Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6092

M E D I A R E L E A S E
September 11, 2003

The Judicial Merit Selection Commission is currently accepting applications for the judicial office listed below. In order to receive application materials, a prospective candidate must notify the commission in writing of the seat for which the prospective candidate intends to apply. Correspondence and questions must be directed to the Judicial Merit Selection Commission as follows:

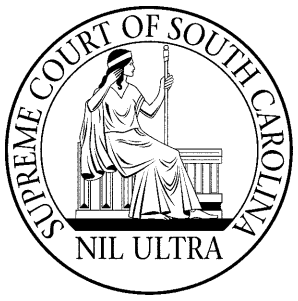
Michael N. Couick, Chief Counsel
Post Office Box 142, Columbia, South Carolina 29202
(803) 212-6623

The commission will not accept applications after 12:00 noon on Friday, October 10, 2003.

A vacancy will exist in the office currently held by the Honorable Rodney A. Peeples, Judge of the Circuit Court for the Second Judicial Circuit, Seat 1, upon Judge Peeples' retirement on or before June 30, 2004.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/html-pages/judmerit.html.

* * *



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

September 15, 2003

ADVANCE SHEET NO. 34

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UNPUBLISHED OPINIONS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

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

3669-Pittman v. Lowther	Pending
3671-White v. MUSC	Pending
3672-Gilbert v. Miller	Pending
2003-UP-292-Classic Stair v. Ellison	Pending
2003-UP-316-State v. Nickel	Pending
2003-UP-324-McIntire v. Columbia	Pending
2003-UP-448-Geiger v. Pardee's et al.	Pending
2003-UP-462-The State v. Green	Pending
2003-UP-467-SCDSS v. Averette	Pending
2003-UP-468-Jones v. Providence Hospital	Pending
2003-UP-469-Adams v. Cook	Pending
2003-UP-470-BIFS Technologies Corp. v. Knabb	Pending
2003-UP-472-Proctor v. SCDHEC	Pending
2003-UP-473-Seaside Dev. Corp. v. Chisholm	Pending
2003-UP-475-In the matter of Newsome	Pending
2003-UP-477-Berry v. Logan	Pending
2003-UP-478-Debordieu Colony Assoc. v. Wingate	Pending
2003-UP-480-Smalls v. Fuji Photo Film	Pending
2003-UP-481-Branch v. Island Sub-Division	Pending
2003-UP-483-Lamar Advertising v. Li'l Cricket	Pending
2003-UP-487-Est of W. Balish (Garibaldi's v. Balish)	Pending

2003-UP-488-Mellon Mortgage v. Kershner	Pending
2003-UP-489-Willis v. City of Aiken	Pending
2003-UP-490-Town of Olanta v. Epps	Pending
2003-UP-494-McGee v. Sovran Const. Co.	Pending
2003-UP-503-Shell v. Richland County	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3518-Chambers v. Pingree	Pending
3551-Stokes v. Metropolitan	Pending
3563-The State v. Missouri	Granted 9/10/03
3565-Ronald Clark v. SCDPS	Pending
3580-FOC Lawshe v. International Paper	Pending
3585-The State v. Murray Roger Adkins, III	Pending
3588-In the Interest of Jeremiah W.	Pending
3592-Gattis v. Murrells	Pending
3596-Collins Ent. v. Coats & Coats et al.	Pending
3597-Anderson v. Augusta Chronicle	Pending
3598-Belton v. Cincinnati	Pending
3599-The State v. Grubbs	Pending
3600-State v. Lewis	Pending
3604-State v. White	Pending

3606-Doe v. Baby Boy Roe	Pending
3607-State v. Parris	Pending
3608-The State v. Padgett	Pending
3610-Wooten v. Wooten	Pending
3614-Hurd v. Williamsburg	Pending
3623-Fields v. Regional Medical Center	Pending
3626-Nelson v. QHG of S.C. Inc.	Pending
3627-Pendergast v. Pendergast	Pending
3629-Redwend Ltd. v. William Edwards et al.	Pending
3631-The State v. Dunbar	Pending
3633-Murphy v. NationsBank, N.A.	Pending
3638-The State v. Smalls	Pending
3639-Fender v. Heirs at Law of Smashum	Pending
3641-The State v. Dudley	Pending
2002-UP-368-Roy Moran v. Werber Co.	Pending
2002-UP-489-Fickling v. Taylor	Pending
2002-UP-514-McCleer v. City of Greer	Denied 9/10/03
2002-UP-537-Walters v. Austen	Pending
2002-UP-538-The State v. Richard Ezell	Pending
2002-UP-586-Ross v. University of S.C.	Pending
2002-UP-598-Sloan v. Greenville	Pending

2002-UP-656-SCDOT v. DDD (2)	Pending
2002-UP-662-State v. Morgan	Denied 9/10/03
2002-UP-715-Brown v. Zamias	Granted 9/10/03
2002-UP-734-SCDOT v. Jordan	Pending
2002-UP-749-The State v. Keenon	Pending
2002-UP-760-State v. Hill	Denied 9/10/03
2002-UP-785-The State v. Lucas	Pending
2002-UP-788-City of Columbia v. Jeremy Neil Floyd	Pending
2002-UP-800-Crowley v. NationsCredit	Pending
2003-UP-009-Belcher v. Davis	Pending
2003-UP-014-The State v. Lucas	Pending
2003-UP-019-The State v. Wigfall	Pending
2003-UP-029-SCDOR v. Springs	Pending
2003-UP-032-Pharr v. Pharr	Pending
2003-UP-033-Kenner v. USAA	Pending
2003-UP-036-The State v. Traylor	Pending
2003-UP-088-The State v. Murphy	Denied 9/11/03
2003-UP-098-The State v. Dean	Pending
2003-UP-101-Nardone v. Davis	Denied 9/10/03
2003-UP-111-The State v. Long	Pending
2003-UP-112-Northlake Homes Inc. v. Continental Ins.	Pending
2003-UP-113-Piedmont Cedar v. Southern Original	Pending

2003-UP-116-Rouse v. Town of Bishopville	Pending
2003-UP-125-Carolina Travel v. Milliken	Pending
2003-UP-126-Brown v. Spartanburg County	Pending
2003-UP-127-City of Florence v. Tanner	Pending
2003-UP-143-The State v. Patterson	Pending
2003-UP-144-The State v. Morris	Pending
2003-UP-147-The State v. Reed	Denied 9/10/03
2003-UP-148-The State v. Billy Ray Smith	Pending
2003-UP-150-Wilkinson v. Wilkinson	Pending
2003-UP-161-White v. J. M Brown Amusement	Pending
2003-UP-163-Manal Project v. Good	Pending
2003-UP-165-The State v. Sparkman	Pending
2003-UP-171-H2O Leasing v. H2O Parasail	Pending
2003-UP-175-BB&T v. Koutsogiannis	Pending
2003-UP-179-State v. Brown	Pending
2003-UP-180-State v. Sims	Pending
2003-UP-184-Tucker v. Kenyon	Pending
2003-UP-188-State v. Johnson	Pending
2003-UP-190-Henfield v. Taylor	Pending
2003-UP-196-T.S. Martin Homes v. Cornerstone	Pending
2003-UP-205-The State v. Bohannan	Pending

2003-UP-228-Pearman v. Sutton Builders	Pending
2003-UP-244-The State v. Tyronne Edward Fowler	Pending
2003-UP-245-Bonte v. Greenbrier Restoration	Pending
2003-UP-255-BB&T of South Carolina v. Fleming	Pending
2003-UP-269-Golf Restaurants v. Tilghman Ins. Agency	Pending
2003-UP-270-Guess v. Benedict College	Pending
2003-UP-271-Bombardier Capital v. Green	Pending
2003-UP-274-The State v. Robert Brown	Pending
2003-UP-277-Jordan v. Holt	Pending
2003-UP-284-Washington v. Gantt	Pending
2003-UP-293-Panther v. Catto Enterprises	Pending
2003-UP-308-Ahmad v. Davis	Pending
2003-UP-325-Miller v. Miller (6)	Pending
2003-UP-348-The State v. Battle	Pending
0000-00-000-Dreher v. Dreher	Pending
0000-00-000-Hagood v. Sommerville	Pending

PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Georgia Department of Transportation, an agency of the State of Georgia, Appellant,

v.

Jasper County, South Carolina, Respondent.

Appeal from Jasper County
Perry M. Buckner, Circuit Court Judge

Opinion No. 25714
Heard June 25, 2003 - Filed September 15, 2003

REVERSED

Richard D. Bybee, of Smith, Bundy, Bybee & Barnett, of Mt. Pleasant; Matthew E. Cline, of Atlanta, Georgia; and David G. Pagliarini, of Daniel Island, for appellant.

Gedney M. Howe, III, of Charleston; Darrell Thomas Johnson, Jr., of Hardeeville; and Stephen A. Spitz, of Columbia, for respondent.

JUSTICE MOORE: Appellant Georgia Department of Transportation (GDOT) commenced this action under S.C. Code Ann. § 28-2-470 (1991)

challenging respondent Jasper County's (County's) notice of intent to condemn 1,776 acres of undeveloped land owned by GDOT on the Savannah River. The trial court found GDOT's challenge without merit. We reverse.

FACTS

The property to be condemned is presently used by GDOT to facilitate dredging activities in the Savannah River Harbor under local sponsor agreements with the U.S. Army Corps of Engineers (USACE). County intends to condemn the land, then lease all but forty acres of it to a private stevedoring corporation, SAIT, a subsidiary of Stevedoring Services of America, Inc. (SSA).

On the leased property, SAIT will construct in phases a maritime terminal. The main terminal will occupy 1,000 acres, 130 acres will be used for an access road, and 646 acres will be set aside for "engineering purposes" including dredging disposal. The terminal will handle freight "of general public origin" and have the capacity to handle a half-million shipping containers annually. It will operate in conjunction with a business park County plans to develop on the forty remaining acres of the condemned property.

County's lease with SAIT has a ninety-nine-year term and is contingent on successful condemnation. SAIT may sublet the leased premises with County's approval. In lieu of rent, SSA will pay the compensation for the condemned property, which County originally offered GDOT in the amount of approximately $8.35 million.

ISSUES

1. Does the condemnation violate the prior public use doctrine?

2. Is the use for which the property is being condemned a public use?

DISCUSSION

1. Prior public use

Under S.C. Code Ann. § 4-9-30(4) (Supp. 2002), a county may "exercise powers of eminent domain for county purposes except where the land is devoted to a public use." In bringing this action, GDOT claimed the property is presently put to public use, and therefore not subject to condemnation, because it is encumbered by use easements held by the USACE for dredge material containment areas. In ruling for County, the trial court found the dredging activity is merely an indirect benefit to the public and not "a public use." In the alternative, he found County's taking would not destroy the prior public use.

Generally, the prior public use doctrine is applicable between entities with equally delegated powers of eminent domain. *See* Florida East Coast Rwy. Co. v. City of Miami, 372 So.2d 152 (Fla. App. 1979); Greater Clark County Sch. Corp. v. Pub. Serv. Co., Indiana, Inc., 385 N.E.2d 952 (Ind. App. 1979); State v. Union County Park Comm'n, 214 A.2d 446 (N.J. 1965). The rationale is to prevent condemnation back and forth between competing condemnors. Florida East Coast Rwy. Co., *supra*; Greater Clark County Sch. Corp., *supra*. As stated by one court: "The doctrine of prior public use does not clothe the court with power to weigh the communal benefit of the proposed use against the present use of property sought to be condemned. It is, rather, a rule of law limited to controversies between two [entities] each possessing a delegated, general power of eminent domain." Bd. of Educ. of Union Free Sch. Dist. No. 2 v. Pace College, 276 N.Y.S.2d 162, 165-66 (A.D. 1966). When the resisting landowner possesses no such power, the question does not arise. *Id.*[1]

Consistent with this line of cases, we conclude the prior public use doctrine should be limited to those cases involving competing condemnors. It is for the condemning entity to determine whether privately owned

[1]The doctrine of prior public use, if applicable, does not depend on whether the prior use was acquired by condemnation or purchase. *See* New York Cent. & H. R.R. Co. v. City of Buffalo, 93 N.E. 520 (N.Y. 1910).

property, although presently used for public benefit, should be condemned for a competing public use. The difficulty of injecting the judicial branch into the arena of competing "public uses" is in fact demonstrated by the one case in which this Court attempted to apply the doctrine of prior public use. In Tuomey Hosp. v. City of Sumter, 243 S.C. 544, 134 S.E.2d 744 (1964), we addressed a condemnation by a municipality whose delegated power of eminent domain was subject to an exception for property previously "devoted to public use." The property to be condemned was a charitable hospital. We noted the difficulty of defining the term "public use:" mere benefit to the public is not enough; the public must have some "definite and fixed use" that is protected by law. Without deciding whether the use in question actually qualified as a "public use," we found it was a factual issue to be determined at trial.[2]

We hereby overrule Tuomey to the extent it allows application of the prior public use doctrine in situations other than between entities with equal powers of eminent domain. Here, although GDOT is an arm of a sovereign state, it has no power of eminent domain in South Carolina. Because GDOT is in the posture of a private landowner in this case, we decline to apply the doctrine of prior public use.

---

[2]Analyzing a prior public use by evaluating the actual use to which the property is put is problematic because the term "public use" applies in two steps of the analysis in condemnation cases: first, whether there is a prior "public use" which forbids the taking of such land; and second, as discussed below, whether the land taken is taken for "public use" as required under our State constitution. An expansive interpretation of "public use" under the prior public use prong may restrict condemnation and protect certain private property owners whose property use somehow benefits the public; conversely, however, such an interpretation results in less protection for the majority of property owners when applied in the second prong of the analysis -- the purpose for which the land is taken -- by allowing the condemning entity to more easily establish a public use to justify the condemnation. This tension is evident in Tuomey where we cited but did not strictly apply the definition of "public use" from earlier cases applying the term in the context of the second prong. *E.g.,* Riley v. Charleston Union Station Co., 71 S.C. 457, 51 S.E. 485 (1905).

2. Use for which taken

Article I, § 13, of our State Constitution provides:

> Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor.

GDOT argues the condemnation is unconstitutional because the property is being taken for private and not public use. We agree.[3]

The trial court held that County's lease to SAIT for a marine terminal qualifies as a "public use" and therefore County's taking of GDOT's property is constitutionally permitted. He distinguished our decision in Karesh v. City Council of City of Charleston, 271 S.C. 339, 247 S.E.2d 342 (1978), which held unconstitutional the City of Charleston's condemnation of land to build and then lease a parking facility and convention center to a private corporation. The trial court found the condemnation here distinguishable because the public interest is protected by federal law and regulation, referencing the lease provisions regarding the application of general maritime laws, and by County's control of the premises as landlord.

