, Hospital policies and procedures relating to adoption provided the mother was to execute a "Permit to Release Baby for Adoption"; the mother or her immediate family were allowed to see the infant at any time prior to discharge; the adoptive parents were not allowed to see the infant while the infant was in Hospital; the mother was allowed to view her infant through the nursery window or in her

---

[1] Claire is referred to in the record as Claire or Clara, with a last name of Rayhorn, Raymond, Manors, or Wilson. She did not testify at trial.

room if she requested; and Hospital's social services department was to be called if there were questions about adoption.

Petitioner alleged Hospital violated several of its policies and procedures. Mother and Hospital's director of Women's and Children's Services, testified no "Permit to Release Baby for Adoption" was executed by Mother. Mother testified Claire and a Hospital nurse told her she could not see or hold her baby after it was born. She was not permitted to see Petitioner because "the baby was being placed up for adoption" and she was not the adopting parent.

This resulted in a confrontation between Mother and Claire. However, Mother did not tell Hospital personnel she decided against the adoption. She never saw Petitioner before leaving Hospital.

Mother signed two forms entitled "Permission to Release Baby to Party Other Than Mother." The forms, contained in the medical charts of mother and infant, state:

> I, the undersigned, mother of Baby Gardner, who was born in [Hospital] on November 16, 1979, hereby authorize and direct [Hospital] to release and deliver said baby to [Attorney] or his or her agents and I do hereby release and discharge [Hospital] from any claims on account of such release and delivery, and I do hereby indemnify and hold harmless the said hospital, its personnel, and my physician against any and all claims which may arise therefrom. It has been fully explained to me and I understand this does not in any way affect the permanent custody of my child and is given for the purpose of authorizing [Hospital] to permit the person named above to remove my child from the hospital as an accommodation to me.[2]

[2] The other form is identical, except much of the "hold harmless" language.

Mother, believing the adoption to be completed, made no attempt to recover her baby in the weeks or years following Petitioner's birth.

The putative adoptive parents, the Bergstroms, lived a nomadic lifestyle and Petitioner was taken into custody by Colorado authorities after an investigation revealed Ms. Bergstrom's boyfriend had taken nude photos of Petitioner at age 11.

In 1994, Colorado authorities determined Petitioner's birth certificate was forged and contacted Columbia, S.C., police. The birth certificate listed Linda Katherine Van Cleef as the mother and was signed by Linda K. Bergstrom. The investigation led police to Mother, who for the first time learned the whereabouts of Petitioner, who was then 14 years old. The investigation revealed the Columbia attorney delivered the baby to the Bergstroms at Hospital and was paid $2,000 as reimbursement for medical expenses. The adoption proceeding was not completed. Mother was granted custody of Petitioner in 1996.

This action commenced in 1998, alleging causes of action for negligence and intentional infliction of emotional distress. The circuit court denied Hospital's Rule 12(b)(6), SCRCP, motion to dismiss the negligence claim but granted Hospital's motion to dismiss the claim for intentional infliction of emotional distress. The circuit court further ruled the statutory limit on any recovery was $100,000.

The case was tried to a jury in 2000. The trial judge granted Hospital's motion for a directed verdict on the negligence claim. Petitioner appealed and the Court of Appeals affirmed, holding Hospital owed a legal duty of due care only to the Mother, not the infant. The Court of Appeals further held Petitioner could not satisfy the requirement she prove her damages were proximately caused by Hospital's alleged negligence. The Court of Appeals affirmed the dismissal of the cause of action for intentional infliction of emotional distress, and did not reach the damages limitation issue. Bergstrom, 352 S.C. at 228-233, 573 S.E.2d at 808-810.

It is not necessary to address the issues of duty or proximate cause in this case. Accordingly, we vacate the Court of Appeals' opinion addressing those matters and affirm the Court of Appeals in result.

ISSUES

I. Did the circuit court err in ruling the statutory limit on any recovery by Petitioner was $100,000?

II. Did the Court of Appeals err in affirming the pretrial dismissal under Rule 12(b)(6), SCRCP, of Petitioner's cause of action for intentional infliction of emotional distress?

STANDARD OF REVIEW[3]

A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. See also Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to appellant, the non-

[3] The record on appeal contains the circuit court's order, but does not contain Hospital's pretrial motions. The order mentions both Rule 12(b)(6) and Rule 56, SCRCP. We will review the first issue pursuant to the standard for Rule 56 motions. We will review the second issue pursuant to the standard for Rule 12(b)(6) motions, as did the Court of Appeals.

moving party below. Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976).

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999). A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory. Id. Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987).

DISCUSSION

I. Statutory limit on recovery

The circuit court ruled Petitioner's recovery was limited to $100,000 by the charitable immunity statute in effect in 1979, S.C. Code Ann. § 44-7-50 (1976). The Court of Appeals did not address this issue, given its affirmance of the dismissal of Petitioner's lawsuit on the grounds of no duty and no proximate cause. Bergstrom, 352 S.C. at 234, 573 S.E.2d at 811.

Petitioner contends the circuit court erred because, if § 44-7-50 was unconstitutional as declared in 1992 in Hanvey v. Oconee Mem. Hosp., 308 S.C. 1, 416 S.E.2d 623, then it was unconstitutional in 1979. Therefore, there is no statutory cap on liability in this case.

Hospital asserts this case is controlled by Laughridge v. Parkinson, 304 S.C. 51, 403 S.E.2d 120 (1991), in which we held the decision in Fitzer v. Greater Greenville YMCA, 277 S.C. 1, 282 S.E.2d 230 (1981), abolishing charitable immunity would not be applied retroactively. Laughridge is not controlling because it does not address whether a statute later declared unconstitutional is deemed void ab initio.

In 1977, we abolished the doctrine of charitable immunity only as it pertained to hospitals, holding a hospital could be held liable for heedless or reckless acts. A hospital would not be liable for acts that were simply negligent. Brown v. Anderson County Hosp. Ass'n, 268 S.C. 479, 234 S.E.2d 873 (1977). Thereafter, the Legislature enacted § 44-7-50, which modified charitable immunity as it applied to hospitals by providing they could be held liable for tortious acts or omissions. Act No. 182 § 3, 1977 Acts 453; Laughridge, 304 S.C. at 54 n.1, 403 S.E.2d 120 at n.1. Petitioner was born in 1979 at Hospital when § 44-7-50 was in effect.

In 1981, we abolished the doctrine of charitable immunity in its entirety. Fitzer, supra. In 1984, the Legislature enacted S.C. Code Ann. §§ 33-55-200 to -230, which limited the liability of charitable organizations to $200,000, except for charitable hospitals from which recovery was still limited to $100,000 by § 44-7-50. Act No. 505, 1984 Acts 2144.

In 1986, we held that Fitzer had, by clear implication, overruled § 44-7-50, "render[ing] charities of all kinds subject to suit to the same extent as all other persons, firms and corporations, allowing recovery of both actual and punitive damages." Hasell v. Medical Society of South Carolina, Inc., 288 S.C. 318, 321, 342 S.E.2d 594, 595 (1986), overruled on other grounds by Hanvey v. Oconee Mem. Hosp., 308 S.C. 1, 416 S.E.2d 623 (1992). Since the alleged malpractice in Hasell occurred after Fitzer totally abolished charitable immunity, the plaintiff's recovery in Hasell was no longer limited by § 44-7-50. However, we declined to address the constitutionality of § 44-7-50.

Hasell is not dispositive in the present case because the alleged negligence occurred in 1979, two years before Fitzer was decided.

In 1992, we reached the question we had declined to address in Hasell and declared § 44-7-50 unconstitutional, ruling it violated the Equal Protection Clause because there was no rational basis for treating charitable hospitals different from other charitable organizations. We held the limit on recovery from a charitable hospital was $200,000 pursuant to § 33-55-210. Hanvey v. Oconee Mem. Hosp., 308 S.C. 1, 416 S.E.2d 623 (explaining the somewhat convoluted development of the statutory and case law governing charitable immunity).[4]

"A cause of action accrues at the moment when the plaintiff has a legal right to sue on it. The law presumes at least nominal damages at that point. The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose." Stephens v. Draffin, 327 S.C. 1, 5, 488 S.E.2d 307, 309 (1997) (tort claims of patient who had been treated for years by his physician, and claims of patient's wife, accrued before the date contributory negligence was abrogated; thus their claims were controlled by doctrine of contributory negligence as that rule was in effect when their claims first accrued) (citations omitted).

"In South Carolina, the law in effect at the time the cause of action accrued controls the parties' legal relationships and rights." Id; see also Tilley v. Pacesetter Corp., 355 S.C. 361, 371, 585 S.E.2d 292, 297 (2003) (plaintiffs' claims accrued prior to filing of class action lawsuit; therefore, version of consumer protection statute in effect when plaintiffs filed the lawsuit and court granted summary judgment was controlling); Murphy v. Owens-Corning Fiberglas Corp., 356 S.C. 592, 590 S.E.2d 479, 482-484 (2003) (cause of action ordinarily

[4] In 1994, the Legislature repealed § 33-55-210 and enacted S.C. Code Ann. § 33-56-180 (Supp. 2003), which presently limits a plaintiff's recovery from a charitable organization to the same limits as contained in South Carolina Tort Claims Act.

accrues when facts relating to negligence and damages exist which authorize one party to maintain an action against another); Swindler v. Swindler, 355 S.C. 245, 247 n.1, 584 S.E.2d 438, 439 n.1 (Ct. App. 2003) (applying provisions of Uniform Commercial Code in effect when cause of action accrued).