Karesh is controlling here. In Karesh, the parking facility was to be made available on reasonable demand to all members of the general public with only 10% reserved for the proposed convention center. We found this public interest was not enough in the context of a condemnation proceeding because private property rights were being infringed. Our decision in Karesh turned on the fact that the parking garage and convention center, which were "ostensibly public facilities," were to be leased long-term to the developer

---

[3] An action challenging a condemnation under § 28-2-470 is considered one in equity because it essentially seeks to enjoin the condemnation. Southern Dev. and Golf Co. v. South Carolina Pub. Serv. Auth., 305 S.C. 507, 409 S.E.2d 428 (Ct. App. 1991), *aff'd as modified,* 311 S.C. 29, 426 S.E.2d 748 (1993). Accordingly, on review we take our own view of the preponderance of the evidence. *Id.*

and used as an adjunct to the developer's own business. The importance of this fact is apparent from our subsequent decision in Goldberg v. City Council of City of Charleston, 273 S.C. 140, 254 S.E.2d 803 (1979), which addressed a later challenge to the revised project involving the same parking garage. In Goldberg, we summarily found the project no longer suffered the same constitutional impediments found in Karesh and was valid because the city would now own and operate the parking garage. General regulations governing the lease here and the standard landlord control provisions included in the lease do not rise to the level of public control required under Karesh.

Further, the trial court found the projected industrial development and economic benefit to the citizens of the county was sufficient to constitute a public use. Facts introduced at trial indicate the majority of County's population have low-paying tourist and service industry jobs and 25% live below the poverty line. The proposed project would be valued at approximately $400 million by the time it is completed, about 40% of County's current tax base. Projected tax revenues under a fee-in-lieu of tax agreement are between $3.5 and $4 million. The project would also diversify County's job base.

The cases relied on by the trial court in finding economic benefit is a sufficient public use, however, are not condemnation cases but tax cases[4] and bond revenue cases.[5] The "public purpose" discussed in these cases is not the same as a "public use," a term that is narrowly defined in the context of condemnation proceedings. Edens v. City of Columbia, 228 S.C. 563, 573, 91 S.E.2d 280, 283 (1956). Although the projected economic benefit to County is very attractive, it cannot justify condemnation in this case. As

---

[4] *E.g.,* Charleston County Aviation Auth. v. Wasson, 277 S.C. 480, 289 S.E.2d 416 (1982); State v. City of Columbia, 115 S.C. 108, 104 S.E. 337 (1920) (whether property is exempt from ad valorem tax because it is used for public purpose).

[5] *E.g.,* WDW Props. v. City of Sumter, 342 S.C. 6, 535 S.E.2d 631 (2000); Nichols v. South Carolina Research Auth., 290 S.C. 415, 351 S.E.2d 155 (1986) (whether public revenue is expended for public purpose).

stated in Karesh: "However attractive the proposed [project], however desirable the project from a [government] planning point of view, the use of the power of eminent domain for such purposes runs squarely into the right of an individual to own property and use it as he pleases." 271 S.C. at 344-45, 247 S.E.2d at 345.

We take a restrictive view of the power of eminent domain because it is in derogation of the right to acquire, possess, and defend property. Karesh, 271 S.C. at 342, 247 S.E.2d at 344; *see generally* 2A Julius L. Sackman & Patrick J. Rohan, Nichols' The Law of Eminent Domain §§ 7.02-7.07 (rev. 3d ed. 1990) (discussing broad and narrow views of public use). It is well-settled that the power of eminent domain cannot be used to accomplish a project simply because it will benefit the public. As we have previously emphasized:

> The public use implies possession, occupation, and enjoyment of the land by the public at large or by public agencies; and the due protection of the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter will devote it.

Edens, 228 S.C. at 573, 91 S.E.2d at 283. The involuntary taking of an individual's property by the government is not justified unless the property is taken for public use -- a fixed, definite, and enforceable right of use, independent of the will of a private lessor of the condemned property. Karesh, 271 S.C. at 344, 247 S.E.2d at 345.

County's proposed marine terminal does not meet our restrictive definition of public use. The private lessor, SAIT, will finance, design, develop, manage, and operate the marine terminal. The terminal itself will be a gated facility with no general right of public access; access is limited to those doing business with SAIT. SAIT will have agreements with various steamship lines and will charge them per container fees for unloading, storing, and delivering. The marine terminal is considered a "public"

terminal simply because it will serve different steamship lines as opposed to a single line or cargo interest.

We hold the trial court erred in finding the property will be taken for public use and conclude the condemnation is therefore unlawful. In so holding, we emphasize it is the lease arrangement in the context of a condemnation that defeats its validity. We express no opinion regarding County's ability to accomplish the project in a different manner.[6] In light of our disposition, we decline to address GDOT's remaining issues.

REVERSED.

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

[6] Under S.C. Code Ann. § 4-9-25 (Supp. 2002), all counties are permitted to exercise those powers "respecting any subject as appears to them necessary and proper for the . . . general welfare" and these powers must be liberally construed. *See* Hospitality Ass'n of South Carolina, Inc. v. County of Charleston, 320 S.C. 219, 464 S.E.2d 113 (1995).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charleston Dry Cleaners & Laundry, Inc., Plaintiff,

v.

Zurich American Insurance Co.; Allstate Insurance Co.; GAB Robins North America, Inc.; and R.S. Townsend, Defendants.

CERTIFIED QUESTIONS

Opinion No. 25715
Heard June 24, 2003 - Filed September 15, 2003

QUESTIONS ANSWERED

Fleet Freeman, of Freeman & Freeman, of Mt. Pleasant, for Plaintiff.

John R. Murphy and Adam J. Neil, of Murphy & Grantland, P.A., of Columbia, for Defendant Zurich American Insurance Company.

Stephen P. Groves, Sr., and Bradish J. Waring, of Nexsen Pruet Jacobs Pollard & Robinson, L.L.P.; and John Hamilton Smith, Sr., of Young, Clement, Rivers & Tisdale, L.L.P., all of Charleston, for Defendants GAB Robins North America, Inc. and R.S. Townsend.

John S. Wilkerson, III, and Sean A. O'Connor, of Turner Padget Graham & Laney, P.A., of Charleston, for Defendant Allstate Insurance Company.

Gray T. Culbreath and Christian Stegmaier, of Collins & Lacy, P.C., of Columbia, for *Amicus Curiae* South Carolina Defense Trial Attorneys' Association.

JUSTICE WALLER: We accepted the following questions on certification from the United States District Court for the District of South Carolina:

(1) Can an independent insurance adjuster or an insurance adjusting company be held individually liable to the insured for the negligent or reckless adjustment of a first party insurance claim, where the adjuster is acting as an agent of the adjusting company and both the adjuster and the adjusting company are agents of the disclosed insurance carrier?

(2) If the answer to the first Certified Question is in the affirmative, what are the elements of such a cause of action?

FACTS[1]

On July 3, 2001, a fire occurred at plaintiff Charleston Dry Cleaners & Laundry, Inc.'s (Dry Cleaners) business premises. The fire destroyed the contents and fixtures of the business. At the time of the fire, Dry Cleaners had a fire insurance policy with both defendant Zurich American Insurance Co. (Zurich) and defendant Allstate Insurance Co.

[1] The facts are based on the factual findings in the district court's certification order. See Rule 228, SCACR.

On July 20, 2001, Dry Cleaners requested that Zurich adjust and pay the losses sustained by its customers for clothes left at Dry Cleaners which were destroyed by the fire. Dry Cleaners submitted to Zurich proof of loss statements for its contents loss of over $200,000, its leasehold improvements loss, and loss of income/business interruption loss.

Defendant GAB Robins North America, Inc. (GAB) is a national insurance adjusting company that provides adjusting, investigation, claims administration, and information management services to the property/casualty insurance industry. Zurich retained GAB to adjust Dry Cleaners' claim, and GAB in turn assigned defendant R.S. Townsend, a general adjuster licensed by the South Carolina Department of Insurance, to adjust the fire claim. Thus, both GAB and Townsend were acting as the agents of Zurich at all relevant times.

In October 2001, Zurich paid Dry Cleaners a partial payment of $25,000 toward its business contents loss. In December 2001, Zurich paid Dry Cleaners $29,796.87, which represented a partial payment for the loss related to the customers' clothing destroyed in the fire. Through GAB and Townsend, Zurich rejected each of Dry Cleaners' sworn proof of loss statements. Except for the payments recounted above, Zurich has not paid Dry Cleaners' claims.

In its amended complaint, Dry Cleaners alleged a negligence cause of action against GAB and Townsend. Specifically, Dry Cleaners alleged GAB and Townsend: (1) owed it a duty of due care; and (2) breached their duty by failing to observe industry standards and by failing to exercise due care in the adjustment of the fire claim. Dry Cleaners additionally alleged that as a result of GAB and Townsend's negligence, gross negligence, and recklessness, it suffered damages and is entitled to punitive damages.

DISCUSSION

Dry Cleaners argues this Court should recognize a duty between the insured and the independent insurance adjuster thereby allowing its negligence claim against GAB and Townsend.

In South Carolina, although the insurer owes the insured a duty of good faith and fair dealing, see Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 306 S.E.2d 616 (1983),[2] this duty of good faith arising under the contract does not extend to a person who is not a party to the insurance contract. Carolina Bank and Trust Co. v. St. Paul Fire and Marine Co., 279 S.C. 576, 310 S.E.2d 163 (Ct. App. 1983). Thus, no bad faith claim can be brought against an independent adjuster or independent adjusting company. It is a novel issue in this State whether a **negligence** claim can be brought against an independent adjuster or independent adjusting company.

To establish a cause of action for negligence, a plaintiff must show three elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) damage proximately resulting from the breach of duty. E.g., South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986). The Court must determine, as a matter of law, whether the law recognizes a particular duty. E.g., Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). An affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. Carson v. Adgar, 326 S.C. 212, 217, 486 S.E.2d 3, 5 (1997). Foreseeability of injury, in and of itself, does **not** give rise to a duty. South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc., 289 S.C. at 376, 346 S.E.2d at 325.

There is a split of authority among those state jurisdictions that have addressed whether a negligence claim can be brought against an independent adjuster. The majority does not allow this cause of action. See Meineke v.

---

[2] In Nichols, we recognized a tort of bad faith against an insurer. Specifically, we held that if an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under the insurance contract, then the insured can recover consequential damages, and the actual damages are not limited by the contract. 279 S.C. at 340, 306 S.E.2d at 610. Furthermore, punitive damages can be recovered if the insured can demonstrate the insurer's actions were willful or in reckless disregard of the insured's rights. Id.

GAB Business Servs., Inc., 991 P.2d 267 (Ariz. Ct. App. 1999); Sanchez v. Lindsey Morden Claims Servs., Inc., 84 Cal.Rptr.2d 799 (Cal. Ct. App. 1999); King v. National Security Fire and Cas. Co., 656 So.2d 1338 (Fla. Dist. Ct. App. 1995); Velastequi v. Exchange Ins. Co., 505 N.Y.S.2d 779 (N.Y. Civ. Ct. 1986); Dear v. Scottsdale Ins. Co., 947 S.W.2d 908 (Tex. App. 1997); see also Troxell v. American States Ins. Co., 596 N.E.2d 921, 925 n.1 (Ind. Ct. App. 1992); Wolverton v. Bullock, 35 F.Supp.2d 1278 (D.Kan. 1998).

Some states, however, have recognized a duty, and therefore allow a negligence claim in this context. See Continental Ins. Co. v. Bayless and Roberts, Inc., 608 P.2d 281 (Alaska 1980); Morvay v. Hanover Ins. Cos., 506 A.2d 333 (N.H. 1986); Brown v. State Farm Fire and Cas. Co., 58 P.3d 217 (Okla. Ct. App. 2002); see also Bass v. California Life Ins. Co., 581 So.2d 1087 (Miss. 1991) (allowing claim for gross negligence).

In recognizing a negligence action against investigators hired by the insurer, the New Hampshire Supreme Court in Morvay v. Hanover Ins. Cos., noted that the investigators "were fully aware that the [insureds] could be harmed financially if they performed their investigation in a negligent manner and rendered a report to [the insurer] that would cause the company to refuse payment." 506 A.2d at 335. This Court, however, has held that foreseeability of injury is an insufficient basis for recognizing a duty. South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc., supra.

We decline to recognize a general duty of due care from an independent insurance adjuster or insurance adjusting company to the insured, and thereby align South Carolina with the majority rule on this issue. See, e.g., Meineke v. GAB Business Servs., Inc., supra; Sanchez v. Lindsey Morden Claims Servs., Inc., supra; King v. National Security Fire and Cas. Co., supra; Velastequi v. Exchange Ins. Co., supra; Dear v. Scottsdale Ins. Co., supra. We note, however, that "the authorized acts of an agent are the acts of the principal." ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 242, 489 S.E.2d 470, 472 (1997). In addition, a bad faith claim against the insurer remains available as a source of recovery for a plaintiff such as Dry Cleaners. Therefore, in a bad faith action against the insurer, the

acts of the adjuster or adjusting company (agent) may be imputed to the insurer (principal).

Accordingly, we answer the first certified question in the negative. As a result, we need not address the second question.

QUESTIONS ANSWERED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Marshall
Usher Rogol, Respondent.

Opinion No. 25716
Submitted August 8, 2003 - Filed September 15, 2003

PUBLIC REPRIMAND

Henry B. Richardson, Jr., and Michael S. Pauley, both of Columbia, for Office of Disciplinary Counsel.

Marshall Usher Rogol, of Darlington, Pro Se.

PER CURIAM: Respondent and Disciplinary Counsel have entered into an agreement pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to accept an admonition or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

Facts

I. Criminal Defense Matter

Respondent was appointed to represent a criminal defendant. The defendant's grandmother made several calls to respondent regarding her grandson's case. In response to the calls, respondent sent the defendant's grandmother a letter advising her that his retainer fee was not less than

$10,000 and asking her to contact his office if she was able to assist in payment of the retainer. Subsequent discussions with the defendant's grandmother were limited to a bond reduction for the defendant.

Respondent concedes his letter was ill advised, but maintains he relied on Rule 602, SCACR, for the proposition that partial payments to appointed attorneys are allowed. Respondent further maintains that he worded the letter so as to convey the message that payment for his representation was not mandatory; however, he admits the message was misconstrued by the recipient. Respondent also admits that he failed to adequately communicate with the defendant's grandmother regarding his appointed role in the representation, his obligations and any obligation defendant's grandmother may have had with regard to payment for his legal services on behalf of her grandson.

II. Contingency Fee Matter

Respondent was retained, on a contingency fee basis, to represent a client who was struck in the head by an object falling from an overhead display at a local retail store. Respondent did not enter into a written fee agreement with the client.

After meeting with the client, respondent began negotiating with the store's insurance carrier. Respondent eventually received a verbal commitment from the insurance carrier for a settlement amount that respondent thought would be a fair resolution of the client's personal injury action. Respondent represents that the client's husband was informed of the settlement offer and he was to deliver the message to the client. Respondent acknowledges he did not provide the offer to the client by telephone or in writing and he failed to verify that the client actually received the settlement offer. When respondent did not receive any instructions from the client, he took no further action on the case. Respondent admits that he failed to follow-up with the client regarding the settlement offer and that he allowed the applicable statute of limitations to run without taking any steps to protect the client's interests.