Petitioner's cause of action accrued in 1979 when Hospital allegedly failed to follow its adoption policies and Petitioner was discharged to an attorney, who in turn delivered her to a stranger. Facts relating to Hospital's negligence and Petitioner's damages existed in 1979, regardless of any future increase in alleged damages or the fact the statute of limitations was tolled until Petitioner reached the age of majority. See S.C. Code Ann. § 15-3-40 (Supp. 2003) (minor tolling provision).

The more difficult question is whether our declaration in 1992 in Hanvey, supra, of the unconstitutionality of § 44-7-50 means the statute was unconstitutional from the date of its enactment in 1977. We have not often addressed the issue of the retroactivity of a declaration of the unconstitutionality of a statute. A review of our cases, as well as foreign cases, reveals that such a ruling generally means the statute is void ab initio, absent special circumstances. See cases collected in West's Digests, Statutes, Key Nos. 63 and 64.

Statutes are presumed to be constitutional and will not be found to violate the constitution unless their invalidity is proven beyond a reasonable doubt. See, e.g., Knotts v. S.C. Dep't of Natural Resources, 348 S.C. 1, 6, 558 S.E.2d 511, 513 (2002); Feldman & Co. v. City of Charleston, 23 S.C. 57, 66 (1885). When a statute is found unconstitutional, we have recognized the "general rule that an adjudication of [the] unconstitutionality of a statute ordinarily reaches back to the date of the act itself. . . ." Trustees of Wofford College v. Burnett, 209 S.C. 92, 102, 39 S.E.2d 155, 159 (1946) (concluding tax abatements granted by state and local officials were voided by court's declaration that statute purporting to grant property tax exemption to colleges for real estate not actually occupied by colleges was

unconstitutional); Herndon v. Moore, 18 S.C. 339, 354 (1883) (recognizing general principle).

Generally, "when a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; . . . it constitutes a protection to no one who has acted under it." Atkins v. Southern Express Co., 94 S.C. 444, 453, 78 S.E. 516, 519 (1913) (holding that portions of criminal statute which prohibited importation of alcoholic beverages into South Carolina from another state for personal use were unconstitutional when enacted as statute violated interstate commerce principles); Feldman & Co. v. City of Charleston, 23 S.C. 57 (1885) (issuance of $2 million in "fire loan" bonds under a city ordinance, which later was ratified by an act of Legislature, was for private purposes and thus violated constitutional requirement that taxes be levied only for public purposes; city's ordinance and Legislature's act were unconstitutional and void when enacted, which meant the bonds were not a valid debt of city and no action could be maintained to enforce their payment); see also 16A Am.Jur.2d Constitutional Law §§ 203 to 206 (1998) (discussing general rule and its exceptions); 16 C.J.S. Constitutional Law § 108 (1984) (same).

However, we also have recognized the necessity of upholding the validity of transactions or events that occurred before a statute was declared unconstitutional. See Knotts, 348 S.C. at 11, 558 S.E.2d at 516 (while statute allowing members of legislative branch to oversee spending of funds was an unconstitutional violation of separation of powers and void in its entirety, executive branch agency would still be allowed to fulfill its proviso obligations under recent appropriations act); O'Shields v. Caldwell, 207 S.C. 194, 224, 35 S.E.2d 184, 196 (1945) (a public officer charged with disbursing funds usually is not liable for paying out public money when directed to do so by statute even when the statute later is found unconstitutional, unless officer acted fraudulently or in bad faith) (Oxner, J., dissenting in

part)[5]; Herndon, 18 S.C. at 352-358 (applying exceptional doctrine of communis error facit jus – "common error makes right" – to hold the great number of sales involving thousands of acres of property during ten-year period by probate courts were valid even though probate courts were later determined not to have subject matter jurisdiction to conduct such sales because statute purporting to grant such jurisdiction was unconstitutional).

Section 44-7-50, which we declared unconstitutional in 1992, was unconstitutional from the date of its enactment in 1977 and thus void ab initio. A close reading of the few South Carolina cases discussing the general rule indicates it is followed except in special or unusual circumstances, such as when doing so would create widespread havoc involving a great number of people or transactions, spawn unnecessary litigation, or result in flagrant injustice. See Herndon, supra, and O'Shields, supra. None of those situations is presented in the instant case.

Petitioner's cause of action accrued in 1979 and is governed by the law then in effect. Our conclusion § 44-7-50 was void ab initio means the controlling law in 1979 was Brown, 268 S.C. 479, 234 S.E.2d 873. Under that case, Petitioner is required to prove Hospital's acts were reckless, not simply negligent. Viewing the facts in the light most favorable to Petitioner as we must, we conclude, while Hospital arguably may have acted negligently in failing to follow certain policies, Hospital's acts as a matter of law do not rise to the required level of recklessness. Therefore, even if we assume without deciding that Hospital owed a duty to both Mother and Petitioner, and if we were to apply the maxim that proximate cause is an issue for the jury, Petitioner's cause of action nevertheless fails because she has not presented evidence Hospital acted recklessly. See Rule 220(c),

---

[5] The justices apparently agreed unanimously with this general principle, although it was stated in the dissent. The justices disagreed on whether the county treasurer was entitled to a jury trial on the payment of funds to himself.

SCACR (appellate court may affirm for any reason appearing in the record).

II. Dismissal of action for intentional infliction of emotional distress

The circuit court dismissed Petitioner's cause of action for intentional infliction of emotional distress, ruling pursuant to Rule 12(b)(6), SCRCP, that Petitioner failed to state facts sufficient to constitute a cause of action. The Court of Appeals affirmed, but reasoned the facts as stated in the complaint failed to show the Hospital's conduct was the proximate cause of Petitioner's damages. Bergstrom, 352 S.C. at 233-234, 573 S.E.2d 811.

To state a claim for intentional infliction of emotional distress, a plaintiff must show (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community; (3) the actions of defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it. Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981).

The facts relating to Hospital set forth in Petitioner's complaint are that Mother was admitted to Hospital for delivery, Hospital's nurse repeatedly refused to let her see Petitioner because she was not the adopting parent, and Hospital forced Mother to sign a form against her will authorizing an attorney to remove Petitioner from Hospital.

We conclude the circuit court erred in dismissing this action when the facts and inferences therefrom as set forth in the complaint are viewed in the light most favorable to Petitioner. If Hospital recklessly or intentionally made repeated and coercive efforts to separate a mother from her newborn infant, that might well

constitute outrageous conduct that we would find utterly intolerable in a civilized community. Such conduct conceivably could cause severe emotional distress.

However, the evidence presented at trial revealed that, while Hospital's staff arguably may have acted negligently in failing to follow certain policies, the staff did not act recklessly or intentionally in the extreme or outrageous manner described in the complaint. Thus, it would have been proper for the trial judge to dismiss the action for intentional infliction of emotional distress on a directed verdict motion at the close of Petitioner's case. Accordingly, we affirm in result the ruling of the Court of Appeals on this issue. See Rule 220(c), SCACR (appellate court may affirm for any reason appearing in the record).

CONCLUSION

We conclude it is unnecessary to address the issues of duty or proximate cause in this case. Accordingly, we vacate those portions of the Court of Appeals' opinion. We conclude § 44-7-50 was void ab initio due to the 1992 decision finding it unconstitutional.

Absent that statute, the law in effect in 1979 when Petitioner's cause of action accrued requires Petitioner prove Hospital's actions were reckless, not merely negligent. Petitioner in her negligence action has not met the requisite burden of production of evidence, viewing the facts adduced at trial in the light most favorable to her. Petitioner's action for intentional infliction of emotional distress fails for similar reasons; consequently, we affirm in result the dismissal of this action

VACATED IN PART; AFFIRMED IN PART.

TOAL, C.J., MOORE, WALLER, JJ., and Acting Justice James E. Brogdon, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frank Gordon, Jr., as Attorney-in-Fact for Dorothy Gordon, Respondent,

v.

Rudolph Robert Drews, and Raymond Beasley, Appellants.

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 3775
Submitted December 8, 2003 – Filed April 12, 2004

AFFIRMED

Kerry W. Koon, of Charleston, for Appellants.

Justin O'Toole Lucey, of Mt. Pleasant, for Respondent.

CURETON, A.J.: Respondent Frank Gordon[1] brought this action against Rudolph Robert Drews alleging the illegal sale of stock in a corporation, misrepresentation, and breach of fiduciary duty. The trial court: (1) found Drews liable for the sale of unregistered securities in the sum of $50,000; (2) dismissed the other claims; and (3) awarded interest and attorney's fees. Drews appeals. We affirm.

---

[1] Gordon brought this action on behalf of his mother, Dorothy Gordon. Gordon used his mother's funds to purchase the stocks in question and acted at all times on her behalf.

FACTS/PROCEDURAL HISTORY

Drews and his business partner, Raymond Beasley, decided to open a hardware store in the West Ashley area of Charleston in 1996. The store, known as Builders Station, was incorporated, and its board of directors approved a business plan and capital structure that provided for the sale of stock to outside investors.