III. Trust Account Matter

Respondent admits that for nearly a year he was not in compliance with the financial recordkeeping requirements of Rule 417, SCACR. Respondent admits he commingled his personal funds with client funds that were held in his trust account. Respondent withdrew funds, which belonged to respondent, from the trust account to pay employee salaries, other firm related expenses and personal expenses.

Respondent advised Disciplinary Counsel that he opened the trust account with $3,000 of his personal funds and that he would periodically add to that "cushion." Respondent represents that he always maintained a balance in the trust account over and above the client funds deposited in the account.

Respondent acknowledges that he was essentially utilizing his trust account as a trust account, operating account and personal account. He further admits that he did not maintain client ledger cards as required by Rule 417, SCACR. However, Disciplinary Counsel found no evidence of misappropriation of client funds. In addition, respondent cooperated fully in the investigation of this matter.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2(a) (a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.4(b) (a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); Rule

1.5(b) (when the lawyer has not regularly represented a client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation); Rule 1.15(a) (a lawyer shall hold client funds in a separate account and complete records of such funds shall be kept by the lawyer); and Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct).

Respondent also acknowledges that his misconduct constitutes grounds for discipline under the following provisions of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate or attempt to violate the Rules of Professional Conduct); Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute) and Rule 7(a)(6) (it shall be a ground for discipline for a lawyer to violate the oath of office taken upon admission to practice law in this state).

Conclusion

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his actions.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael G. Olivetti, Respondent.

Opinion No. 25717
Submitted August 12, 2003 - Filed September 15, 2003

DISBARRED

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

Desa A. Ballard, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the sanction of disbarment. We accept the agreement and disbar respondent from the practice of law in this state. The facts, as set forth in the agreement, are as follows.

Facts

Respondent misappropriated approximately $30,176.65 in trust funds for his own personal use and, on at least one occasion, was dishonest in explaining how the funds were used. Respondent also forged signatures of payees on several checks, thereafter converting the funds to his own use.

Finally, respondent commingled $15,000 in client funds with funds in his firm's general operating account.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.15(a) (a lawyer shall hold property of clients that is in the lawyer's possession in connection with a representation separate from the lawyer's own property); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also acknowledges that his misconduct constitutes grounds for discipline under the following provisions of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute) and Rule 7(a)(6) (it shall be a ground for discipline for a lawyer to violate the oath of office taken upon admission to practice law in this state).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent, retroactive to January 10, 2001, the date of his interim suspension.[1] Within thirty days of the date of this opinion, Disciplinary Counsel and respondent shall establish a restitution schedule pursuant to which respondent shall make restitution to the victims whose funds were misappropriated as well as the Lawyers' Fund for Client Protection for

[1] In the Matter of Olivetti, 343 S.C. 486, 541 S.E.2d 242 (2001).

amounts which the Fund paid to the attorney appointed to protect the interests of respondent's clients ($156.84) and any other amounts the Fund may have paid on claims resulting from respondent's misconduct in connection with this matter. Failure to make restitution in accordance with this opinion and the restitution plan may result in respondent being held in contempt of this Court.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael E. Atwater, Respondent.

Opinion No. 25718
Submitted July 14, 2003 - Filed September 15, 2003

PUBLIC REPRIMAND

Henry B. Richardson, Jr., and Michael S. Pauley, both of Columbia, for the Office of Disciplinary Counsel.

Michael E. Atwater, of Columbia, Pro Se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of any sanction set forth in Rule 7(b), RLDE, Rule 413, SCACR.

Respondent has also filed a motion asking the Court to allow him to supplement the record with an affidavit in mitigation and to allow him to personally appear before the Court regarding the agreement or, in the alternative, to remand the matter to the Commission on Lawyer Conduct for further review of the agreement in light of his affidavit in mitigation. We deny respondent's request for oral argument as well as his request to remand

the matter to the Commission; however, we grant his request to supplement the record with the affidavit in mitigation and the affidavit has been considered in reaching the decision set forth herein.

We accept the Agreement for Discipline by Consent and, in light of the information set forth in the affidavit in mitigation, issue a public reprimand. The facts, as set forth in the agreement, are as follows.

Facts

I. Lack of Written Fee Agreement

Respondent entered into a verbal contract to represent a client in a medical malpractice action. Respondent contacted the client's former attorney and obtained the balance of the client's retainer as well as the client's file. Respondent initiated and eventually settled the medical malpractice action without ever obtaining a written fee agreement with the client. Respondent maintains he mailed several fee agreements to the client which the client never signed and returned.

As a result of a disagreement over respondent's legal fee, the client contacted the Office of Disciplinary Counsel to initiate a disciplinary complaint against respondent. Respondent failed to respond to requests by the Office of Disciplinary Counsel for information regarding respondent's representation of the client.

Respondent admits that he failed to obtain a written fee agreement with the client and that he did not have anything in writing that outlined the method pursuant to which the fee was to be determined. Respondent admits that his fee was to be contingent upon the outcome of the matter.

However, in mitigation, respondent states the client's former attorney, over a period of four years, had failed to actively pursue the medical malpractice claim because he considered the claim to be dubious. After the client transferred his file to respondent, respondent was able to obtain new

evidence, amend the claim and resolve it in the client's favor and with the client's blessing. While respondent was unable to locate a signed fee agreement, he maintains there was evidence that such an agreement was sent to the client to be signed and returned. Respondent maintains the signed agreement could have been returned to the client along with other documents at the conclusion of the case. Respondent points out, however, that there is ample evidence in the client file that the client transferred the file to respondent for litigation, that the client hired respondent's firm to pursue a matter in which the fee is controlled by federal statute, that the client communicated with respondent throughout the entire process, including settlement and disbursement, and the client signed a general power of attorney giving respondent the authority to handle the client's legal matters while the client was overseas with the military.

II. Conflict of Interest

Prior to respondent's admission to the South Carolina Bar, he was employed as a paralegal in a law firm. While employed as a paralegal, respondent assisted an attorney in the formation of a corporation for a college friend (Husband) and the friend's wife (Wife). After being admitted to the South Carolina Bar, respondent represented Wife and her son with regard to several traffic violations.

In 1999, respondent was retained by Husband to pursue a divorce action against Wife. Wife's counsel filed a motion seeking respondent's disqualification. The trial court, in its order granting the motion, recognized that the corporation was to be equitably divided and would more than likely be a contested issue at trial. The trial court was concerned about the possible conflict of interest that could result from respondent's representation of Husband as well as the possibility that respondent could be called as a witness.

Following the issuance of the order, Wife contacted the Office of Disciplinary Counsel to initiate a disciplinary complaint against respondent. Respondent failed to respond to requests by the Office of Disciplinary Counsel for information regarding respondent's representation of Husband.

Respondent admits that undertaking representation of Husband was an error in judgment. He also admits he failed to respond to inquiries made by the Office of Disciplinary Counsel and that he did not initially cooperate in the investigation being conducted by the Office of Disciplinary Counsel.

However, in mitigation, respondent states that Wife's complaint was raised long after he had been involved in representation of Husband and in retaliation for the aggressive manner in which he represented Husband. Respondent maintains Wife's attorneys litigated the case without objection to respondent representing Husband and even negotiated with respondent over a period of time in an attempt to settle the matters in dispute. Respondent contends there would have never been a complaint about his representation of Husband if the matters had been settled as Wife and her counsel desired. Respondent also contends the family court order specifically stated there was no evidence of a conflict of interest in his representation of Husband. He states that although Wife's complaint alleged he was a possible witness, he was never called as a witness because Wife's assertions that respondent could be a witness were not true.

III. Failure to Respond to Summary Judgment Motion

Respondent was retained to pursue a medical malpractice action on behalf of a client. Respondent failed to respond to the defendants' motions for summary judgment thereby failing to provide the court with evidence in support of his client's claims.

Respondent, in mitigation, states that he did an immense amount of work on this case, taking over twenty depositions, including the depositions of five experts, traveled more than 10,000 miles in the process of discovery and spent more than $10,000 in uncovered expenses. He states he spent hundreds of hours preparing the case for trial.

Respondent states that the week he received the motion for summary judgment was the same week his wife left him.[1] He states that on a daily basis he was faced with issues involving his house and his children. He explained his circumstances and the resultant emotional upheaval in a letter to Judge Shedd and asked for an extension of time in which to respond to the summary judgment motion. Respondent maintains he spoke with Judge Shedd's law clerk who told respondent to let Judge Shedd know the amount of time he needed to prepare a response to the motion. Respondent continued to work on his response, but ten days later received an order granting the motion for summary judgment. Respondent telephoned Judge Shedd's law clerk who recommended respondent contact opposing counsel and ask if they would consent to have the order withdrawn, otherwise, Judge Shedd would not reverse his decision. Respondent contacted opposing counsel but they would not consent to having the order withdrawn and proceeding with a hearing on the summary judgment motion.

Respondent represents that his client has been made whole by respondent's malpractice insurance carrier. In addition, respondent has since successfully represented and is currently representing members of the client's family in other unrelated litigation.

IV. Letter in Support of Affidavit in Mitigation

In an attempt to resolve the first two matters addressed in this opinion, respondent entered into an Agreement for Discipline by Consent on August 20, 2001. In support of the agreement, respondent provided the Commission on Lawyer Conduct and this Court with an affidavit in mitigation. Attached to the affidavit was a letter that appeared, on its face, to be written and signed by respondent's former law partner (Partner). However, respondent signed Partner's name to the letter.

Respondent and Partner both admit that respondent contacted Partner regarding a letter to be submitted to the Commission and that they

[1] Respondent states that the matters discussed in sections I and II of this opinion also arose at the time he was going through the emotional upheaval of an unwanted divorce, property division and a child custody battle.

agreed respondent would provide Partner with a proposed draft of the letter. Partner was to review the letter and mail it to the Commission. However, due to time constraints, respondent had Partner's permission to execute the letter on his behalf at the time of submission. Respondent admits, in retrospect, that this method of executing the letter was improper or, at the very least, misleading.

Contemporaneous with the approval of the agreement by this Court, but prior to the implementation of a sanction, respondent advised the Office of Disciplinary Counsel that respondent affixed Partner's signature to a letter included in the mitigation materials submitted to this Court. At the time, respondent was unaware of the Court's actions in approving the agreement.

Respondent, in mitigation, maintains Partner's allegation is unfair and was made at a time when respondent was suing Partner. Respondent contends Partner has changed his story in conversations with Disciplinary Counsel. Respondent states that the fact that Partner could offer to write a letter on respondent's behalf, instruct respondent to execute it for him, and subsequently place respondent in jeopardy for having done so is still hard for respondent to accept or comprehend.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, keep the client reasonably informed about the status of the matter, and promptly comply with reasonable requests for information); Rule 1.5(b) (when a lawyer has not regularly represented a client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation); Rule 1.5(c) (a contingent fee agreement shall be in

writing and shall state the method by which the fee is to be determined and upon conclusion of the matter the lawyer shall provide the client with a written statement stating the outcome of the matter, the remittance to the client, if there is a recovery, and the method of its determination); Rule 3.2 (a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client); Rule 3.3(a) (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal or offer evidence the lawyer knows to be false); Rule 3.7 (a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except under limited circumstances); Rule 8.1 (a lawyer in connection with a disciplinary matter shall not knowingly make a false statement of material fact, fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter or knowingly fail to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent's misconduct constitutes grounds for discipline under the following provisions of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct); Rule 7(a)(3) (it shall be a ground for discipline for a lawyer to fail to respond to a lawful demand from a disciplinary authority including a request for a response); Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute); and Rule 7(a)(6) (it shall be a ground for discipline for a lawyer to violate the oath of office taken upon admission to practice law in this state).

Conclusion

We find, after consideration of the mitigating circumstances, that respondent's misconduct warrants a public reprimand. Accordingly, we

accept the Agreement for Discipline by Consent and publicly reprimand respondent for his actions.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Zepsa Construction, Inc, Respondent,

v.

Phillip A. Randazzo and
Virginia M. Randazzo, Appellants.

Appeal From York County
John Buford Grier, Master-in-Equity

Opinion No. 3673
Heard May 13, 2003 – Filed September 15, 2003

AFFIRMED AS MODIFIED

Douglas Gay, of Rock Hill; for Appellants.

S. Jackson Kimball, III, of Rock Hill; for Respondent.

CURETON, J.: In this action to foreclose a mechanic's lien, the master ordered judgment against Phillip and Virginia Randazzo in the amount of $50,846.00, and awarded attorney's fees to Zepsa in the amount of $8,123.40. The Randazzos appeal, arguing the master erred in: (1) including lost profits and overhead in the amount of the

mechanic's lien; and (2) awarding attorney's fees to Zepsa. We affirm as modified.

FACTS

Phillip and Virginia Randazzo (collectively, "Randazzos"), owned and operated an Italian restaurant near Tega Cay Village Shopping Center in Fort Mill, South Carolina. In September 1996, they contacted Ed Zepsa, president of Zepsa Construction, Inc. ("Zepsa") to inquire about the design and construction of a new restaurant. After several months of discussions and negotiations, the parties entered into on May 14, 1997, a written construction contract for Zepsa to build the restaurant. The agreed price was $610,000.00. The terms of the contract required a deposit in the amount of $61,000.00 to be paid when the contract was signed.

On May 29, 1997, the Randazzos gave written "notice to proceed" with construction. At that time, they provided Zepsa with a check for $21,000.00, representing part of the agreed deposit. Zepsa did not begin work at this time because the Randazzos had not paid the full deposit. By letter dated July 1, 1997, Zepsa agreed to accept the remainder of the deposit in two installments. These installments were to be paid at the time of the first two payment requests after construction began. Zepsa began work on the site on July 7, 1997. Between July 15 and August 2, 1997, Virginia Randazzo (Virginia) spoke by phone with either Ed Zepsa or the project manager on four occasions. During these conversations, she asked about terminating the contract due to the Randazzos' marital problems, instructed Zepsa to stop work, and told Zepsa to continue to delay construction while the Randazzos tried to resolve their marital difficulties. On August 3, Virginia called Ed Zepsa and told him she did not want to continue with the project.

On August 4, the Randazzos contacted Ed Zepsa and instructed him to proceed with construction. In response, he submitted a payment request seeking payment of $8,674.00 for work that had been performed and $40,000.00 for the balance of the deposit. Also on

August 4, Zepsa received a letter from the Randazzos' attorney requesting that Zepsa abide by the deposit payment schedule and proceed with the work. Zepsa resumed work on the project.

On August 11, Zepsa submitted a payment request for work performed through July and included a request for the next deposit installment. No payment was made for this completed work or the deposit installments. By letter dated August 28, 1997, the Randazzos' attorney gave notice of termination of the contract.