Drews and Beasley agreed that each would own a twenty-five percent share of stock in Builders Station. The other half of the outstanding shares would be sold to outside investors. Drews and Beasley also agreed they would each acquire an additional one-half share for each share issued to outsiders. Ultimately, Builders Station had eleven shareholders.

Among the investors the company was able to attract was Frank Gordon. On several occasions, Gordon discussed with Drews and Beasley the possibility of investing in the new store. Before agreeing to purchase shares, Gordon asked about the capital structure of the company. Gordon testified he expressed concern that "the monies put in by investors were no where [sic] near sufficient." Drews reportedly tried to allay his concern by informing Gordon the company anticipated receiving a $250,000 loan that would be guaranteed by the Small Business Administration. Gordon also claimed Drews and Beasley made oral representations that receipt of the loan was all but certain by assuring Gordon it was a "done deal" or "in the bag." After receiving assurances from Drews and Beasley, Gordon purchased fifty shares at $1,000 per share.

The $250,000 loan, however, never came to fruition. When Drews originally negotiated the terms of the loan, he agreed to pledge several parcels of real property he owned as collateral. He later sought to revise the terms, seeking a right of indemnification for his collateral, additional compensation, or both. Drews' attempts to renegotiate the loan delayed and ultimately prevented its consummation.

The company's board of directors (of which all eleven shareholders were members) learned of the dispute over the guaranty and collateralization of the SBA loan in November 1996. Despite the Board's additional attempts to obtain the loan, the issue was never resolved. The Board later decided to end Drews' relationship with the company. Ultimately, a "Release and Settlement Agreement" was executed releasing Drews and the shareholders from all liability arising out of their business relationship with the corporation. Though a majority of the shareholders signed the Release, Frank Gordon refused.

The business did not succeed and ultimately closed in October 1997.

Gordon brought suit against Drews, claiming the sale of stock was illegal and fraudulent under section 35-1-1490 of the Uniform Securities Act, S.C. Code Ann. §§ 35-1-10 to -1590 (Supp. 2003).[2] He also asserted claims for common-law misrepresentation and breach of fiduciary duty in connection with Drews' sale of the stock.

The trial court found Drews was liable under section 35-1-1490(1) for the illegal sale of unregistered securities. The court concluded, however, that Drews was not liable for the fraudulent sale of stock under section 35-1-1490(2), nor for common-law misrepresentation or breach of fiduciary duty. Drews appeals.

STANDARD OF REVIEW

Section 35-1-1490 provides that a person who purchases a security as a result of an illegal or fraudulent sale or offer "may sue either at law or in equity to recover the consideration paid for the security." S.C. Code Ann. § 35-1-1490 (Supp. 2003).

[2] There have been no substantive changes to the Uniform Securities Act since the underlying cause of action arose. Accordingly, we cite to the most current version of the Act.

To determine whether this suit is legal or equitable, we must look to the "main purpose" of the action as reflected by the nature of the pleadings and proof, and the character of relief sought under them. Ins. Fin. Servs., Inc. v. South Carolina Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978); see also Alford v. Martin, 176 S.C. 207, 212, 180 S.E. 13, 15 (1935) (finding "[t]he character of an action is determined by the complaint in its main purpose and broad outlines and not merely by allegations that are merely incidental"); Nat'l Bank of South Carolina v. Daniels, 283 S.C. 438, 440, 322 S.E.2d 689, 690 (Ct. App. 1984) (noting that, although the determination of whether an action is legal or equitable "must be determined from the character of the action as framed in the complaint," the court may also consider "the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action").

In this action, the only cause of action before this Court is Gordon's claim seeking return of the price he paid for the Builders Supply stock. Furthermore, this was the exclusive remedy allowed by the trial court. The action, therefore, is rescissionary in nature and is appropriately reviewed under the equitable standard of review. See Brown v. Greenwood Sch. Dist. 50 Bd. of Trustees, 344 S.C. 522, 525, 544 S.E.2d 642, 643 (Ct. App. 2001) (holding an action to rescind a contract was equitable in nature).

Accordingly, this Court may "find facts in accordance with its views of the preponderance of the evidence." Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Our broad scope of review, however, does not require this Court to disregard the findings of the trial judge "who saw and heard the witnesses and was in a better position to judge their credibility." Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000).

LAW/ANALYSIS

I. Drews' Liability Under the Securities Act

The South Carolina Uniform Securities Act prohibits the sale of securities in this state unless the securities are properly registered with the securities commissioner or the securities are subject to an exemption. See S.C. Code Ann. § 35-1-810 (Supp. 2003). Drews admits the Builders Supply stock at issue in this case was not registered with the commissioner. Drews, however, claims he is not liable for the illegal sale of stock because (A) the stock offering was an exempt transaction under the Securities Act, and (B) he did not participate in the sale of the stock.

A. Exemption from Registration Requirement

Drews argues the trial court erred in finding the offering of stock in Builders Station was not exempt from registration as a limited offering. We disagree.

There are numerous registration exemptions provided for under the Securities Act in sections 35-1-310 and 35-1-320. Only one of these exemptions—the "limited offering" exemption—arguably applies in the present case. Section 35-1-320(9) defines this exemption, in pertinent part, as follow:

> Any transaction pursuant to an offer directed by the offeror to not more than twenty-five persons . . . in this State during any period of twelve consecutive months, whether or not the offeror or any of the offerees is then present in this State, if (a) the seller reasonably believes that all the buyers in this State . . . are purchasing for investment and (b) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective buyer in this State.

S.C. Code Ann. § 35-1-320(9) (Supp. 2003). Specifically at issue in the present case is (1) whether Drews offered the Builders Station stock to more than twenty-five people and (2) whether Drews received remuneration for soliciting the potential buyers.

We are mindful that we must narrowly construe exemptions under the Act because the securities laws are remedial in nature and, therefore, should be liberally construed to protect investors. McGaha v. Mosley, 283 S.C. 268, 273, 322 S.E.2d 461, 464 (Ct. App. 1984). Furthermore, in arguing the Builders Station stock was exempt from the Act's registration requirements, Drews bears the burden of proving he was entitled to the claimed exemption. S.C. Code Ann. § 35-1-340 (Supp. 2003). We find he has failed to satisfy this burden.

1. Number of Offerees

We find Drews failed to sufficiently prove he offered Builders Station stock to no more than twenty-five people.

Drews presented no evidence regarding the number of people to whom he offered stock. Raymond Beasley, Drews' original business partner, testified that Drews probably offered the stock to "dozens" of people. He further testified, "I believe we did it to more than 25 people" and that Drews offered the stock to "dozens and dozens."

Drews attempts to circumvent this obvious lack of proof by arguing the limited offering exemption applies when there are not more than twenty-five "ultimate purchasers" of the offered security. This assertion is without merit.

As always, we look first to the plain meaning of the statute when interpreting its language. See Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (holding that words used in a statute "must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation"). Under the plain language of section 35-1-320(9), we find this Court is compelled to reject Drews' contention that the exemption

applies to all transactions involving twenty-five or fewer "purchasers." The statute speaks only in terms of an "offer," not a "sale" or "purchase." The Securities Act specifically defines "offer" and "offer to sell" as including "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value." S.C. Code Ann. § 35-1-20(13)(b) (Supp. 2003). We glean no intent on the part of the General Assembly to veer from the plain meaning of this statutory language.

Though our courts have not addressed the application of our state's limited offering exemption, similar exemptions under the federal securities laws have been interpreted to require a consideration of the number of offerees, not ultimate purchasers. See, e.g., Doran v. Petroleum Mgmt. Corp., 545 F.2d 893, 900 (5th Cir. 1977) (holding that under the private offering exemption of 15 U.S.C.A. § 77d(2), "[t]he number of offerees, not the number of purchasers, is the relevant figure in considering the number of persons involved in an offering"); SEC v. Kenton Capital, Ltd., 69 F. Supp. 2d 1, 11 (D.D.C. 1998) (finding the "number of offerees" to be a critical factor in determining whether the private placement exemption applies); see also 69A Am. Jur. 2d Securities Regulation § 143 (1993) (commenting that "the failure to prove the number of offerees, not the number of ultimate purchasers, is fatal to the claim of the [limited offering] exemption").

Although there were only eleven "ultimate purchasers" in this case, a clear reading of the statute reveals that it is the number of offerees, not the number of ultimate purchasers, with which we are concerned. The only evidence presented concerning this question was Beasley's testimony that the stock was offered to more than twenty-five people. Because Drews did not introduce any evidence to the contrary, we conclude Drews failed to meet his burden to prove Builders Supply stock was offered to no more than twenty-five persons.

2. Remuneration for Sales

We find Drews is also barred from claiming the limited offering exemption because he received compensation for his sales of the Builders Supply stock.

For each share of Builders Supply stock Drews sold to outside investors, he received an additional one-half share of stock. Drews argues he and Beasley each received an additional one-half share in order to maintain their status as fifty percent shareholders in the corporation, not as compensation for selling stock. We disagree with this characterization.