Zepsa timely filed a lis pendens and complaint on October 16, 1997. The complaint sought judgment against the Randazzos and foreclosure of a mechanic's lien that Zepsa had previously filed and served. The matter was referred with finality to the master. At the hearing, Zepsa presented uncontested evidence that Zepsa performed construction work on the job site in the amount of $10,846.00. In his order dated January 22, 2001, the master granted Zepsa judgment against the Randazzos in the amount of $50,846.00, which included the unpaid balance for work already performed and payment for the remaining deposit balance of $40,000.00. By order dated March 22, 2001, the master awarded Zepsa attorney's fees in the amount of $8,123.40, and costs in the amount of $1,490.60. The Randazzos appeal.

STANDARD OF REVIEW

"An action to foreclose a mechanic's lien is a law case in South Carolina." Keeney's Metal Roofing, Inc. v. Palmieri, 345 S.C. 550, 553, 548 S.E.2d 900, 901 (Ct. App. 2001). "In an action at law, tried without a jury, the judge's findings will not be disturbed unless they are without evidentiary support." King v. PYA/Monarch, Inc., 317 S.C. 385, 388, 453 S.E.2d 885, 888 (1995). "His findings are equivalent to those of a jury in an action at law." Id. at 389, 453 S.E.2d at 888.

DISCUSSION

I. Mechanic's Lien

The Randazzos argue the master erred by including lost profits in the amount of the mechanic's lien when only a small portion of the contract work was actually performed.

Section 29-5-10 of the South Carolina Code of Laws defines a mechanic's lien. S.C. Code Ann. § 29-5-10 (1991 & Supp. 2002).[1] This section provides in pertinent part:

> (a) A person to whom a debt is due for labor performed or furnished or for materials furnished and actually used in the erection, alteration, or repair of a building or structure upon real estate or the boring and equipping of wells, by virtue of an agreement with, or by consent of, the owner of the building or structure, or a person having authority from, or rightfully acting for, the owner in procuring or furnishing the labor or materials shall have a lien upon the building or structure and upon the interest of the owner of the building or structure in the lot of land upon which it is situated to secure the payment of the debt due to him.

S.C. Code Ann. § 29-5-10(a) (1991).

[1] Although we recognize section 29-5-10 was amended in 1999, we cite to the most current version of this subsection given no substantive amendments have been made to the subsection since this litigation began.

In the instant case, the master granted a judgment against the Randazzos in the amount of $50,846.00 based on two grounds. First, the master found Zepsa's lost profits and overhead expenses were recoverable as an element of damages for the Randazzos' breach of the construction contract. Secondly, the master concluded "these elements of damage [were also] recoverable in a mechanic's lien foreclosure action." The master reasoned:

> Since Zepsa is entitled to profits and overhead expenses, there is a reasonable and equitable basis for claiming the balance of the deposit as an integral part of the payment due under the contract, unrelated to actual work performed. Thus, Zepsa is entitled to be paid the balance of the deposit due, along with the balance due for work which was performed.

As a threshold matter, we find the master erred in awarding Zepsa an in personam judgment based on a breach of contract cause of action.[2] In its complaint, Zepsa only pleaded factual allegations consistent with statutory recovery under a mechanic's lien.[3] As such, Zepsa could not recover an in personam judgment against the Randazzos based on a breach of contract action that was neither pleaded nor permitted by the statutory parameters for the foreclosure of a mechanic's lien. See Atl. Coast Lumber Corp. v. Morrison S. Mercantile Co., 152 S.C. 305, 309-10, 149 S.E. 243, 245 (1929) ("[I]n

---

[2] The Randazzos did not separately argue this issue. However, we must necessarily address it because it is the underlying basis for their challenge to the amount of the mechanic's lien award. The Randazzos essentially assert the award for overhead and lost profit constituted contract damages that were not recoverable in Zepsa's action to foreclose a mechanic's lien. In fact, they state in their brief "[Zepsa] has successfully parlayed a damage award for lost profits in a breach of contract action into a mechanic's lien."

[3] In their Answer, the Randazzos counterclaimed for damages based on the allegation that Zepsa breached the construction contract.

a proceeding strictly to enforce a mechanic's lien, the petitioner may not recover a personal judgment against the owner of the property or such judgment for any deficiency that may result from its sale."); Smythe v. Monash, 109 S.C. 82, 85, 95 S.E.138, 139 (1918) (holding trial judge erred in awarding in personam judgment to plaintiff who brought an action to foreclose a mechanic's lien given "it would not have been in accordance with the terms of the statute providing for the foreclosure of a mechanic's lien"); Metz v. Critcher, 83 S.C. 396, 65 S.E. 394 (1909) (finding in action to foreclose mechanic's lien trial judge was not authorized to award in personam judgment but was limited to determining amount due under mechanic's lien statute); Tenny v. Anderson Water, Light & Power Co., 67 S.C. 11, 45 S.E. 111 (1903) (concluding plaintiff, who brought an action under the statutory proceedings to foreclose a mechanic's lien, could not recover a judgment in personam against the defendant); cf. Arnet Lewis Constr. Co. v. Smith-Williams & Assocs., Inc., 269 S.C. 143, 236 S.E.2d 742 (1977) (holding where amended complaint included allegations sufficient to support a cause of action in personam for breach of contract as well as foreclosure of a mechanic's lien, petitioner could recover in personam judgment even though mechanic's lien was dismissed by consent). Therefore, Zepsa was limited to an action to foreclose a mechanic's lien.

Although we recognize a mechanic's lien is based on an underlying contract that must be referenced to determine the amount owed for the lien, an action strictly limited to the foreclosure of a mechanic's lien cannot be utilized to recover contract damages. See S.C. Code Ann. § 29-5-160 (1991) ("The [mechanic's lien] petition shall contain a brief statement of the contract on which it is founded and of the amount due thereon, with a description of the premises subject to the lien and all other material facts and circumstances, and shall pray that the premises may be sold and the proceeds of the sale applied to the discharge of the demand."); Sea Pines Co. v. Kiawah Island Co., 268 S.C. 153, 159, 232 S.E.2d 501, 503 (1977) ("[A] mechanic's lien under the statute is not a vehicle for collecting damages for breach of contract. The statute, by its own terms, secures a debt 'for labor performed or furnished or for materials furnished and actually

used.'"); Wood v. Hardy, 235 S.C. 131, 110 S.E.2d 157 (1959) (holding supplier, who was not paid for materials furnished to contractor, was entitled to a mechanic's lien for only such amount as would have been due to contractor in light of his breach of contract); see also Bangor Roofing & Sheet Metal Co. v. Robbins Plumbing Co., 116 A.2d 664, 666 (Me. 1955) (A mechanic's "lien is dependent upon the existence of contract, express or implied, and the obligation of debt. The lien is incident and security to a legal liability to pay.").[4]

Given Zepsa's recovery is limited to that as provided for in the mechanic's lien statute, the question becomes whether the overhead expenses and lost profits were lienable items. In concluding these items were recoverable under a mechanic's lien, the master relied on our Supreme Court's decision in Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp., 287 S.C. 346, 338 S.E.2d 631 (1985). In Sentry, a builder, Sentry, and a developer executed two separate agreements for the construction of a condominium. The first agreement provided for the cost of the construction and the second provided for the additional compensation of overhead and profit. As the project neared completion, Sentry filed a mechanic's lien for balances due under both agreements and change orders. Sentry exercised its right to arbitration and filed a claim in the amount of its mechanic's lien. Sentry later amended its arbitration demand to include claims for

[4] The overhead expenses and lost profits would have been appropriate elements of damages pursuant to a breach of contract action. See S.C. Code Ann. § 29-5-420 (1991) ("Nothing contained in this chapter shall be construed to prevent a creditor in such contract from maintaining an action thereon in like manner as if he had no such lien for the security of his debt."); Manning v. City of Columbia, 297 S.C. 451, 455, 377 S.E.2d 335, 337 (1989) ("Damages recoverable for breach of contract either must flow as a natural consequence of the breach or must have been reasonably within the parties' contemplation at the time of the contract."); Drews Co. v. Ledwith-Wolfe Assocs., 296 S.C. 207, 210, 371 S.E.2d 532, 534 (1988) ("Profits lost by a business as the result of a contractual breach have long been recognized as a species of recoverable consequential damages in this state.").

damages for wrongful termination of the construction contract. The American Arbitration Association (AAA) found Sentry was entitled to $503,271.00. The circuit court adopted the AAA's award as a judgment, granted Sentry summary judgment on its mechanic's lien foreclosure petition, assessed interest, and awarded Sentry attorney fees.

On appeal, the developer raised several issues, including the assertion the circuit court judge erred in holding that profit and overhead were components of "debt" under the mechanic's lien statute. Id. at 349, 338 S.E.2d 633. Our Supreme Court rejected the developer's argument. The Court held "that overhead and profit, when stated as part of the contract price, are proper components of a mechanic's lien." Id. at 352, 338 S.E.2d at 635. The Court found that "'[s]uch items, as such and standing by themselves, are nonlienable, but they become lienable when they are included in a contract price or are reflected in the reasonable value of labor or materials furnished.'" Id. at 352, 338 S.E.2d at 634 (quoting 53 Am. Jur. 2d Mechanics' Liens § 107 (1970)).

Based on our reading of Sentry, we believe the Supreme Court expanded the items that are recoverable under the mechanic's lien statute to include overhead and profit. However, this holding is only available in the limited situation where the terms of overhead and profit are agreed upon by the parties and are subsequently embodied within a contract.

In view of the specific facts of the instant case, Sentry is inapplicable for several reasons. Significantly, the parties in Sentry entered into a separate agreement that specifically provided for the recovery of overhead and profit. In contrast, Zepsa and the Randazzos did not execute an agreement providing for overhead and profit. Their contract is silent concerning these items. Even though Ed Zepsa testified the deposit constituted compensation for pre-construction or "up front" work, his testimony is not determinative of the agreed upon terms of the contract. There is no evidence the parties agreed to pay $61,000.00 as an upfront cost. Additionally, the account statement of

the contract does not list overhead and profit as terms, but instead indicates the $61,000.00 is an additional amount that represents 10% of the $610,000.00 contract price. Furthermore, the construction in Sentry was substantially completed whereas only $10,000.00 of the $610,000.00 Zepsa project had been completed.

Because we find Sentry distinguishable, Zepsa is limited to recovery provided for by the strict terms of the mechanic's lien statute. This "statute provides that debts for 'labor performed' or 'materials furnished' are lienable debts." Hardin Constr. Group, Inc. v. Carlisle Constr. Co., 300 S.C. 456, 457, 388 S.E.2d 794, 795 (1990); see Johnson v. Barnhill, 279 S.C. 242, 245, 306 S.E.2d 216, 218 (1983) ("In order to establish a mechanic's lien, it is generally necessary that the labor performed go into something which has attached to and become a part of the real estate, adding to the value thereof."); Tenny v. Anderson Water, Light & Power Co., 67 S.C. 11, 17, 45 S.E. 111, 113 (1903) ("'The extent of the remedy afforded by the [mechanic's lien] act is to enforce the lien upon the property covered.'" (quoting Johnston v. Frazee, 20 S.C. 500 (1884))).

With respect to overhead and profits, the extent of a contractor's recovery has been interpreted as follows:

> A contractor is only allowed a privilege for claims expressly granted by the statute and equitable considerations do not enlarge such right. Generally, overhead costs and lost profits are not within the purview of a mechanics' lien statute; but, where overhead costs and profits are provided for in the contract, they become subject to collection on a mechanic's lien.

56 C.J.S. Mechanics' Liens § 196 (2000).

As testified to by Ed Zepsa, the $61,000.00 deposit was not associated with any labor performed. The master also recognized this fact given he stated in his order "there is a reasonable and equitable basis for claiming the balance of the deposit as an integral part of the

payment due under the contract, unrelated to actual work performed." Thus, we find the master erred in finding Zepsa was entitled to the balance of this amount under a mechanic's lien action. Moreover, we note the mechanic's lien statement of account, which outlines the amount that is recoverable, is not included in the Record on Appeal. Despite this omission from the record, there is a letter from Zepsa's attorney to the Randazzos' attorney that itemizes the amount of Zepsa's claim. In this accounting, the "Total due on work" is valued at $10,846.00. Accordingly, Zepsa's recovery under its mechanic's lien action is limited to $10,846.00, an amount that the parties agree represents the work completed.

Our decision is consistent with the holdings in other jurisdictions. See, e.g., In re Reg'l Bldg. Sys., Inc., 273 B.R. 423, 443 (Bankr. D. Md. 2001), aff'g 320 F.3d 482 (4th Cir. 2003) ("[A] claim for lost profits arising from a breach of contract based on wrongful termination of a contract before construction is completed cannot be asserted as a mechanic's lien or as a claim payable from contractor's trust."); Tilt-Up Concrete, Inc. v. Star City/Federal, Inc., 582 N.W.2d 604 (Neb. 1998) (concurring with other jurisdictions which deny lien for lost profits because they compensate a party for work not yet performed); Fortune v. Million Dev. Co., 768 P.2d 1194, 1197 (Ariz. Ct. App. 1989) (holding that "a lien filed before completion of a contract is limited to the value of the labor or services actually furnished at the time the lien is filed . . . rather than the full contract price payable after completion of the contract"); Bangor Roofing & Sheet Metal Co. v. Robbins Plumbing Co., 116 A.2d 664 (Me. 1955) (recognizing that overhead and lost profit standing by themselves are not lienable); see generally W. J. Dunn, Annotation, Amount For Which Mechanic's Lien May Be Obtained Where Contract Has Been Terminated or Abandoned by Consent of Parties or Without Fault on Contractor's Part, 51 A.L.R.2d 1009 (1957 & Supp. 2003) (discussing the following methods for valuing a mechanic's lien where contract had been prematurely terminated: (1) amount of work performed up to the date work was stopped; (2) amount proportional to entire contract price; (3) amount of profit included in lien in limited jurisdictions; (4) amount of profit

excluded; and (5) amount includes contract price less amount of completion).

II. Attorney's Fees

The Randazzos argue the master erred by awarding attorney's fees to Zepsa and not to them.

The Randazzos raise this issue in conjunction with their first issue. They assert that "[i]f this Court reverses the lower court's finding regarding the lien, the Appellants will become the prevailing party under the statute." The Randazzos do not make any argument that the master erred in awarding attorney's fees other than to contend that because we should reverse on the first issue, we should also reverse the award of attorney's fees.

"The determination as to the amount of attorney's fees that should be awarded under the mechanic's lien statute is addressed to the sound discretion of the trial court." Keeney's Metal Roofing, Inc., 345 S.C. 550, 553, 548 S.E.2d 900, 901 (Ct. App. 2001). "The court's decision regarding such a matter will not be disturbed absent an abuse of discretion." Id.

In an action to foreclose a mechanic's lien, the award of attorney's fees is governed by section 29-5-10(a). This section states in pertinent part, "The costs which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney's fee, may be recovered by the prevailing party." S.C. Code Ann. § 29-5-10(a) (1991).

Section 29-5-10(b) outlines the procedure for determining the "prevailing party." The statute in effect at the time of this action provides in relevant part:

> For purposes of the award of attorney's fees, the determination of the prevailing party is based on one

> verdict in the action. One verdict assumes some entitlement to the mechanic's lien and the consideration of compulsory counterclaims. The party whose offer is closer to the verdict reached is considered the prevailing party in the action. If the difference between both offers and the verdict is equal, neither party is considered to be the prevailing party for purposes of determining the award of costs and attorney's fees.
>
> If the plaintiff makes no written offer of settlement, the amount prayed for in his complaint is considered to be his final offer of settlement.
>
> If the defendant makes no written offer of settlement, the value of his counterclaim is considered to be his negative offer of settlement. If the defendant has not asserted a counterclaim, his offer of settlement is considered to be zero.

S.C. Code Ann. § 29-5-10(b) (Supp. 2002).[5]

---

[5] We note section 29-5-10(b) was substantively amended in 1999 and the new version became effective on June 11, 1999. Act No. 83, 1999 S.C. Acts 269. Prior to the amendment, the portion of the statute applicable to settlement offers and the award of attorney's fees stated, "If the defendant makes no written offer of settlement, his offer of settlement is considered to be zero." S.C. Code Ann. § 29-5-10(b) (1991); see Lauro v. Visnapuu, 351 S.C. 507, 570 S.E.2d 551 (Ct. App. 2002), cert. denied (Apr. 24, 2003) (discussing determination of prevailing party for award of attorney's fees in mechanic's lien action under pre- and post-amendment version of section 29-5-10(b)).

The Randazzos do not present any argument concerning which version of the statute is applicable to their case. However, based on the following procedural facts, we find the post-amendment version of the statute governs our analysis in this case. Zepsa filed its Complaint on October 16, 1997. The Randazzos filed their Answer and Counterclaim

In the instant case, Zepsa made a written offer of settlement for $40,000.00. Because the Randazzos did not make an offer of settlement, the value of their counterclaims, $88,000, is considered a negative offer of settlement. As previously discussed, the $40,000.00 deposit should not have been included as part of the mechanic's lien and, thus, Zepsa should have been awarded $10,864.00. Even excluding the amount of the deposit, Zepsa still remains the prevailing party and was properly awarded attorney's fees. Given the Randazzos do not challenge the amount of the award of attorney's fees, we affirm the master's decision.

CONCLUSION

In view of the foregoing analysis, we hold the master erred in awarding $50,486.00 to Zepsa for the mechanic's lien. Because the $40,000 balance of the agreed upon deposit, which the parties characterized as overhead expenses and lost profit, was not a term of the construction contract, it was not a proper lienable item under the mechanic's lien statute. The master did, however, correctly award $10,864.00 to Zepsa for the value of work that had been completed on the project. Finally, we affirm the master's decision to award Zepsa attorney's fees given it was the "prevailing party" under the mechanic's lien statute.

AFFIRMED AS MODIFIED.

HEARN, C.J. and STILWELL, J., concur.

---

on August 17, 1998, to which a Reply was made on September 10, 1998. On November 13, 2000, Zepsa made its offer of settlement. The master entered his final order for judgment and foreclosure of the mechanic's lien on January 22, 2001. Subsequently, the master awarded Zepsa attorney's fees by order dated March 22, 2001. Given Zepsa made its offer of settlement and the master awarded attorney's fees after the 1999 amendment, we conclude the post-1999 version of the statute is applicable to this case.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Auto-Owners Insurance Company, Respondent,

v.

Shirley Maxine Horne, Crystal Horne, and Michael Horne, Appellants.

Appeal From Saluda County
L. Lee Plumblee, Special Referee

Opinion No. 3674
Heard June 11, 2003 – Filed September 15, 2003

AFFIRMED

Jon E. Newlon and John R. McCravy, III, both of Greenwood, for Appellants.

James P. Walsh, of Greenville, for Respondent.

CONNOR, J.: In this declaratory judgment action, the special referee found Crystal Horne was not a Class I insured entitling her to stack underinsured motorist benefits under Shirley Maxine Horne's automobile insurance policy. Crystal, Shirley Maxine, and Michael Horne appeal, arguing the referee erred in finding: (1) Crystal was not a resident relative of Shirley Maxine Horne and Michael Horne's household, and (2) Crystal was not herself a named insured on the policy. We affirm.

FACTS/PROCEDURAL HISTORY

Crystal Horne's parents divorced on July 22, 1988. The final divorce decree, entered in Saluda County, ordered that Crystal's mother, Dianne Williams (Williams), "be granted the permanent care, custody and control of the parties' minor children" and that Michael Horne (Mr. Horne) "be granted the right to reasonable periods of visitation with the parties' minor children." After the divorce, Crystal's mother remarried and remained living in Saluda until moving to Conway in 1992. Crystal, however, stayed with her father in the Greenwood/Saluda area for approximately three months before moving to Horry County to live with her mother and younger sister. Before she moved to Horry County, Crystal had lived with Williams in Saluda and had stayed with her father during the summer months and every other weekend during the school year.

On March 9, 1997, Crystal sustained personal injuries from an automobile wreck in Horry County while operating a 1987 Chevrolet Camaro. The Camaro was insured under an automobile policy issued by Auto-Owners Insurance Company (Auto-Owners) to Shirley Maxine Horne (Mrs. Horne) as the named insured. Mrs. Horne is Michael Horne's wife and Crystal's stepmother. Mr. Horne owned the Camaro. At the time of the accident, Crystal was seventeen years old and her driver's license listed an address in Conway. Crystal stated the address on the driver's license is where she was living with her mother at the time of the accident.[1]

From 1992 until the date of the accident, Crystal continued to live with Williams in the Conway area and visited her father in Saluda during the summers, holidays, and occasional weekends during the school year. Crystal

[1] Crystal was apparently confused during her deposition about her stated address and the address listed on her driver's license. Crystal stated she lived at 4134 Highland Drive, Aynor, at the time of the accident and that this was the address found on her driver's license. Crystal had earlier testified she and her mother "moved to 4134 in Aynor" after living at an address in Conway. However, the copy of Crystal's driver's license included in the record lists her address as Plum Tree Lane, Conway. Any discrepancy between Crystal's stated address and that found on her driver's license does not affect our analysis.

would usually spend the whole summer with her father in Saluda. However, the summer prior to the accident Crystal stayed in Saluda for only a few days during the summer. During Crystal's trips to Saluda, she would also visit and stay with her grandmothers and aunts, who lived in the area.

Following the accident, Crystal recovered the limits against the liability insurance carrier for the at-fault driver and then made a claim to Auto-Owners for underinsured motorist (UIM) benefits. Auto-Owners paid Crystal the primary UIM coverage on the vehicle involved in the wreck.[2] Crystal then submitted a claim to Auto-Owners seeking to recover additional UIM benefits by stacking coverages of other vehicles insured under Mrs. Horne's policy.

Auto-Owners filed this declaratory judgment action seeking to determine Crystal's eligibility for stacking UIM benefits under the policy. Pursuant to Rule 53(b), SCRCP, the parties consented to have the matter heard by a special referee, with appeal from the referee's final judgment to be made directly to this Court. The referee found Crystal was not entitled to stack UIM benefits because she was not a named insured on the Auto-Owners policy and did not reside in the named insured's household at the time of the accident. The Hornes appeal.[3]

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "An issue essentially one at

---

[2] The underinsured motorist endorsement of the policy issued to Mrs. Horne stated Auto-Owners "will pay damages for: (1) Bodily injury sustained by any person occupying or getting in or out of an automobile . . . covered by the Liability Coverage of the Policy, provided such person is legally entitled to recover such damages from the owner or driver of an [under]insured motor vehicle."

[3] In their brief, the Hornes argued the referee erred in finding Crystal was not also a named insured under the Auto-Owners policy. However, at oral argument the Hornes abandoned this argument. Thus, we will not address it.

law will not be transformed into one in equity simply because declaratory relief is sought." Id.

The issue here involves whether Crystal can stack underinsured motorist coverage available under an insurance policy. "An action to determine coverage under an insurance policy is an action at law." South Carolina Farm Bureau Mut. Ins. Co. v. Wilson, 344 S.C. 525, 528-29, 544 S.E.2d 848, 849 (Ct. App. 2001); see Richardson v. South Carolina Farm Bureau Mut. Ins. Co., 336 S.C. 233, 519 S.E.2d 120 (Ct. App. 1999) (stating an action seeking a declaration of whether coverage under uninsured motorist policies could be stacked is an action at law); see also State Auto Prop. & Cas. Ins. Co. v. Gibbs, 314 S.C. 345, 444 S.E.2d 504 (1994) (stating an action to declare excess insurance coverage is an action at law).

> In a non-jury action at law, the judge's findings of fact will not be disturbed on appeal unless they are without evidentiary support. Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292 (1996). The trial court's findings of fact have the same force and effect as a jury verdict unless it committed some error of law leading to an erroneous conclusion or unless the evidence is reasonably susceptible of the opposite conclusion only. Noisette v. Ismail, 299 S.C. 243, 384 S.E.2d 310 (Ct. App. 1989), rev'd on other grounds, 304 S.C. 56, 403 S.E.2d 122 (1991). We must affirm the trial court if there is any evidence that reasonably supports its decision. Id. In reviewing the findings, we must view the evidence and all its reasonable inferences in the light least favorable to the losing party below. Id.

Hiott v. Guar. Nat'l Ins. Co., 329 S.C. 522, 528-29, 496 S.E.2d 417, 421 (Ct. App. 1997).

DISCUSSION

The Hornes argue the evidence established that Crystal resided with her father for part of the year and the special referee thus erred in finding as a matter of law that Crystal was not a resident relative of her father's household for stacking purposes.

"Stacking is the insured's recovery of damages under more than one policy until the insured satisfies all of his damages or exhausts the limits of

all available policies." Cont'l Ins. Co. v. Shives, 328 S.C. 470, 473, 492 S.E.2d 808, 810 (Ct. App. 1997). "In determining whether an insured can stack, insureds are divided into two classes: Class I and Class II. Only Class I insureds can stack." State Farm Mut. Auto. Ins. Co. v. James, 337 S.C. 86, 94, 522 S.E.2d 345, 349 (Ct. App. 1999). Previous cases have stated section 38-77-160 of the South Carolina Code of Laws[4] is the statute controlling the right to stack and that under this section "a Class I insured is an insured or named insured who 'has' a vehicle involved in the accident." Concrete Servs., Inc. v. United States Fid. & Guar. Co., 331 S.C. 506, 512, 498 S.E.2d 865, 868 (1998). In order "to 'have' a vehicle involved in the accident as a prerequisite to stacking mean[s] only that a person must be a Class I insured with respect to a vehicle involved in the accident." Id. at 513, 498 S.E.2d at 868. A Class I insured has been repeatedly defined as the named insured, his spouse and relatives residing in his household. Id.; see also Davidson v. E. Fire & Cas. Ins. Co., 245 S.C. 472, 477, 141 S.E.2d 135, 138 (1965) (defining a Class I insured as the "named insured, his spouse and **his or her** relatives resident in the same household") (emphasis added).[5] A Class II

---

[4] Section 38-77-160 provides in part:

> If, however, an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage.

S.C. Code Ann. § 38-77-160 (2002).

[5] Even though Davidson defined two classes of insured persons, the decision did not involve an issue of stacking. In Davidson, the two classes of insureds were culled from the definition of the term "insured" under section 46-750.11 of the 1962 South Carolina Code of Laws. Davidson, 245 S.C. at 476-77, 141 S.E.2d at 137-38. This section defined "insured" as the "named insured and, while resident of the same household, the spouse of any such

named insured and relatives of **either** . . . , and any person who uses, with the consent . . . of the named insured, the motor vehicle to which the policy applies and a guest in such a motor vehicle . . . ." S.C. Code Ann. § 46-750.11 (1962) (emphasis added). The current definition of insured found in section 38-77-30 is nearly identical to the former definition under which the Davidson court formed the separate classes of insureds. However, it appears that later stacking cases have pared down the language of a Class I insured to include only the named insured, his spouse, and relatives residing in his household, rather than relatives of **either** the named insured or the spouse of the named insured. See, e.g., Concrete Servs., Inc., 331 S.C. at 514, 498 S.E.2d at 868-69 (stating that to qualify as a Class I insured an individual must be the spouse or relative of the named insured); Garris v. Cincinnati Ins. Co., 280 S.C. 149, 156, 311 S.E.2d 723, 727 (1984) (defining the first class of insureds to include the named insured, his spouse and relatives residing in his household); Richardson v. South Carolina Farm Bureau Mut. Ins. Co., 336 S.C. 233, 235, 519 S.E.2d 120, 122 (Ct. App. 1999) ("A Class I insured is a named insured, his spouse, and relatives residing in his household.").

A literal and exacting application of the definition of a Class I insured in the stacking cases after Davidson raises an interesting issue in the present case. Obviously, the question of whether someone is a resident relative requires that residency and relationship be shown. Since Crystal is not a spouse of Mrs. Horne, the named insured, in order for Crystal to stack UIM benefits she must be Mrs. Horne's relative. However, Crystal may not be Mrs. Horne's relative. Ordinarily, a relative is defined as a person connected by blood, marriage, or adoption. Inman v. South Carolina Ins. Co., 300 S.C. 550, 551-52, 389 S.E.2d 173, 174 (Ct. App. 1990). But "[i]n the context of insurance contracts, 'relative' has been reasonably interpreted as restricted to those related by consanguinity and excluding those related by affinity." Forner v. Butler, 319 S.C. 275, 278, 460 S.E.2d 425, 427 (Ct. App. 1995).

However, even though Crystal may not be Mrs. Horne's relative based on Forner, Auto-Owners did not raise this issue in its complaint. In its brief, Auto-Owners states the "Special Referee correctly held that Crystal Horne was not living with her father and the named insured (stepmother) at the time of the . . . accident." Thus, because Crystal is certainly Mr. Horne's relative, and thereby is entitled to stack if she is a resident, we will address whether Crystal is a resident of her father's, and Mrs. Horne's, household for stacking

insured includes any person using, with the consent of the named insured, the motor vehicle to which the policy applies and a guest in the motor vehicle. Garris v. Cincinnati Ins. Co., 280 S.C. 149, 311 S.E.2d 723 (1984).

The pertinent inquiry here is whether Crystal is a Class I insured. Specifically, the issue is whether Crystal was a resident relative of the named insured's household entitling her to stack UIM benefits under the policy.