Again, we look first to the plain meaning of the statutory language. "Remuneration" is defined as "payment; compensation" and "the act of paying or compensating." Black's Law Dictionary 1298 (7th ed. 1999). Other jurisdictions have held that similar share distribution schemes constituted compensation for purposes of determining remuneration under their securities laws. See, e.g., PIC Oil Co. v. Grisham, 702 P.2d 28, 33 (Okl. 1985) (holding that receipt of securities by promoters for prices substantially below those paid by outside investors amounted to indirect compensation because the "effect of the interests retained by the [promoters] was to dilute the equity paid by outside investors and to mislead [the outside investors] . . . into believing that [promoters] were contributing a proportionate share of capital for interests retained"); Prince v. Heritage Oil Co., 311 N.W.2d 741, 746 (Mich. App. 1981) (holding the sale of undivided fractional interests in oil and gas leases constituted the sale of securities, and the retention of leasehold working interests in the wells amounted to remuneration).

There is no question that the additional shares Drews received when selling the stock represented an increase in the value of his interest in the corporation. For every two shares Drews sold, he received another share. Thus, he received something of value for work he performed. We conclude the trial court did not err in finding Drews was remunerated for the sale of Builders Supply stock.

B. Liability as Seller of Unregistered Security

Drews contends the trial court erred in finding he was liable as a "person who offers or sells a security" as defined under the Securities Act. We disagree.

Section 35-1-1490 is the operative provision imposing liability on those who engage in the illegal sale of stock. In pertinent part, it provides:

> Any person who:
>
> > (1) offers or sells a security in violation [of the registration requirements of the Securities Act] . . . or
> >
> > (2) Offers or sells a security by means of any untrue statement of material fact or any omission to state a material fact . . . , the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission;
>
> Is liable to the person buying the security from him . . . .

S.C. Code Ann. § 35-1-1490 (Supp. 2003).[3]

In evaluating subsection (2) of this statute, our Supreme Court defined a person "who offers or sells a security" in Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993). The Biales court expressly

[3] Gordon was allowed to amend his complaint to conform with the evidence at the conclusion of trial to include an action under both section 35-1-1490(1) and (2). In the final order, the trial court found Gordon was entitled to recover from Drews for a violation of section 35-1-1490(1). However, the court went on to hold that Gordon could not prevail under subsection (2) because Drews met his burden of showing he could not have known of the untruth of his statements. Accordingly, we evaluate the trial court's order as applied to subsection (1).

adopted the "financial benefits test" articulated by the United States Supreme Court in Pinter v. Dahl, 486 U.S. 622, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988), interpreting a federal law comparable to subsection (1).[4] The Court held that a person "who offers or sells a security" within the meaning of the Securities Act "is not limited to the owner who passes title"; however, to come within the definition, "a nonowner must (1) solicit the purchase, and (2) be motivated at least in part by a desire to serve his own financial interest or that of the owner of the security." Biales, 315 S.C. at 169, 432 S.E.2d at 484-85. In Biales, the Court found that an escrow agent, who had disbursed funds arising from the purchase of securities in property to his client, did not offer, solicit an offer, or pass title to an alleged security within the meaning of the Securities Act where the agent had not "persuaded or urged" the creditor to purchase the securities in the property. Id. at 170, 432 S.E.2d at 485. The Court went on to adopt the Pinter definition as applicable to the entire statute. Id. ("We, therefore, adopt the Pinter definition of a person "who offers or sells a security" as applicable to section 35-1-1490.").

We are convinced by the evidence in the record that Drews actively solicited—that is, persuaded or urged—Gordon to purchase shares in Builders Supply. Drews admitted he met with Gordon at Drews' office to discuss investing in Builders Supply, at which time Drews provided Gordon with promotional materials he had prepared.

---

[4] The Pinter Court limited its holding to Section 12(1) of the Securities Act, codified at 15 U.S.C.A. § 77*l* (1981), holding "this case does not present, nor do we take a position on, the scope of a statutory seller for the purposes of [Section] 12(2)." Pinter, 486 U.S. at 642 n.20, 108 S.Ct. at 2076 n.20, 100 L.Ed.2d at 679 n.20. Although many state courts, including South Carolina, have adopted the Pinter "financial benefits test" as applicable to their state statutes comparable to Section 12(2), some have refused to extend the definition of seller and have instead adopted a "substantial factor test." See, e.g., Hoffer v. State, 776 P.2d 963, 964-65 (Wash. 1989) (refusing to extend the Pinter test to subsection (2) of the state statute and maintaining the "substantial factor test" to evaluate that section as previously adopted by the court).

Beasley testified that Drews' "specific and total job" was to raise capital for the new business. He also testified that: "Frank Gordon was told by the two principal stockholders of Builders Station, Raymond Beasley and R.R. Drews, that financing was in place, and the SBA loan had been procured, in the bag . . . awaiting final signings."

We also find sufficient evidence to conclude Drews' solicitation of Gordon was motivated at least in part by a desire to serve his own financial interests and that of his fellow shareholders, thus satisfying the second prong of the Biales/Pinter test. It can hardly be disputed that the success of the Builders Supply venture depended on the ability of Beasley and Drews to raise sufficient capital. Therefore, they had a direct financial incentive to market and sell shares in the new company.

Accordingly, we find no error with the trial court's finding Drews was liable for the illegal sale of stock.

II. Release and Settlement Agreement

Drews next argues the trial court erred in finding Gordon was not bound by the Release and Settlement Agreement executed by a majority of the Builders Station board members. We disagree.

It is undisputed that Gordon did not sign the agreement. Drews, however, contends the release was binding against Gordon even though he did not sign it because he "accepted the benefits of the release."

Drews argues this result is mandated by our Supreme Court's holding in Watson v. Coxe Bros. Lumber Co., 203 S.C. 125, 26 S.E.2d 401 (1943). We find this case inapposite. Watson involved an employee of the lumber company that had been injured on the job. When the employee brought suit against the company for damages, the company claimed it had been released from liability when it paid the employee an agreed-upon settlement. The Court held that the employee must return the settlement payment before suing on the underlying action. Id. at 135, 26 S.E.2d at 404.

Unlike the injured employee in Watson, Gordon did not enter into an agreement to receive any compensation or other benefit in exchange for Drews' resignation. The "benefit" Drews claims Gordon allegedly received was "an incremental increase in [his] percentage of stock in relation to the outstanding number of shares." Again, unlike Watson, this "benefit" was not bargained for by Gordon, nor was Gordon capable of returning this "benefit" to the company since the change in his percentage ownership was merely incidental to the fixed number of shares he had purchased.

Furthermore, any claim that Gordon impliedly "ratified" the agreement without signing it is equally without merit. The record reflects that, at the board of directors meeting during which the settlement agreement was presented and signed, Gordon specifically asked Builders Supply's corporate attorney whether he would be bound by the agreement if he did not sign. He was told he would not be so bound.

For these reasons, we find the trial court correctly ruled Gordon was not bound by the Release and Settlement Agreement.

III. Laches

Drews also asserts Gordon's claims are barred by laches. We disagree.

"Laches" is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Muir v. C.R. Bard, Inc., 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct. App. 1999); Treadaway v. Smith, 325 S.C. 367, 378, 479 S.E.2d 849, 855-56 (Ct. App. 1996). "Delay alone is not enough to constitute laches; it must be unreasonable, and the party asserting laches must show prejudice." Brown v. Butler, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001); Hallums v. Hallums, 296 S.C. 195, 130 S.E.2d 525 (1988).

Parties seeking recovery under section 35-1-1490 must tender their securities before recovering the consideration paid for the shares. S.C. Code Ann. § 35-1-1490 (Supp. 2003). Gordon tendered his shares during the trial. Drews asserts Gordon's claims are barred by laches because he tendered his securities more than four years after Builders Supply ceased business operations.

Section 35-1-1510, however, provides: "Any tender specified in Section 35-1-1490 may be made at any time before entry of judgment." S.C. Code Ann. § 35-1-1510 (Supp. 2003). Gordon, therefore, tendered his shares within the statutorily prescribed time limit. Accordingly, we will not apply the equitable doctrine of laches in a manner that would subvert this explicit statutory provision.

Moreover, we discern no prejudice to Drews due to Gordon's delay in tendering his shares. Gordon filed his initial complaint over one and one-half years before the action went to trial. Drews had no reason to believe Gordon would not tender his shares within the time period allowed by statute.

We conclude the trial court was correct to deny Drews' request to dismiss Gordon's claims as barred by laches.

IV. Attorney's Fees

Lastly, Drews argues the trial court's award of $42,693.50 in attorney's fees to Gordon was unreasonable. We disagree.

As a general rule, the amount of attorney's fees to be awarded in a particular case is within the discretion of the trial judge. Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 385-86, 377 S.E.2d 296, 298 (1989). The award, however, must be reasonable. Id.

There are six factors for the trial court to consider when determining an award of attorney's fees: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5)

beneficial results obtained; and (6) customary legal fees for similar services. Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). Upon request for attorney's fees that are authorized by contract or statute, the trial court should make specific findings of fact on the record for each of these factors. See Jackson, 326 S.C. at 308, 486 S.E.2d at 760 (holding that, "on appeal, an award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor"); Blumberg v. Nealco, Inc., 310 S.C. 492, 494, 427 S.E.2d 659, 661 (1993) (holding that the "court should make specific findings of fact on the record for each factor").

In the present case, the trial court entered specific findings for each of the required factors outlined in the case law. These findings are sustained by the evidence in the record. Thus, the award is affirmed.

CONCLUSION

We find the trial court properly found Drews liable for the illegal sale of an unregistered security under the Securities Act, and that Drews failed to prove his entitlement to the limited offering exemption under the Act. Also, for the reasons stated above, Drews' other claims and defenses are without merit. The trial court's rulings are therefore

AFFIRMED.