Our Supreme Court first analyzed whether a person was a resident relative of the same household as the named insured in Buddin v. Nationwide Mut. Ins. Co., 250 S.C. 332, 157 S.E.2d 633 (1967). In finding a nephew was a "relative resident of the same household" as his uncle, as that term was used in the uncle's insurance policy to extend coverage to additional insureds, the Court stated "'a resident of the same household is one, other than a temporary or transient visitor, who lives together with others in the same house for a period of some duration, although he may not intend to remain there permanently.'" Id. at 339, 157 S.E.2d at 636 (quoting Hardware Mut. Cas. Co. v. Home Indem. Co., 50 Cal. Rptr. 508, 514 (Cal. Dist. Ct. App. 1966)); see also Farmers Ins. of Columbus, Inc. v. Taylor, 528 N.E.2d 968, 969 (Ohio Ct. App. 1987) (stating "the word 'resident' as used in the phrase 'resident of your household,' [unless otherwise defined in a policy,] refers to one who lives in the home of the named insured for a period of some duration or regularity, although not necessarily there permanently, but excludes a temporary or transient visitor."). The Court also noted several factors for possible consideration but stated that none of the factors were determinative of the issue. Buddin, 250 S.C. at 338-39, 157 S.E.2d at 636. The factors included: (1) the payment of rent or board; (2) the presence or absence of control over the relative; and (3) whether there was lack of a permanent living arrangement. Id.

This Court has more recently considered whether an individual was a resident relative in Auto Owners Ins. Co. v. Langford, 330 S.C. 578, 500 S.E.2d 496 (Ct. App. 1998), and Richardson v. South Carolina Farm Bureau Mut. Ins. Co., 336 S.C. 233, 519 S.E.2d 120 (Ct. App. 1999). In Langford, we recognized the notion of the individual's intent and noted "a person may be a resident relative for insurance purposes even though he does not have an

---

purposes. Moreover, in this case, the household of one (Mr. Horne) is the household of the other (Mrs. Horne).

intent to permanently reside with the insured." Langford, 330 S.C. at 583, 500 S.E.2d at 498.

In Richardson, we affirmed the trial court's determination that a twenty-five-year-old graduate student was not a resident relative of her father's household, and thus, was not entitled to stack uninsured motorist coverage under her father's policy. The daughter was held to be a "transitory visitor," even though she still had certain connections to her father's household. Richardson, 336 S.C. at 236-37, 519 S.E.2d at 122. In so holding, we noted several factors supporting the trial court's finding that the daughter was not a resident of her father's household, including: (1) she kept an exercise machine, some furniture, and seasonal clothes at her father's house; (2) she acknowledged living in various apartments in the seven years preceding the accident; (3) she usually visited her parents once a month for three to four days at a time; (4) she spent only a portion of two summers with her parents in the four years prior to the accident; (5) she filed her own tax returns and claimed herself as a dependent; (6) her tax refund was not sent to her father's house; (7) her driver's license did not list her father's address; (8) she was registered to vote in a different county than her father; and (9) Richardson worked regularly and claimed income of over $10,000 in each of the two years prior to the accident. Id. at 237, 519 S.E.2d at 122-123.

In State Farm Fire & Cas. Co. v. Breazell, our Supreme Court also discussed, in the context of a homeowner's policy, whether a foster child was a resident of the foster parents' household and adopted a three-factor test for making this determination. State Farm Fire & Cas. Co. v. Breazell, 324 S.C. 228, 478 S.E.2d 831 (1996).

> The determination under the . . . test is dependent upon [these] factors: (1) living under the same roof; (2) in a close, intimate and informal relationship between the parties; and (3) where the intended duration of the relationship is likely to be substantial, where it is consistent with the informality of the relationship, and from which it is reasonable to conclude that the parties would consider the relationship in contracting about such matters as insurance or in their conduct in reliance thereon.

Id. at 231, 478 S.E.2d at 832.

Notwithstanding the South Carolina appellate courts' determinations of resident relative status in the above cases, our courts have not considered the issue of whether a child is a resident relative of a noncustodial parent's household when the child's parents are divorced or separated, the child is living with one parent, and custody of the child has been established. Numerous other states have visited this issue with varying results. See generally Carolyn Kelly MacWilliam, Annotation, Who is "Member" or "Resident" of Same "Family" or "Household" within No-Fault or Uninsured Motorist Provisions of Motor Vehicle Insurance Policy, 66 A.L.R.5th 269 (1999).

The analysis in cases of this type is generally fact-specific and no bright line test exists for determining under what instances a child is a resident relative of a noncustodial parent. See Griffith v. Sec. Ins. Co. of Hartford, 356 A.2d 94, 97 (Conn. 1975) (stating the problem of deciding whether a person is a member of a particular household is dependent upon the factual circumstances involved and noting the factual circumstances in the cases are so varied that the decisions are of little precedential value); Adams v. Great Am. Ins. Cos., 942 P.2d 1087, 1091 (Wash. Ct. App. 1997) (stating there is no bright line test for determining residency in a household and the inquiry in each case is factual). The fact-specific analysis in the various cases can be attributed to the phrase "resident of the same household" having no absolute or precise meaning. See Buddin, 250 S.C. at 338, 157 S.E.2d at 635; Coriasco v. Hutchcraft, 615 N.E.2d 64, 65 (Ill. App. Ct. 1993) (stating the phrase "resident of the household" has no fixed or exact meaning); Pierce v. Aetna Cas. & Sur. Co., 627 P.2d 152, 154 (Wash. Ct. App. 1981) ("The phrase 'residents of the same household' has no fixed meaning but varies according to the circumstances of the case."). The decisions of other courts on this issue have resulted from the application of the facts in the cases before them to a variety of factors.[6]

[6] The insurance policies discussed in most of the following cases in the remainder of this opinion usually provide coverage for a named insured and his or her relatives or family members. The broad issue in each case centers on whether a child is an insured under a parent's insurance policy. The terms "relatives" and "family members" are consistently defined in the insurance

In Countryside Cas. Co. v. McCormick, 722 S.W.2d 655 (Mo. Ct. App. 1987), the court of appeals affirmed the trial court's decision in a declaratory judgment action that a child was a resident of her father's household, even though her mother had been granted custody. The appellate court found that an aggregate of the following factors tended to support the trial court's finding: (1) the child's age; (2) the proximity of the divorced parents; (3) whether reasonable visitation rights had been awarded under the divorce decree; (4) currency of child support payments; (5) the relationship between the parent and the child; (6) whether the child had a separate bedroom and wardrobe; and (7) the frequency of visitation. Id. at 658. The court also noted that the most significant factor in determining residence is custody, but that other factors affect the determination, including periods of residence with the parent and substantial support from the parent. Id. at 657; accord Garrison v. Travelers Ins. Co., 618 A.2d 387 (N.J. Super. Ct. Law Div. 1992) (recognizing and applying the factors discussed in Countryside to find that a nine-year-old was a resident relative of her non-custodial father's household; the child visited her father every other weekend and for extended periods over school holidays in the five months prior to the child being struck by an underinsured automobile).

An Illinois court held that the determination of residency in each case includes an analysis of intent, physical presence, and permanency of abode. Coriasco, 615 N.E.2d at 65; see Country Mut. Ins. Co. v. Watson, 274 N.E.2d 136, 138 (Ill. App. Ct. 1971) ("The elements required beyond physical presence are intention and permanency of abode."). The court applied the facts of the case to these factors and found a minor child to be a resident of her father's household. The child's parents had divorced and custody had been awarded to the mother. The child "resided with her mother except for

---

policies as "a resident of the same household" as the named insured. The present case is distinguishable because the policy issued to Mrs. Horne does not define a "relative" or a "family member." However, this is of no consequence because we are not concerned with the definition of either term under an insurance policy. Our inquiry focuses on whether Crystal is a resident of the Horne's household based on statutory and common law concepts of stacking. The following cases are nonetheless instructive given the policy language in the cases is so similar to our notion of a Class I insured as being a resident relative of the same household as the named insured.

visitation with her father which occurs principally on weekends and occasionally during the week." Coriasco, 615 N.E.2d at 66. The child also kept clothing and personal items at her father's house and had occasionally received mail there.

In another case, a seventeen-year-old son was found not to be a resident relative of his father's household. Gulf Am. Fire & Cas. Co. v. Azar, 364 So. 2d 332 (Ala. Civ. App. 1978). At the time of an accident involving an uninsured motorist, the son had been living with his mother for three months pursuant to the custody arrangements of a divorce decree. The son had visited at his father's home but had not spent the night there. "As these facts indicate, neither [the son's] actual or legal residence was in his father's household." Id. at 334.

In a North Carolina declaratory judgment action to determine a minor child's entitlement to uninsured motorist coverage under her father's insurance policy, the court held "the evidence discloses that there existed between the father and the minor plaintiff a continuing and substantially integrated family relationship." Davis v. Maryland Cas. Co., 331 S.E.2d 744, 747 (N.C. Ct. App. 1985). The court pointed to the child's frequent overnight stays with her father, the provisions made for the keeping of the child's clothes, personal property, and furniture, and the father's support and healthcare obligations pursuant to a separation agreement. Id. at 745. In addition, the court noted that for insurance purposes a child is not a resident of one parent's household to the exclusion of the other, but could be a resident of both households. Id. at 746; see also Hartford Cas. Ins. Co. v. Phillips, 575 S.W.2d 62 (Tex. Civ. App. 1978) (affirming jury's finding that a fourteen-year-old living with his father was still a resident relative of his mother's household and pointing out that a finding of residency in one household does not necessarily foreclose that person being a resident of another household).

The Washington Court of Appeals listed four factors to consider in addressing whether a child is a resident of a household: "(1) the intent of the departing person, (2) the formality or informality of the relationship between the person and the members of the household, (3) the relative propinquity of the dwelling units, and (4) the existence of another place of lodging." Adams v. Great Am. Ins. Cos., 942 P.2d 1087, 1090 (Wash. Ct. App. 1997) (quoting

Pierce v. Aetna Cas. & Sur. Co., 627 P.2d 152, 155 (Wash. Ct. App. 1981)). Interestingly, the court then went on to frame the question as follows for cases of this type:

> Does the child regularly spend time in the household in question, such that there exists a continuing expectation of the child's periodic return on intervals regular enough that the household is the child's home during the time the child is there, as opposed to a place of infrequent and irregular visits.

Adams, 942 P.2d at 1091.

In Midwest Mut. Ins. Co. v. Titus, a Colorado court focused on intent and stated a "[c]onsideration of all relevant circumstances must reveal 'some intended presence in the insured's home.'" Midwest Mut. Ins. Co. v. Titus, 849 P.2d 908, 910 (Colo. Ct. App. 1993) (quoting Wheeler v. Allstate Ins. Co., 814 P.2d 9, 10 (Colo. Ct. App. 1991)). The court listed the factors it would take into account in determining whether an individual is a resident of a household to include the "subjective or declared intent of the individual, the relation between the individual and the members of the household, the existence of a second place of lodging, and the relative permanence or transient nature of the individual's residence in the household." Midwest, 849 P.2d at 910. The child's status as a minor is just one factor to be considered. Id. The court also recognized that a child of divorced parents is a resident of the household in which she actually lives but the child may reside in more than one household. Id.

In another case focusing on intent, the Rhode Island Supreme Court stated the test for residency as follows:

> In order to determine if a person is a resident of a particular household, the court must consider whether in the totality of the circumstances that person maintains a physical presence in the household with the intent to remain there for more than a mere transitory period, or that person has a reasonably recent history of physical presence together with

> circumstances that manifest an intent to return to the residence within a reasonably foreseeable period.

Barricelli v. Am. Universal Ins. Co., 583 A.2d 1270, 1271 (R.I. 1990) (quoting Aetna Life & Cas. Co. v. Carrera, 577 A.2d 980, 985 (R.I. 1990)). In Barricelli, custody of a minor daughter had been granted to her mother. The daughter lived with her mother for four years and then permanently moved in with her father. The custody decree was not judicially modified. The daughter received her own room in her father's home, registered for and attended school from the father's home, received mail there, and kept most of her personal belongings and clothing there. The father claimed the daughter as a dependent on his tax returns. The daughter "maintained a structured, albeit intermittent, relationship" with her mother "although it remained necessary for [the daughter] to pack a suitcase to stay with her mother on the alternate weekends." Id. at 1271. The court held the totality of the circumstances showed the impermanence of the daughter's physical presence in her mother's household and failed to establish the daughter's visits to her mother's home were for anything more than a transitory period. Id. at 1272.

In Herbst v. Hansen, 176 N.W.2d 380, 384 (Wis. 1970), the court stated the test for whether a person remains a member of a household is whether the person has intent to return. In this case, the mother had been granted custody of a ten-year-old child pursuant to a decree of legal separation. The issue was whether the child could be considered a resident of the same household as his father under the father's insurance policy. The court found the father's continued support and visitation, coupled with the parents' chances for reconciliation, precluded granting summary judgment in favor of the father's insurance carrier given the facts supported a finding that the father's absence was only temporary. The court held if a party is not living under the "family roof" at the time in question then the absence of that party must be of a temporary nature with intent to return. Id. "'Whether the absence from the household is of long or short duration is immaterial except as it may give rise to an inference of intent to remain away permanently or only temporarily.'" Id. (quoting Doern v. Crawford, 140 N.W.2d 193, 196 (Wis. 1966)); see also Ohio Cas. Ins. Co. v. Wittkopp, 741 A.2d 619, 622 (N.J. Super. Ct. App. Div. 1999) ("Absence from a parent's home, even for several months, does not terminate the child's residency without additional factors.").

In Elder v. Metro. Prop. & Cas. Co., 851 S.W.2d 557 (Mo. Ct. App. 1993), a twenty-year-old son was held not to reside with his father for insurance purposes. The son contended he was an unemancipated minor and should be considered a resident of his father's household even though he lived with his mother on a permanent basis and his parents were separated and living apart. The court found the evidence suggested the son was not truly unemancipated since he was not attending secondary school or an institution of vocational or higher education. Id. at 561. Custody had been placed with the mother and the son had not stayed with his father in the two and a half years preceding the accident. The court stated custody was the most important factor in determining residency. Id. at 560. The court also stated "[r]esidence is a matter of intention and depends on a person's physical location." Id. at 561; cf. Amica Mut. Ins. Co. v. Donegal Mut. Ins. Co., 545 A.2d 343 (Pa. Super. Ct. 1988) (holding residence in a household under the policy in question was a matter of physical fact and not intention).

As evident from these cases, there is no single test to determine whether a minor child is a resident of a noncustodial parent's household for purposes of determining UIM benefits. Rather, the courts generally look at the facts and circumstances of each case in totality to determine the child's residency. In this case, the record supports the referee's conclusion that Crystal was not a resident relative of the Horne's household.

In support of their contention that Crystal was a resident relative, the Hornes cite the following evidence: (1) Crystal's visits were planned, coordinated, and expected; (2) Crystal received mail at her father's address; (3) Crystal's custodial setting was established pursuant to the 1988 divorce decree; (4) the Hornes maintained a room prepared with furniture, lamps, and a trash can they purchased and designated for Crystal's use when she was with them; (5) Crystal kept clothes, toiletries, and other items at the Hornes' house; (6) Crystal ate meals with and prepared by Mr. Horne; (7) Crystal washed clothes at the Hornes' house; (8) Crystal had unrestricted access to the entire house while she lived there and was not required to obtain permission before returning to the house; and (9) Mr. Horne maintained health insurance for Crystal and was current on child support payments. The Hornes argue this evidence, especially the planned and coordinated nature of Crystal's visits, demonstrates residency and show Crystal "had every intent to continue the relationship with her father without ever considering ending it."