GOOLSBY and ANDERSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Caroline Boyd and The Caroline Collection, Inc., Appellants,

v.

BellSouth Telephone Telegraph Company, Inc., aka BellSouth Telecommunications, Inc., now known as BellSouth, Respondent.

Appeal From Bamberg County
J. Martin Harvey, Special Referee

Opinion No. 3776
Heard November 5, 2003 – Filed April 12, 2004

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

J. D. Mosteller, III, of Barnwell and Stephen A. Spitz, of Columbia, for Appellants.

Richard B. Ness, of Bamberg, for Respondent.

HOWARD, J.: Caroline Boyd, on behalf of herself and her antique business, The Caroline Collection, Inc., sued BellSouth Telephone Telegraph Company, Inc., a/k/a BellSouth Telecommunications, Inc., now known as BellSouth ("BellSouth"), seeking to establish an easement over BellSouth's property. Specifically, Boyd alleged she possessed an easement by necessity, pre-existing use, or estoppel. The special referee granted summary judgment to BellSouth, concluding no easement arose under any view of the facts. Boyd appeals, arguing factual issues precluded summary judgment as to each cause of action. We affirm in part, reverse in part, and remand.

FACTUAL/PROCEDURAL BACKGROUND

The two properties involved in this litigation are located in the City of Denmark, South Carolina. At one time, BellSouth owned both properties under its predecessor name, AT&T. As one parcel, the property was bounded on three sides by public streets.

In 1923, AT&T built a three-story building to house offices and switching equipment on the front portion of the lot. Thereafter, BellSouth constructed a concrete driveway running from the street at the back of the property to double-doors at the back of the building. These rear doors lead to the basement of the building.

In 1988, BellSouth severed the front lot, selling it to the City of Denmark. The City continued using the driveway to access the rear of the building. Approximately three years after the original severance, the City sold the lot and building to Boyd's husband, who in turn transferred it to Boyd to use as a retail antique store. According to Boyd's husband, driveway access was a consideration in the decision to purchase the property. Boyd asserts her husband was acting on behalf of both himself and Boyd in the purchase of the building, in a joint venture, to open the antique business.

Following the purchase, BellSouth gave Boyd access to the driveway by allowing her to have a lock and key to the gate located at

the street fronting on BellSouth's property. Boyd used this driveway to accept deliveries from tractor-trailers carrying large furniture, such as pianos, which she placed in the basement level of the antique store. However, after the terrorist attack on the United States on September 11, 2001, BellSouth increased the security to its property, notifying Boyd it intended to place a fence along her back property line separating Boyd's property from BellSouth's property, thereby cutting off access to the driveway.

In response, Boyd sued BellSouth, arguing the court should grant her continued use of the driveway by virtue of an easement by necessity and an easement by pre-existing use. Furthermore, Boyd claimed BellSouth made representations to her husband at the time he purchased the property, estopping BellSouth from claiming no easement existed. The case was referred to a special referee.

BellSouth moved for summary judgment on all of Boyd's causes of action. The special referee concluded no questions of fact existed and granted summary judgment. Boyd appeals.

STANDARD OF REVIEW

To obtain summary judgment, the moving party must demonstrate there is "no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Rule 56, SCRCP. In deciding whether to grant summary judgment, trial courts must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. Id. Alternatively stated, "if the pleadings and evidentiary matter in support of summary judgment do not establish the absence of a genuine issue of material fact, summary judgment must be denied . . . ." Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999). Furthermore, "[a]n appellate court reviews the granting of summary judgment under the same standard applied by the trial court." Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998)

LAW/ANALYSIS

I. Easement By Necessity

Boyd argues the special referee erred by granting summary judgment on her claim for easement by necessity. We disagree.

A party claiming to be benefited by an easement by necessity must demonstrate the existence of the following three elements: 1) unity of title; 2) severance of the title; and 3) necessity of the easement. Morrow v. Dyches, 328 S.C. 522, 529, 492 S.E.2d 420, 424 (Ct. App. 1997).

The third element, that of necessity, requires a showing of more than convenience. Morrow, 328 S.C. at 529, 492 S.E.2d at 424. The doctrine of easement by necessity is based upon the presumption that the grantor intended the grantee of a landlocked parcel to have access to his property, a right recognized as essential to the enjoyment of the land. Id. Thus, "[this] doctrine only provides reasonable access to the dominant estate when there is none; it does not provide a means for ensuring a preferred method of access to a particular portion of a tract when access to the tract is otherwise available." Id.

Public streets border Boyd's property. Therefore, we agree with the conclusion of the special referee that no easement by necessity arises under the facts of this case. Rather, under any view of the evidence, Boyd has reasonable access to her property. Accordingly, we hold the special referee properly granted summary judgment.

II. Implied Easement by Pre-existing Use

Boyd argues the special referee erred by granting summary judgment on her claim for an implied easement by pre-existing use. We agree.

An easement by pre-existing use exists where: 1) the dominant and servient tracts of land originated from a common grantor; 2) the

use was in existence at the time the original grantor severed the tracts; and 3) the use was apparent, continuous, and necessary for enjoyment of the dominant tract. Crosland v. Rogers, 32 S.C. 130, 133, 10 S.E. 874, 875 (1889); see Slater v. Price, 96 S.C. 245, 255-56, 80 S.E. 372, 374 (1913) (holding the trial court did not err by charging the jury on the law of easement by pre-existing use); 25 Am. Jur. 2d Easements and Licenses § 27 (1996) ("Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of the estate in favor of another part, which servitude is in use at the time of severance and is necessary for the reasonable enjoyment of the other part, on a severance of the ownership a grant of the right to continue such use arises by implication of law."); Russakoff v. Scruggs, 400 S.E.2d 529, 532 (Va. 1991) (holding to establish an easement by pre-existing use, one must demonstrate: "(1) the dominant and servient tracts originated from a common grantor, (2) the use was in existence at the time of the severance, and that (3) the use is apparent, continuous, and reasonably necessary for the enjoyment of the dominant tract."); Ryerson Tower, Inc. v. St. James Towers, Inc., 517 N.Y.S.2d 48, 49 (N.Y. App. Div. 1987) ("An implied easement arises when two adjacent parcels of land were previously held in common title and an intent can be ascertained from the circumstances surrounding the land's previous use and the conveyance that the holder of one parcel is to have a right to pass through the other parcel, or to make some other such limited use of it."); Underwood v. Shepard, 521 So.2d 1314, 1316 (Ala. 1988) (holding an easement by pre-existing use exists, where the following are demonstrated: 1) unity of ownership; and 2) a use during that ownership that was open, visible, continuous, and reasonably necessary to the estate granted); see also Charles C. Marvel, Annotation, What Constitutes Unity of Title or Ownership Sufficient for Creation of an Easement by Implication or Way of Necessity, 94 A.L.R.3d 502 (1979) ("[W]here, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part, which servitude is in use at the time of severance and is necessary for the reasonable enjoyment of the severed part, a grant or reservation of the right to continue such use arises by implication of law.").

The term necessary in the context means, "there could be no other reasonable mode of enjoying the dominant tenement without this easement . . . ." Crosland, 32 S.C. at 133, 10 S.E. at 875.

In a light most favorable to Boyd, the evidence within the record indicates BellSouth was the common owner of the two properties. Furthermore, prior to the severance, BellSouth used Boyd's building as a commercial building, and the driveway in question was used to access the rear doors of the building. The use was present at the time of severance and apparent and continuous during the period of common ownership. Thus, the only remaining inquiry is whether evidence exists within the record indicating use of the driveway to access the rear doors was necessary for the enjoyment of Boyd's property, the dominant tract. Id.

According to the affidavits and testimony presented by Boyd, the building in question only has two entrances – the front entrance and the rear doors. The evidence indicates that at the time BellSouth owned the property, the front entrance was unsuitable for loading and unloading the type of equipment owned by BellSouth. The evidence also indicates the driveway provided the only means of access to the rear doors, and the driveway was used to access the rear doors for a period of at least fifty years.

Furthermore, the evidence indicates for the brief period the City owned the building, they used the rear doors as loading doors. Additionally, at the present time, the loading doors are the only reasonable means of access for moving large items in and out of the building.

Viewing this evidence in a light most favorable to Boyd, we conclude a factual issue exists as to whether BellSouth's driveway is reasonably necessary for the enjoyment of Boyd's property. Thus, we hold the special referee erred by granting summary judgment on this issue.

III. Estoppel

Boyd argues the special referee erred by granting summary judgment against her claim for easement by estoppel. We agree.

"The doctrine of estoppel applies if a person, by his actions, conduct, words or silence which amounts to a representation, or a concealment of material facts causes another to alter his position to his prejudice or injury." Hubbard v. Beverly, 197 S.C. 476, 480, 15 S.E.2d 740, 741 (1941); see also Ott v. Ott, 182 S.C. 135, 140, 188 S.E. 789, 792 (1936) ("The final element of an equitable estoppel is that the person claiming it must have been misled into such action that he will suffer injury if the estoppel is not declared. That is, the person setting up the estoppel must have been induced to alter his position, in such a way that he will be injured if the other person is not held to the representation or attitude on which the estoppel is predicated.").