The special referee noted the evidence established Crystal had a close relationship with Mr. and Mrs. Horne but it did not translate into a finding that Crystal was a resident of their household. See Griffith v. Sec. Ins. Co. of Hartford, 356 A.2d 94, 96 (Conn. 1975) (stating evidence indicating a close paternal relationship does not necessarily support an additional finding that the parties are members of the same household).

Crystal's parents divorced in 1988 and sole custody had been granted to Williams. Crystal moved with Williams to Conway in 1992 and they have resided there since that time. Mr. and Mrs. Horne have remained in the Saluda/Greenwood area. In the year prior to the accident Crystal had stayed with her father on a maximum of three occasions, for a total of approximately fourteen days, but at the time of the accident Crystal had not visited her father for over three months.[7] Crystal, however, could not testify with any certainty whether she had visited her father during the 1996 Thanksgiving holiday.

Crystal did not maintain everyday clothes or other possessions at her father's house. If any items had been left behind or forgotten at her father's house, such as clothes or cosmetics, it was because Crystal did not need the items or did not use them anymore. Any mail Crystal may have received at her father's house came only from her mother. Crystal's healthcare providers were located in Conway and Crystal's driver's license listed her address as her mother's home. Williams claimed Crystal as a dependent on her tax return.

Crystal was seventeen years old at the time of the accident and worked full-time at a Burger King restaurant close to her home in Conway. She was scheduled to work on the day after the accident. Crystal began spending significantly less time with her father once she quit school in 1996 after her ninth-grade year and began working at Burger King. Crystal spent only a

[7] The three occasions in 1996 included a few days in the summertime, Thanksgiving, and Christmas. The Hornes dispute the referee's finding of fourteen days, arguing Crystal spent a weekend with her father approximately one month before the accident. However, the Hornes point to an isolated portion of Crystal's stepbrother's testimony for this proposition. In context, her stepbrother's testimony refers to Crystal's visits on the weekends before Crystal moved to Conway in 1992. Even assuming sixteen days were correct, the two-day difference would not affect our analysis.

few days in Saluda during the summer of 1996 and did not spend the entire summer as she had in previous years. Mr. and Mrs. Horne admitted Crystal's visits became less frequent through the years. When Crystal started working, the pattern of visitation changed, and she did not visit unless she had time off from work. However, Crystal had time off from her job at Burger King the weekend before the accident but she did not leave the Conway/Myrtle Beach area.

Crystal packed a suitcase when she traveled to Saluda and spent the night with other family members besides her father during her visits. Sometimes Crystal would visit her other relatives before going to her father's house. During her four- or five-day stay in Saluda over the Christmas holiday before the accident, Crystal spent nights with her two aunts and her grandmother. Crystal shared a room at her father's house with her sister. Moreover, Crystal's stepsister also used the bedroom when she would visit her mother, Mrs. Horne. The stepsister did not have to ask Crystal for permission to use the bedroom. Crystal had unrestricted access to her father's house when she was there but her father required her to call before she visited so he would know she was coming and Crystal never just "showed up."

The special referee properly found Crystal was not a resident relative of her father's household. The evidence in the record reasonably supports his decision and is not "reasonably susceptible of the opposite conclusion only." Hiott, 329 S.C. at 529, 496 S.E.2d at 421. We agree with the referee that while Crystal had a close relationship with her father and stepmother, she was not a resident of their household. Crystal's short, infrequent visits to Saluda, scattered with her overnight stays with other relatives, demonstrate the transient nature of Crystal's residence in her father's household. Buddin, 250 S.C. at 339, 157 S.E.2d at 636; Midwest, 849 P.2d at 910. Crystal could visit Saluda only when she was able to get off of work. Her work schedule at the time of the accident precluded an expectation of Crystal's return to the home with any regularity. Any personal items left at her father's home do not indicate an intent to return there with any regularity given the items were either forgotten or were not needed any longer. In some respects, Crystal had even less contacts with her father's household than did the daughter in Richardson, 336 S.C. at 237, 519 S.E.2d at 122-23 (finding the daughter was not a resident of her father's household even though she kept furniture and an exercise bike at her father's home and usually visited her parents once a

month for three or four days at a time). The circumstances present in this case do not manifest Crystal's intent to return to her father's household within a reasonably foreseeable period or her intent to remain there for more than a transitory period. Barricelli, 583 A.2d at 1271.

CONCLUSION

Accordingly, because Crystal was not a resident relative of the named insured's household, she was not a Class I insured entitled to stack UIM benefits. See Concrete Servs., 331 S.C. at 509, 498 S.E.2d at 866 ("The right to stack is available only to a Class I insured."). The special referee's judgment is

AFFIRMED.[8]

HEARN, C.J. and STILWELL, J., concur.

[8] The Hornes also urge this Court to hold that a minor unemancipated child can be a resident of two households. See, e.g., Davis v. Maryland Cas. Co., 331 S.E.2d 744, 746-47 (N.C. Ct. App. 1985) (stating it is not required that a minor be a resident of one parent's household to the exclusion of the other and that a minor could be a resident of two separate households). We need not specifically rule on this issue given the facts in this case do not demonstrate Crystal resided in her father's household. However, implicit in this decision is the recognition that a child of divorced parents may be a resident of two households given Crystal is surely a resident of her mother's household. Cf. Cook v. Fed. Ins. Co., 263 S.C. 575, 582, 211 S.E.2d 881, 884 (1975) ("A person may have only one domicile, but may have several residences.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jimmy Lee Ellison, Appellant.

Appeal From Marion County
James E. Lockemy, Circuit Court Judge

Opinion No. 3675
Heard June 11, 2003 – Filed September 15, 2003

VACATED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Edgar Lewis Clements, III, of Florence, for Respondent.

STILWELL, J.: In this opinion we must decide whether the circuit court had subject matter jurisdiction to convict Jimmy Lee Ellison of second-

degree criminal sexual conduct (CSC) with a minor. We hold the indictment as originally drafted and as amended failed to confer such jurisdiction and vacate Ellison's conviction.

BACKGROUND

Ellison was indicted following an allegation that he raped a 13 year old girl. Both the caption of the indictment and the title preceding the text in the body of the indictment stated that the offense was "Criminal sexual conduct with a minor (first degree)." The language in the body of the indictment alleged Ellison "did commit, or attempt to commit, a sexual battery in and upon [Victim], age thirteen . . . by using aggravated force and aggravated coercion upon her and assaulting her with the intent to commit sexual battery with the said [Victim]." The indictment further stated Ellison's conduct was a violation of section 16-3-655 of the South Carolina Code, the statute prohibiting CSC with minors.

At the onset of trial, the State moved to amend the statutory reference, asserting it intended to charge Ellison with first-degree CSC and that the statute referenced was merely an error. When the court inquired, defense counsel stated he was aware the State intended to charge first-degree CSC and that the amendment would make no difference in the presentation of his defense. The court then permitted the amendment without objection.

While conferencing proposed jury instructions after the close of the evidence, the State requested the court submit second-degree CSC as a lesser-included offense of first-degree CSC. The State reasoned that the jury might believe the victim but not be convinced the circumstances rose to the level of aggravated force. The court questioned the State's decision not to charge second-degree CSC with a minor, which would have made proof of force or coercion unnecessary. Concern was also expressed that the jury might acquit Ellison if they thought Victim "consented" to the encounter. Defense counsel noted he intended to argue the alleged event did not occur at all, not that it was consensual. The defense thus objected to the submission of any charge other than first-degree CSC, and the State elected to proceed on that charge alone.

During Ellison's closing argument, the State objected to a comment on the ground that it invited the jury to disregard evidence. After closing arguments, the court, on its own initiative**,** concluded the defense had introduced the issue of Victim's consent in its closing argument and decided, over defense objection, to charge second-degree CSC with a minor as a lesser-included offense of first-degree CSC. The jury found Ellison guilty of second-degree CSC with a minor.

DISCUSSION

Ellison argues the trial court lacked subject matter jurisdiction to convict him of second-degree criminal sexual conduct with a minor because it is not a lesser-included offense of the charge for which he was indicted. We agree, and further hold that the indictment fails independently to vest the court with subject matter jurisdiction on the charge for which Ellison was convicted.

"A criminal defendant is entitled to be tried only on indicted offenses." State v. Jones, 342 S.C. 248, 251, 536 S.E.2d 396, 397 (Ct. App. 2000). In South Carolina, "it is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." State v. Cody, 180 S.C. 417, 423, 186 S.E. 165, 167 (1936). "An indictment is sufficient if it apprises the defendant of the elements of the offense intended to be charged and apprises the defendant what he must be prepared to meet." State v. Wilkes, 353 S.C. 462, 465, 578 S.E.2d 717, 718 (2003). "Further, an indictment is sufficient if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon." Id.

The body of the indictment here alleged Ellison committed a sexual battery on a 13 year old. A person who commits a sexual battery on a person "who is fourteen years of age or less but who is at least eleven years of age" is guilty of second-degree CSC with a minor. S.C. Code Ann. § 16-3-655(2)

(2003). However, the caption of the indictment and the title to the indictment's body stated the alleged crime was first-degree CSC with a minor, a crime involving prohibited sexual conduct with a person under the age of 11. § 16-3-655(1).

The indictment is even more complicated because the body also contains factual allegations apparently sufficient to charge both first-degree CSC by alleging Ellison used aggravated force and second-degree CSC by alleging Ellison used aggravated coercion. S.C. Code Ann. § 16-3-652(1)(a) (2003) (a person who commits a sexual battery by use of aggravated force is guilty of first-degree CSC); S.C. Code Ann. § 16-3-653(1) (2003) (a person who commits a sexual battery by use of aggravated coercion is guilty of second-degree CSC). The body of the indictment does not specifically state the name of the offense Ellison allegedly committed. Further confusing the issue, the indictment was amended at the beginning of trial to change the statutory reference from the general statute prohibiting CSC with minors to the statute prohibiting first-degree CSC.

Our supreme court recently reviewed the sufficiency of an indictment with similar difficulties. In Cohen v. State, 354 S.C. 563, 582 S.E.2d 403 (2003), the indictment alleged Willie Cohen engaged in CSC with a minor. The body of the indictment as well as its title and the indictment's caption all identified the crime as CSC with a minor in the first degree. However, the body of the indictment also stated the victim was 11 years old. Id. at ___, 582 S.E.2d at 404. The supreme court noted the indictment was insufficient to charge Cohen with first-degree CSC with a minor because the victim was 11 years old, not less than 11 as the statute requires. Id. The court went on to explain why the trial court also lacked subject matter jurisdiction to accept Cohen's guilty plea on the charge of second-degree CSC with a minor.

> The question then becomes whether the indictment otherwise sufficiently states the offense of second degree CSC with a minor. The indictment appears to sufficiently allege second degree CSC with a minor because it charges that respondent engaged in a sexual battery with a victim of eleven years of age. However, the body of the indictment includes the language

> "criminal sexual conduct with a minor in the first degree." (Emphasis added). The inclusion of the "first degree" language is not a scrivener's error given that the title and caption of the indictment both indicate the indictment is for first degree CSC with a minor.
>
> * * * *
>
> Further, the indictment does not sufficiently inform the court as to what judgment to pronounce. . . . Therefore the plea court was without subject matter jurisdiction to accept respondent's plea to second degree CSC with a minor.

Id. at ___, 582 S.E.2d at 405.

Both the caption of the indictment and the title preceding the body indicated Ellison was charged with first-degree CSC with a minor, a crime that was not alleged, factually or by name, in the body of the indictment. The body of the indictment contained a statutory reference indicating Ellison's conduct was a violation of the statute prohibiting CSC with minors, but did not identify a crime by name. However, the body of the indictment contained allegations sufficient to accuse Ellison of second-degree CSC with a minor and first and second-degree CSC. Then, at the beginning of trial, the indictment was amended to change the statutory reference to the section prohibiting first-degree CSC, and the assistant solicitor indicated this change was no surprise to Ellison as it was the intended charge all along. By this point, if not before, it was unclear what judgment the court could pronounce and sentence it could impose, as was the case in Cohen. This fact is evidenced by the court's submission of second-degree CSC with a minor to the jury as a lesser-included offense. It is unclear whether any conviction could be had on this indictment. But, even if it could have supported a conviction for first-degree CSC, it did not confer jurisdiction on the charge of second-degree CSC with a minor because it is not a lesser-included offense of first-degree CSC.

The test to determine whether an offense is a lesser-included offense of another is whether the greater offense contains all of the elements of the lesser offense. Joseph v. State, 351 S.C. 551, 555, 571 S.E.2d 280, 282 (2002). Because second-degree CSC with a minor requires the victim be between the ages of 11 and 14, it is not a lesser-included offense of first-degree CSC, which contains no element regarding the victim's age. Viewing this indictment with a "practical eye" we are compelled to conclude the court lacked subject matter jurisdiction to convict Ellison of second-degree CSC with a minor. See State v. Gunn, 313 S.C. 124, 130, 437 S.E.2d 75, 78 (1993) (noting "that in viewing the sufficiency of an indictment we must look at the issue with a practical eye in view of the surrounding circumstances").

VACATED.[1]

HEARN, C.J., and CONNOR, J., concur.

[1] Because of our resolution of this issue, we need not address Ellison's remaining issue.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Marty K. Avant, Claimant,

v.

Willowglen Academy, Employer,

and

United Heartland, Respondent,

and

Travelers Property Casualty Co., Appellant.

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

Opinion No. 3676
Heard April 8, 2003 – Filed September 15, 2003

REVERSED

Johnnie W. Baxley, III, of Charleston, for Appellant.

Roy A. Howell, III and Kristen L. Barr, both of Mt. Pleasant, for Respondent.

CONNOR, J.: Travelers Property Casualty Company (Travelers) filed a motion with the Workers' Compensation Commission seeking an order identifying the proper carrier for Marty Avant's claim. The single commissioner found United Heartland (United) was the proper carrier. The full commission reversed and found both carriers equally liable for the claim. The circuit court reversed in part and ruled Travelers was responsible for Avant's claim. We reverse.

FACTS/PROCEDURAL HISTORY

Travelers began insuring Willowglen Academy (Willowglen), a subsidiary of a Wisconsin corporation, on August 15, 1994, under an assigned risk policy administered through the National Council on Compensation Insurance (NCCI). Travelers renewed the policy in 1995 and 1996. On June 19, 1997, Travelers issued a quotation to renew the assigned risk policy with the effective dates of August 24, 1997, through August 24, 1998. Travelers received partial payment from Willowglen for the premium on July 3, 1997, and received the balance on August 13, 1997. On August 29, 1997, Travelers issued the renewal policy with the effective dates of August 24, 1997 through August 24, 1998.