In a light most favorable to Boyd, the evidence within the record indicates that when Boyd's husband was negotiating the purchase of the front lot, he negotiated with BellSouth to purchase the rear lot, but thought BellSouth's price of forty thousand dollars was too high. He countered at thirty-five thousand dollars, whereupon a BellSouth agent explained that he did not need the property because he had access through the driveway to the rear of the building located on the front lot. According to Boyd's husband, the agent supplied him with a "plot plan," showing the driveway running through the BellSouth property to the building. Relying on these representations, the Boyds, acting as joint venturers, purchased the front lot to open an antique buisness.

We conclude this evidence is sufficient to establish a claim for estoppel. Thus, we hold the special referee erred by granting summary judgment.

CONCLUSION

For the foregoing reasons, the order of the special referee granting summary judgment on the cause of action to establish

easement by necessity is affirmed. The grant of summary judgment on the causes of action to establish an easement implied by pre-existing use and by estoppel is reversed, and the matter is remanded for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

William Larry Childers, Jr., Appellant.

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

Opinion No. 3777
Heard March 11, 2004 – Filed April, 12, 2004

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Melody J.

Brown, all of Columbia; and Solicitor Warren Blair Giese, of Columbia, for Respondent.

HEARN, C.J.: William Larry Childers, Jr. was convicted of murder, assault and battery of a high and aggravated nature (ABHAN), and discharging a firearm into a dwelling. The trial judge imposed a sentence of life imprisonment for murder and concurrent terms of ten years imprisonment each for ABHAN and discharging a firearm. Childers appeals. We affirm in part, reverse in part, and remand.

FACTS

Childers was estranged from the victim, his former live-in girlfriend, at the time of the victim's death. Though the victim and her children were living with her mother, Childers testified the couple was attempting to reconcile.[1] The victim's sister testified that on October 14, 2000, Childers came to the house to visit the victim and return some CDs. After the victim refused to leave the house, the sister testified Childers "started getting mad" and threw the CDs before he left. The victim's sister further testified that she, her ex-husband, and the victim saw Childers at a turkey shoot later that night.

At approximately 3:00 a.m. the following morning, October 15, 2000, the victim's brother testified he called the police because he saw Childers outside of the house. Police arrived at the scene but did not find anyone in the vicinity. The victim's brother testified that, shortly after the police left, he heard gunshots and ran outside, where he "[saw] Larry Childers go across the yard."

The victim's sister testified that she, her ex-husband, and the victim returned to her mother's home from the turkey shoot in the early morning hours of October 15th and stood in the yard talking. The sister testified that her ex-husband suddenly said he saw Childers with a gun right before she

[1] The victim's sister disputes this, testifying that the victim was living with her mother until she could evict Childers from her home.

heard gunshots. Childers shot the victim twice, killing her. The sister testified Childers then shot at her once before he fired a shot into the house. The sister's ex-husband corroborated her testimony.

Childers testified to a different version of the evening's events. Childers stated he and the victim had been involved in a serious relationship and that they had only been estranged for eight or nine days before the shooting. Childers admitted that he saw the victim at the turkey shoot, and he claimed that the victim indicated she was willing to talk to him, but he wanted to talk to her privately, not at the turkey shoot. After leaving the turkey shoot, Childers testified that he drove around for a while before going to a friend's house that was near the home of the victim's mother. Childers walked to the mother's home because he wanted to "try to get [the victim] to come outside and talk to [him] a minute because [they had] fussed, she had got mad with [him] earlier and [he] wanted to clear that up." Childers testified that he brought a loaded gun with him in case he encountered stray dogs during his walk.

Childers testified that when he arrived at the house, he saw the victim, her sister, and her sister's ex-husband in the yard. As he walked toward them, Childers testified that the ex-husband shot at him. Childers said he immediately fired back and ran away.

After the jury had been selected, the public defender, who was a former assistant solicitor, informed the trial judge that he had prosecuted Childers approximately ten years earlier and that he had performed some legal work for the victim's brother approximately six years before the trial. Defense counsel informed the judge that Childers did not "feel comfortable at this point with my previous relationship with the [S]tate and as a prosecutor against him." Childers then told the judge, "I want him [re]moved because he prosecuted me." The trial judge declined to relieve defense counsel, stating there was no "built-in conflict," as Childers' prior trial was several years earlier and defense counsel did not remember prosecuting him. The trial judge did not specifically address the fact that defense counsel had previously done legal work for the victim's brother.

At the close of trial, defense counsel asked for charges on self defense, involuntary manslaughter, and voluntary manslaughter. The trial judge agreed to charge self defense and involuntary manslaughter, but refused to charge voluntary manslaughter. The jury ultimately returned with guilty verdicts on murder, ABHAN, and discharging a firearm into a dwelling, and Childers received an aggregate sentence of life imprisonment. Childers appeals.

LAW/ANALYSIS

I. Request to Relieve Defense Counsel

Childers argues the trial judge erred in refusing his request to relieve defense counsel based on counsel's prosecution of him in the past and counsel's previous representation of the victim's brother. We disagree.

"A motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." State v. Graddick, 345 S.C. 383, 385, 548 S.E.2d 210, 211 (2001) (citation omitted). The mere possibility that defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction. See Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)).

A. Defense counsel as former prosecutor

When defense counsel revealed to the court that he had successfully prosecuted Childers ten years earlier, he stated that he had no independent recollection of the case. In fact, he only learned of the prosecution when the solicitor checked the files and revealed to him that he was the assistant solicitor in charge of Childers' prior case.

While South Carolina courts have never addressed whether an attorney who formally prosecuted the defendant can later serve as appointed counsel for the defendant in a subsequent case, other jurisdictions have addressed the issue. In State v. Cobbs, 584 N.W.2d 709 (Wis. Ct. App. 1998), defense

counsel had previously prosecuted the defendant when he was working in the district attorney's office. The Wisconsin Supreme Court found there was no actual conflict of interest or serious potential conflict of interest. Id. at 711. The court pointed out that "[t]here were no competing loyalties in this case," nor was it "a situation where defense counsel has appeared for and represented the State as a prosecutor in prior proceedings involving the *same case* in which he or she currently represents the defendant[.]" Id. (Emphasis in original.) See also People v. Nunez, 186 A.D.2d 764 (N.Y. App. Div. 1992) (finding that even though defense counsel had formerly been a solicitor and even though she had only visited defendant twice during his incarceration, the trial court did not err in failing to substitute counsel because there was no irreconcilable conflict of interest). Other jurisdictions have even found no conflict despite defense counsel's actual involvement in the prosecution of the same case against his eventual client. See e.g., State v. King, 447 So.2d 395 (Fla. Dist. Ct. App. 1984) (finding defendant's counsel need not be disqualified in the revocation of probation case even though he had been the prosecuting attorney for the underlying charges because the alleged violation of probation was factually unrelated to the prior offense and there was no actual prejudice shown); Brown v. State, 385 N.E.2d 1148 (Ind. 1979) (finding no abuse of discretion where trial judge denied a mistrial motion that was made after it was discovered that defense counsel, who was a previous prosecutor, had several informations against the defendant).

In this case, aside from the fact that defense counsel had prosecuted Childers ten years earlier, there was no showing of any competing loyalties or actual conflict. See People v. Abar, 786 N.E.2d 1255 (N.Y. 2003) (stating that there was no evidence the public defender obtained information about defendant through her prior employment as an assistant district attorney even though she had prosecuted the defendant in the past). When there is no actual conflict, the defendant must demonstrate he was prejudiced by the attorney's representation of him. Cf. Thomas v. State, 346 S.C. 140, 145 n.2, 551 S.E.2d 254, 259 n.2 (2001) ("Petitioner does not have to demonstrate prejudice if there is an actual conflict of interest."). Here, there was no showing of prejudice. Defense counsel testified that he was ready and prepared to defend Childers' case, and other than complaining that his attorney had not met with him frequently enough prior to trial, Childers did not articulate any reason he

would be prejudiced by being represented by his former prosecutor. Thus, we find no error in the trial judge's refusal to relieve defense counsel.

B. Defense counsel's representation of witness

Childers also argues defense counsel should have been relieved based on his past representation of the victim's brother. While defense counsel mentioned he had "previously done some work" for the brother approximately six years before Childers' trial, the trial judge did not rule upon whether this prior representation was grounds for a conflict.[2] As such, this issue is not preserved for review by this court. See State v. Perez, 334 S.C. 563, 566-67, 514 S.E.2d 754, 755 (1999) (holding an issue must be both raised to and ruled upon by the trial judge to be preserved for appellate review); see also State v. Graddick, 345 S.C. 383, 386, 548 S.E.2d 210, 211 (stating that it was defendant's burden to show satisfactory cause for removing counsel).

II. Jury Charge

Next, Childers argues the trial judge erred by declining to charge the jury on the law of voluntary manslaughter. We agree.

The evidence presented at trial determines the charged jury instruction. State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 836 (1989). "The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict." State v. Blurton, 352 S.C. 203, 207, 573 S.E.2d 802, 804 (2002). "When determining whether a defendant is entitled to a voluntary manslaughter charge, the court views the facts in the light most favorable to the defendant." State v. Grubbs, 353 S.C. 374, 381, 577 S.E.2d 493, 497 (Ct. App. 2003).

---

[2] At trial, Childers never requested defense counsel be relieved because of counsel's past legal representation of the victim's brother. Rather, Childers' complaint about defense counsel stemmed from counsel's prior prosecution of him and his perception that counsel had not met with him frequently enough prior to trial.

"Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." State v. Locklair, 341 S.C. 352, 360, 535 S.E.2d 420, 424 (2000). "To warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000).

Here, there was evidence that Childers only fired his gun after he was shot at by the victim's ex-brother-in-law. In State v. Penland, 275 S.C. 537, 540, 273 S.E.2d 765, 766 (1981), our supreme court found that a voluntary manslaughter charge was warranted "based upon a statement given by appellant following the shooting, which created a jury issue on provocation and heat of passion due to the evidence of the pointing of the gun at the appellant and the subsequent struggle." Thus, if the pointing of a gun and subsequent struggle justifies a voluntary manslaughter charge, so too would the pointing of a gun and subsequent firing of that gun. Although it was the victim's brother-in-law, and not the victim herself, who allegedly shot at and thereby provoked Childers, the doctrine of transferred intent justifies a voluntary manslaughter charge as to the killing of the victim. See State v. Gandy, 283 S.C. 571, 573, 324 S.E.2d 65, 67 (1984) *implicitly overruled on other grounds by* Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991) ("Where a defendant intends to kill or seriously injure one person, but kills another, a defendant may be found guilty of murder or manslaughter.") Accordingly, Childers' conviction for murder is reversed and remanded.

CONCLUSION

We find no error in the trial judge's refusal to relieve counsel; however, the trial judge did err by not charging the jury on voluntary manslaughter. Therefore Childers' convictions for ABHAN and discharging a firearm into a dwelling are **AFFIRMED**, and his conviction for murder is **REVERSED and REMANDED**.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

ANDERSON AND BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carol Hunting, as Guardian ad Litem for Catherine L. Hitchcock, Respondent,

v.

William Elders, Samuel Chris Gordon and Elmyer Enterprises, Inc., Defendants

of whom William Elders is, Appellant.

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

Opinion No. 3778
Heard October 8, 2003 – Filed April 19, 2004

AFFIRMED

D. Mark Stokes, of N. Charleston, for Appellant.

Geoffrey H. Waggoner, Richard S. Rosen, and Alex B. Cash, all of Charleston, for Respondent.

STILWELL, J.: This action was commenced to recover damages sustained by Catherine L. Hitchcock in an accident caused by a drunk driver. Carol Hunting, as guardian ad litem for Hitchcock, brought suit against Chris Gordon as the drunk driver, Elmyer Enterprises, Inc. as the owner and operator of the bar, and William Elders as the alter ego of the corporation. In the first portion of the bifurcated trial, damages of $1.5 million were awarded against Gordon and Elmyer Enterprises. The second phase of the trial, which is the subject of this appeal, resulted in a holding that Elders was the alter ego of Elmyer Enterprises, justifying piercing the corporate veil, thereby holding Elders personally liable for the $1.5 million verdict and the interest which had accrued from the date of the original judgment against the corporation. We affirm.

FACTS

We discern the following facts from the order of the unappealed first phase of the trial. Gordon became intoxicated while at Willie's, a bar operated by Elmyer Enterprises. Gordon was served alcohol despite being obviously intoxicated. After leaving the bar in an intoxicated state, he caused the accident in which Hitchcock was left permanently brain damaged. Hunting was awarded $1.5 million in actual damages against Gordon and Elmyer Enterprises. The jury also awarded $3,000 and $25,000 in punitive damages against Gordon and Elmyer Enterprises respectively. Subsequently, a non-jury trial was held on the issue of whether to pierce the corporate veil of Elmyer Enterprises and hold Elders liable for the judgment as its alter ego.

The facts as gleaned from the second trial reveal that Elmyer Enterprises was originally incorporated in 1981 and engaged in the business of selling tires. Elders and another shareholder operated the business until Elders bought out the other shareholder. The business then became inactive for several years.

In 1990, Elders opened two bars on property he owned. He originally held the liquor licenses in his own name. In 1993, he reinstated Elmyer Enterprises for the purpose of operating the bars. Each bar was capitalized

with $1,000, which was deposited into separate bank accounts. The property and equipment used to operate the bars were leased to Elmyer Enterprises by other businesses formed and owned by Elders. Both bars operated video poker machines, which were leased from yet another of Elders' business corporations. That particular enterprise owned many more machines than were present in the bars belonging to Elmyer Enterprises.

In December 1993, Elders transferred several shares of stock in Elmyer Enterprises to his wife and niece. He designated his wife as a vice president and his niece as secretary and treasurer. However, his niece testified that she knew nothing about her ownership of shares of stock of Elmyer Enterprises or her selection as an officer of the company. Minutes were recorded that detailed the selections and the stock transfers.

During the trial, Hunting presented the testimony of Jan Waring-Woods, a forensic accountant, who testified money was siphoned from the corporation for Elders' personal use. She testified many records needed for an accurate audit of the corporation were either not created or not made available at the time of trial. After reviewing the corporate tax returns for the various companies Elders owned, as well as some of the records she managed to locate regarding the income of the business, she testified Elders siphoned off between $400,000 and $800,000 from the business over a three-year period. Additionally, she testified some of Elders' personal tax forms were altered prior to trial to eliminate information about dividend income from investment accounts Elders held during the time he ran the business.

Hunting also presented testimony from John Freeman, a law professor at the University of South Carolina. He testified that in his opinion the company was operated as a facade by Elders. Freeman maintained Elmyer Enterprises was grossly undercapitalized given its purpose of operating bars and considering the inherent risks associated with a business dispensing alcohol. His conclusion was that Elmyer Enterprises had income that was unaccounted for and profit that was not adequately revealed. He further testified that, in his opinion, Elders was the alter ego of Elmyer Enterprises.

Elders testified the income was as reported. He claimed detailed records were never kept by the company. He noted that any discrepancies in the records were the result of the way in which the bar was managed. He also argued the business was run as a statutory close corporation and as an S corporation. Therefore, it did not have to meet the normal business formalities and would likely mirror Elders as the majority shareholder. Elders claimed the business met its ongoing financial obligations and therefore was not undercapitalized.

The trial court found Elders' testimony was not credible, and the evidence presented at trial clearly indicated Elmyer Enterprises was operated as a mere facade for Elders. Thus, the court concluded Hunting met the burden of proof in establishing the factors necessary to pierce the corporate veil and hold Elders personally liable for the judgment originally awarded against Elmyer Enterprises.

STANDARD OF REVIEW

An action to pierce the corporate veil lies in equity, and therefore, this court may determine the facts according to its own view of the preponderance of the evidence. See C.T. Lowndes & Co. v. Suburban Gas & Appliance Co., 307 S.C. 394, 396, 415 S.E.2d 404, 405 (Ct. App. 1991); Sturkie v. Sifly, 280 S.C. 453, 456-57, 313 S.E.2d 316, 318 (Ct. App. 1984). The broad scope of review applicable to appeals in equity actions does not, however, require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses. Pinckney v. Warren, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001).

LAW/ANALYSIS

Elders contends the trial court erred in piercing the corporate veil of Elmyer Enterprises and therefore holding him personally liable for the judgment. We disagree.

"At the outset, it is recognized that a corporation is an entity, separate and distinct from its officers and stockholders, and that its debts are not the

individual indebtedness of its stockholders." DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 683 (4th Cir. 1976). The South Carolina Supreme Court has ruled that the corporate entity may be disregarded in certain situations. See Baker v. Equitable Leasing Corp., 275 S.C. 359, 271 S.E.2d 596 (1980). "However, 'piercing the corporate veil' is not a doctrine to be applied without substantial reflection." Baker, 275 S.C. at 367, 271 S.E.2d at 600. "The corporate form may be disregarded only where equity requires the action to assist a third party." Woodside v. Woodside, 290 S.C. 366, 370, 350 S.E.2d 407, 410 (Ct. App. 1986). The party asserting the corporate veil should be pierced has the burden of proof. Id.

Generally, courts are reluctant to "disregard the integrity of the corporate entity." Sturkie, 280 S.C. at 459, 313 S.E.2d at 319.

> If any general rule can be laid down, it is that a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears; but when the notion of legal entity is used to protect fraud, justify wrong, or defeat public policy, the law will regard the corporation as an association of persons.

Id. at 457, 313 S.E.2d at 318.

In Sturkie, this court set forth a two-pronged test to be used to determine whether to pierce the corporate veil. "The first part of the test, an eight-factor analysis, looks to observance of the corporate formalities by the dominant shareholders. The second part requires that there be an element of injustice or fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals." Id. at 457-58, 313 S.E.2d at 318. The first eight factors were delineated in Dumas v. InfoSafe Corp., 320 S.C. 188, 463 S.E.2d 641 (Ct. App. 1995):

(1) whether the corporation was grossly undercapitalized;
(2) failure to observe corporate formalities;
(3) non-payment of dividends;

(4) insolvency of the debtor corporation at the time;
(5) siphoning of funds of the corporation by the dominant stockholder;
(6) non-functioning of other officers or other directors;
(7) absence of corporate records; and
(8) the fact that the corporation was merely a facade for the operations of the dominant stockholder.

Dumas, 320 S.C. at 192, 463 S.E.2d at 644. "The conclusion to disregard the corporate entity must involve a number of the eight factors, but need not involve them all." Id. (citing Cumberland Wood Prods. v. Bennett, 308 S.C. 268, 417 S.E.2d 617 (Ct. App. 1992)). There is a second prong contained in Sturkie, but it need not be reached until and unless the requirements of the first prong are met.

Neither Sturkie nor any other case cited by the parties has set forth the weight that must be accorded to each of the eight factors, nor has any case required that each factor be accorded equal weight with the others. Additionally, in applying the eight-factor test of the first prong set out in Sturkie, significant changes in basic South Carolina corporate law and federal and state tax law have somewhat complicated the analysis. The ability under state corporate law to adopt and operate under a statutory close corporation status has, as a practical matter, diminished the importance of several of the eight factors. In the same fashion, the ability of corporations to avoid double taxation by adopting S corporation status under federal income tax law has lessened the importance of applying the factor concerning the nonpayment of dividends.

The Sturkie factors which now have less importance include the failure to observe corporate formalities, nonfunctioning of other officers or other directors, the absence of corporate records and, as stated above, the nonpayment of dividends. The adoption of the statutory device allowing the creation of a statutory close corporation was designed to lessen the formalities necessary to maintain a corporation. A statutory close corporation

may operate without a board of directors,[1] need not adopt bylaws under certain circumstances,[2] and need not hold an annual meeting unless pursuant to a shareholder request.[3] The failure to observe the formality "is not a ground for imposing personal liability on the shareholders for liabilities of the corporation." S.C. Code Ann. § 33-18-250 (1990). Indeed, the official comment to section 33-18-250 notes "the purpose of this section is to eliminate the possible argument that the shareholders in a statutory close corporation are individually liable for the debts and torts of the business because the corporation did not follow the classical model of a corporation." The comment continues:

> This section does not prevent a court from "piercing the corporate veil" of a statutory close corporation if the circumstances should justify imposing personal liability on the shareholders were the corporation not a statutory close corporation. It merely prevents a court from "piercing the corporate veil" because it is a statutory close corporation.

S.C. Code Ann. § 33-18-250 cmt. (1990).

The advent of the statutory close corporation has also had an impact on the type and extent of corporate records required to be maintained and the number and duties of corporate officers and directors. Elders asserts he maintained all necessary corporate records and there were always officers of the corporation.

Although Elders maintained a bare minimum of corporate records, normal business records were definitely lacking in sufficiency. The corporation did not have adequate records of income from the video poker

---

[1] S.C. Code Ann. § 33-18-210(a) (1990).

[2] S.C. Code Ann. § 33-18-220(a) (1990).

[3] S.C. Code Ann. § 33-18-230(b) (1990).

machines or from the operation of the bars. It did not have records of cash receipts, cash expenses, sales, inventory, or other profit and loss statements that normally would be expected.

In the same fashion, although the corporate minutes indicated the election of officers, Elders' niece, who served as secretary-treasurer, stated she did not know she was an officer in the corporation. Elders produced minutes indicating that his wife and niece were present during meetings. However, the niece testified she never attended any corporate meetings.

Admittedly, Elmyer Enterprises was not required to follow the same corporate formalities as a regular business corporation. Although the failure to adhere to these formalities alone cannot be used to pierce the corporate veil, coupling the dearth of corporate business records and the inactivity of other corporate officers with the evidence of substantial siphoning of funds provides evidence upon which the trial court, at least in part, based its decision.

As to the factor concerning the payment or nonpayment of dividends, its importance in the overall scheme of things has been diminished by the election now allowed by federal tax law. Elders asserts that because the corporation elected to operate as an S corporation pursuant to 26 U.S.C. §§ 1361-1399 (2002), the failure to pay dividends should not be considered a factor against it in determining whether to pierce the corporate veil. We agree, because the net income of the corporation would be passed to the shareholders in direct proportion to their ownership percentage. However, at the same time, this lessens the importance of this factor.

The corporation was originally funded with only $2,000, which represented $1,000 for each of the two operating locations. Elders asserts that the corporation was properly capitalized at all times, even though the capitalization never appeared to increase over time.

"One fact which all the authorities consider significant in the inquiry, and particularly so in the case of the one-man or closely-held corporation, is whether the corporation was grossly undercapitalized for the purposes of the

corporate undertaking." See Dewitt, 540 F.2d at 685. The Fourth Circuit Court of Appeals continued: "(t)he obligation to provide adequate capital begins with incorporation and is a continuing obligation thereafter * * * during the corporation's operations." Id. (quoting Gillespie, The Thin Corporate Line: Loss of Limited Liability Protection, 45 N.D. L. Rev. 363, 377-8 (1969)). "An obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking, has frequently been an important factor in cases denying stockholders their defense of limited liability." Anderson v. Abbott, 321 U.S. 349, 362 (1944).

The corporation's initial funding was minimal at best. However, as an ongoing concern, the corporation was not properly capitalized. The corporation appeared to have a sufficient cash flow from the bar as well as the video poker machines to continue experiencing growth throughout the life of the corporation. However, no evidence was produced showing that that growth was ever reflected in the corporation's capital account.

Additionally, as Professor Freeman testified, a corporation established for the purpose of serving alcohol has more inherent risks and should be adequately protected from liability associated with those risks. The failure to properly protect the business and others should be considered when determining whether the corporation is properly capitalized. Accordingly, we hold Elmyer Enterprises failed to remain properly capitalized as an ongoing business.

The factors dealing with undercapitalization, siphoning of funds, and whether the corporation was a facade for its dominant shareholder are closely related. The trial court found Elders siphoned substantial funds from the corporation, and the evidence substantiates this finding. Using documents from the corporation, the forensic accountant testified there was a significant amount of income not reported, and she determined that Elders siphoned $400,000 to $800,000 from Elmyer Enterprises over a three-year period. Even though the corporation was able to pay its debts and thereby escape the classical definition of insolvency, the evidence indicates that Elders left in the till only so much as was necessary to pay basic expenses.

The trial court found Elders lacked credibility in his explanations for the difference in the income and what was reported. The court specifically found the money was never accounted for and must have been siphoned by Elders. This is additional evidence that the corporation was used as a mere facade for the benefit of the dominant shareholder, justifying the ultimate conclusion reached by the trial court.

We therefore agree with the trial court that a sufficient number of the eight Sturkie factors were present to justify moving to the second prong of the analysis.

The second prong of the Sturkie test, requiring "that there be an element of injustice or fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals," Sturkie, 280 S.C. at 457-458, 313 S.E.2d at 318, is perhaps more elusive. In Sturkie, the court stated:

> The burden of proving fundamental unfairness requires that the plaintiff establish (1) that the defendant was aware of the plaintiff's claim against the corporation, and (2) thereafter, the defendant acted in a self-serving manner with regard to the property of the corporation and in disregard of the plaintiff's claim in the property.

Id. at 459, 313 S.E.2d at 319. Later cases clarified the actual knowledge requirement by stating that a person is "aware" of a claim against the corporation if he has notice of facts which, if pursued with due diligence, would lead to knowledge of the claim. Multimedia Publ'g of South Carolina, Inc. v. Mullins, 314 S.C. 551, 554, 431 S.E.2d 569, 572 (1993). Most recently this court has held that "the essence of the fairness test is simply that an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell." Dumas, 320 S.C. at 193, 436 S.E.2d at 644.

There is evidence that indicates Elders knew of the plaintiff's claim against the corporation and that, as the trial court found, he nevertheless acted in a self-serving and unfair manner by siphoning off substantial sums of

money, commingling and transferring assets which he held in his own name to different entities, transferring stock in the corporation to other individuals without a valuable consideration, and then finally dissolving the corporation.

Elders submits there is no evidence he intended to avoid the normal consequences of his entrepreneurial adventures. However, the "normal" consequences of operating a bar which, at least in this instance, admittedly served alcohol to an already-intoxicated individual, transcends that which would be considered normal consequences for the average entrepreneurial endeavor.

Finally, Elders submits that even if the corporate veil of Elmyer is pierced and he is held individually liable, he should not be responsible for the interest that has so far accrued on the debt against the corporation. We disagree.

South Carolina Code Ann. § 34-31-20(B) (Supp. 2003) states that money decrees and judgments of courts enrolled or entered shall draw interest. "[A] claimant is entitled to interest from the date of the rendition of the verdict, or post-judgment interest, as a matter of course." Calhoun v. Calhoun, 339 S.C. 96, 102, 529 S.E.2d 14, 18 (2000). "The running of post-judgment interest further encourages judgment debtors to pay judgments promptly." Casey v. Casey, 311 S.C. 243, 245, 428 S.E.2d 714, 716 (1993).

In general, a corporation and a shareholder are separate and distinct, and the debts of the corporation are not the debts of the shareholder. However, when the corporate veil is pierced, the corporation and the individual become one and the same. See Dewitt, 540 F.2d at 683. As they are identical, the liabilities of the corporation are the liabilities of the shareholder. This would include the judgment awarded against the corporation as well as post-judgment interest from the time of the original judgment against the corporation. If post-judgment interest were not included, there would be no penalty for failing to pay until after a subsequent trial regarding piercing the corporate veil. Accordingly, Elders should be held responsible for the post-judgment interest attributable to the corporation.

AFFIRMED.

HOWARD and KITTREDGE, JJ., concur.