On or about July 7, 1997, Willowglen's parent corporation renewed its voluntary policy for its Wisconsin holdings with United. Subsequently, Willowglen's insurance agent, Stan Strelka, evaluated whether to add Willowglen's South Carolina operations to the United policy. Willowglen and Strelka ultimately decided to add South Carolina to the policy and United issued an endorsement to this effect on either August 27 or 29, 1997. The endorsement stated the effective dates of the United policy were July 1, 1997 through July 1, 1998. The necessary notification of this coverage and endorsement was not received by NCCI until December 12, 1997. See 25A

S.C. Code Ann. Regs. 67-406(A), (B) (Supp. 2002) (stating the insurance carrier shall file a report of coverage of workers' compensation insurance and NCCI is the authorized agent for filing such reports); 25A S.C. Code Ann. Regs. 67-405(B)(1) (1990) (stating insurance carrier shall file report of coverage as provided in Reg. 67-406). Neither Willowglen nor Strelka notified Travelers of the new voluntary policy. The same insurance agency procured both the assigned risk policy with Travelers and the voluntary policy with United.

On September 6, 1997, Marty Avant, an employee of Willowglen, sustained an injury arising out of and in the course of his employment. Willowglen notified Travelers of the claim. Travelers accepted the claim and began providing benefits. At the time of Avant's accident, neither Travelers nor United knew of the dual coverage.

Travelers learned of the dual coverage on January 5, 1998. United had also learned of Avant's claim and the dual coverage in late December 1997 or early January 1998 while conducting a claims review. United's Vice President of Loss Control, Paul Hindtgen, then suggested changing the effective date of United's policy to October 1, 1997. Stan Strelka also stated that in his discussions with Willowglen and United's underwriter in late January 1998, it was mutually decided that it was "logical" to terminate the Travelers policy and begin the voluntary policy on October 1, 1997, given United had not received any claims from Willowglen prior to this date.

Travelers contacted Willowglen by phone on January 15, 1998. Willowglen indicated its desire to cancel the Travelers policy. On January 29, 1997, Willowglen sent a letter to Travelers requesting that its assigned risk policy be cancelled as of October 1, 1997. On February 12, 1998, Travelers requested from Willowglen a policy release and a copy of the declaration page of the replacement policy and advised Willowglen it could not backdate the cancellation until verifying other coverage. Travelers also issued a notice of intent to cancel its policy with an effective date of March 19, 1998. This date allowed for time to give the required notice to NCCI and the Workers' Compensation Commission. See 25A S.C. Code Ann. Regs. 67-405(E)(1) (1990) (stating a workers' compensation insurance carrier shall

file a notice of termination as provided in Reg. 67-406); 25A S.C. Code Ann. Regs. 67-406(F)(2) (Supp. 2002) (stating an insurance termination shall not be effective until after thirty days from the date of receipt by NCCI).

On March 9, 1998, Travelers received its first notice of the voluntary nature of the coverage with United. On this date, Travelers received the policy release from Willowglen requesting an effective date of cancellation of October 1, 1997. Travelers also received a copy of the declaration page from United showing a voluntary workers' compensation policy in effect from July 1, 1997 through July 1, 1998. On April 2, 1998, Travelers issued a cancellation notice with an effective date of March 19, 1998. Subsequently, on June 4, 1998, Travelers decided to cancel its policy effective on the date of the voluntary policy, as opposed to cancelling the policy on March 19, 1998. Travelers performed an audit and refunded to Willowglen all premiums paid for the assigned risk coverage after July 1, 1997.

On May 7, 1999, Travelers filed a motion requesting the Workers' Compensation Commission to identify the proper carrier for Avant's claim. In its motion, Travelers asserted a provision of the South Carolina Workers' Compensation Insurance Plan operated to cancel its assigned risk policy as a matter of law as soon as Willowglen secured voluntary coverage through United. The single commissioner found United was the proper carrier. United appealed. The full commission reversed and determined both insurers intended to provide coverage on the date of Avant's accident and were equally liable for benefits. Both parties appealed. The circuit court reversed in part and found Travelers was responsible for Avant's claim because there was dual coverage on the date of the accident and Travelers' policy had the later effective date. Travelers appeals.

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). "The appellate court's review is limited to deciding whether the commission's decision is unsupported by

substantial evidence or is controlled by some error of law." Hendricks v. Pickens County, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct. App. 1999); see Roper Hosp. v. Clemons, 326 S.C. 534, 536, 484 S.E.2d 598, 599 (Ct. App. 1997) ("On appeal from the Workers' Compensation Commission, this court may reverse where the decision is affected by an error of law."). The commission's decision must be affirmed unless it is clearly erroneous in view of the substantial evidence on the whole record. Nettles v. Spartanburg School Dist. #7, 341 S.C. 580, 586, 535 S.E.2d 146, 149 (Ct. App. 2000).

LAW/ANALYSIS

Travelers argues the circuit court erred in finding Travelers was the proper carrier for Avant's claim.

A.

Travelers first contends the circuit court erred in refusing to apply the South Carolina Workers' Compensation Insurance Plan (WCIP) administered by NCCI. The circuit court found the WCIP does not supersede the provisions of the Workers' Compensation Act and the regulations promulgated thereunder and does not govern the determination of coverage under the facts of this case. We hold the WCIP does apply to the facts of this case.

The South Carolina General Assembly has granted insurers the right to enter into assigned risk agreements in order to equitably apportion among themselves insurance for applicants who are in good faith entitled to, but are unable to procure, voluntary insurance. S.C. Code Ann. § 38-73-540(A)(1) (2002). Section 38-73-540 further provides that "any mechanism designed to implement such agreement . . . must be submitted in writing to the [Director of the Department of Insurance] for approval prior to use . . . ." Id.

The WCIP, as administered by NCCI, is the only "mechanism" in the state for implementing the assigned risk pool and has been approved by the

Director of the Department of Insurance for use in this State. The Director "must follow the general policies and broad objectives enacted by the General Assembly regarding the operation of the insurance industry in this State." S.C. Code Ann. § 38-3-60 (2002). The Director's duties include "supervis[ing] and regulat[ing] the rates and service of every insurer in this State and fix[ing] just and reasonable standards, classifications, regulations, **practices**, and measurements of service to be observed and followed by every insurer doing business in this State." S.C. Code Ann. § 38-3-110(1) (2002) (emphasis added). While we recognize the General Assembly has not specifically enacted the WCIP, the Director of the Department of Insurance has followed the broad mandate of the General Assembly and has properly acted upon its intent in section 38-73-540 to create an assigned risk plan by approving the WCIP for its use in the assigned risk practice in this State.

The WCIP provides the framework for the assigned risk pool and includes numerous provisions governing assigned risk practice. Without the WCIP there would be nothing guiding assigned risk practice and its procedure, such as an employer's application process for assigned risk coverage or the assignment of an insurer to a risk. For example, the Workers' Compensation Commission's compliance investigator, Joel Scott, testified that the only way an employer can obtain an assigned risk policy is by applying through NCCI and the WCIP and certifying that the employer is unable to obtain voluntary coverage. Moreover, section 38-73-540 obligates assigned carriers to report their experience on business written under the assigned risk plan to the "plan administrator." S.C. Code Ann. § 38-73-540(C) (2002). NCCI is designated in the WCIP as the "plan administrator" and undertakes to secure the information reported by assigned carriers. For these reasons, the WCIP applies to the facts of this case and the circuit court erred in not applying it.

The specific provision of the WCIP at issue here provides that:

> any insurer that wishes to insure an employer as voluntary business may do so at any time. If such insurer is not the assigned carrier, the assigned carrier shall cancel its policy pro rata and the assignment

> shall automatically terminate as of the effective date of the voluntary insurer's policy.

The circuit court refused to apply the WCIP provision and instead relied on Regulation 67-409 in finding Travelers solely responsible for Avant's claim. Regulation 67-409 states, in pertinent part,

> When duplicate or dual coverage exists by reason of two different insurance carriers issuing two policies to the same employer securing the same liability, the Commission shall presume the policy with the later effective date is in force and the earlier policy terminated on the effective date of the later policy.

25A S.C. Code Ann. Regs. 67-409(A) (1990).

We agree with the circuit court that the WCIP does not supersede the provisions and regulations of the Workers' Compensation Act (Act). Instead however, the WCIP should be read in conjunction with the Act and its regulations and be accorded effect under the facts of this case given the WCIP addresses matters where the Act is silent. The WCIP addresses the specific situation of the cancellation of an assigned risk policy upon the effective date of voluntary coverage, whereas Regulation 67-409 generally addresses duplicate policies issued by, rather than assigned to, multiple carriers. See Adoptive Parents v. Biological Parents, 315 S.C. 535, 543, 446 S.E.2d 404, 409 (1994) ("Statutes in apparent conflict should be construed, if possible, to allow both to stand and give effect to each."); see also Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995) ("The general rule of statutory construction is that a specific statute prevails over a more general one.").

Regulation 67-409 applies only where two carriers have issued policies and dual voluntary coverage is in effect at the time of the claim. In this case, however, there was not dual coverage. Pursuant to the WCIP, the Travelers' assigned risk coverage terminated on July 1, 1997, the effective date of the voluntary policy. Through the application of the WCIP, United became the

only carrier with coverage on the date of Avant's claim, and thus United is responsible for this claim.[1] In addition, the application of Regulation 67-409 would create in this case an unreasonable and unintended presumption that United's policy terminated on August 24, 1997. Neither Willowglen nor United intended for United's policy to be terminated.

Paul Hindtgen testified he would never have suggested changing the effective date of United's voluntary policy to October 1, 1997, had he known the Travelers policy would terminate as a matter of law on July 1, 1997, pursuant to the WCIP.[2] Moreover, according to Stan Strelka, the agent who procured both policies, his intention was to notify Willowglen and the assigned carrier of the July 1, 1997 change in insurers so that the assigned policy would not be renewed and claims would be sent to United. Strelka stated it was inexplicable why Willowglen "continued to turn claims in to The Travelers rather than turning them in to the proper carrier."

B.

Travelers argues the circuit court erred in failing to find it performed all statutory and regulatory requirements with regard to cancelling its assigned risk policy. The circuit court stated Travelers did not file a cancellation notice thirty days before Avant's accident. Thus, the circuit court found the policy issued by Travelers in August 1997 would have been in effect at the time of Avant's accident and South Carolina law does not allow for

---

[1] Moreover, as a policy matter, to deny the effect of the WCIP in this case would encourage voluntary insurers to receive premiums and set effective dates prior to the effective date of an assigned risk policy.

[2] It should also be noted that the record does not definitively show that United made the proper filing with NCCI changing the effective date of its voluntary policy, nor did United ever cancel its policy. See 25A S.C. Code Ann. Regs. 67-406(D) (Supp. 2002) (stating the insurance carrier shall file with NCCI a report of coverage and endorsements within thirty days of the policy's effective date). Thus, the effective date of United's policy remains July 1, 1997.

retroactive cancellation of an assigned risk policy based on the facts of this case.

The parties involved in this action were unaware of the duplicate policies until late December 1997 or early January 1998. Travelers did not learn Willowglen's policy with United had been obtained on the voluntary market until after receiving the policy release from Willowglen on March 9, 1998. Initially, Travelers filed a notice of intent to cancel its policy on February 12, 1998, but the effective date of the cancellation was denoted as March 19, 1998, to allow for the thirty-day cancellation period and five additional days for mailing the notice to NCCI. See 25A S.C. Code Ann. Regs. 67-405(E)(1) (1990) (stating a workers' compensation insurance carrier shall file a notice of termination as provided in Reg. 67-406); 25A S.C. Code Ann. Regs. 67-406(F)(2) (Supp. 2002) (stating an insurance termination shall not be effective until after thirty days from the date of receipt by NCCI).

However, once Travelers became aware of the voluntary coverage, it then completed the pro rata cancellation pursuant to the WCIP back to July 1, 1997, the date the voluntary coverage went into effect. Travelers cancelled its policy in accordance with the WCIP and refunded all of the premiums earned during the time of dual coverage. The WCIP allows for this retroactive cancellation. Thus, the trial court erred as a matter of law in finding Travelers did not properly cancel its assigned risk policy and that retroactive cancellation was not allowed based upon the facts of this case.

C.

Travelers argues the circuit court erred in finding the parties mutually agreed Travelers would be responsible for claims prior to October 1, 1997, and that United would only be responsible for claims after that date. The substantial evidence in the record does not support this finding of fact by the circuit court. See Baggott v. Southern Music, Inc., 330 S.C. 1, 5, 496 S.E.2d 852, 854 (1998) ("Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action.").

Hindtgen testified he suggested changing the effective date of United's policy to October 1, 1997. Hindtgen thought this would be the "logical" thing to do since Travelers was already handling claims made prior to this date. Upon learning of the two policies in effect, United informed Stan Strelka that it had begun to receive claims from Willowglen after October 1, 1997. After Strelka discussed the situation with United's underwriter and Willowglen, they mutually decided that it was "logical" to terminate the Travelers policy and begin the voluntary policy on October 1, 1997, given United had not received any claims from Willowglen prior to this date.

The record is clear the only reason Travelers handled claims prior to October 1, 1997, is because Willowglen had mistakenly sent the claims to Travelers[3] and Travelers had not been notified of the voluntary policy issued by United. There is no evidence Travelers *agreed* to an arrangement where it would handle claims made prior to October 1, 1997. Hindtgen never spoke with anyone at Travelers about this arrangement and admitted no one from Travelers had done anything to lead him to believe Travelers agreed to handle claims made prior to October 1, 1997.

Moreover, Travelers sent a letter to Willowglen on June 5, 1998, which stated that the assigned risk coverage terminated on the effective date of the voluntary insurance. Pursuant to this, Travelers cancelled Willowglen's policy back to July 1, 1997. This is a clear statement from Travelers that it never consented to providing coverage for claims originating before October 1, 1997.

[3] Strelka stated Willowglen's intent, through his agency, was to place its workers' compensation insurance in the voluntary market and allow the Travelers policy to lapse. However, Willowglen mistakenly paid premiums to Travelers upon receiving the renewal notice.

D.

Travelers argues the circuit court erred in failing to find that it was the negligence and inaction of United which caused dual policies and the resulting dispute in this matter.

We need not address this issue because the operation of the WCIP precluded dual policies on the date of Avant's accident. Therefore, any negligence or inaction on the part of United in making the proper filings is irrelevant to this coverage dispute.[4]

CONCLUSION

Accordingly, based on the foregoing reasons, the decision of the circuit court is **REVERSED**. United is the proper carrier and is responsible for Avant's claim.

REVERSED.

HUFF, J., concurs and ANDERSON, J., dissents in a separate opinion.

---

[4] In any event, in the absence of the WCIP, any negligence or inaction by United would not have prevented dual policies on the date of Avant's accident. United did not decide until, at the earliest, August 27, 1997, to add Willowglen's South Carolina operations to its coverage. At this time the Travelers policy was already in effect. Even if United had given Travelers notice of its policy on August 27, 1997, and Travelers had immediately started cancellation of its policy, the cancellation would not have taken effect until thirty days later. See S.C. Code Ann. Regs. 67-406(F)(2) (Supp. 2002) (stating an insurance cancellation shall not be effective until after thirty days from the date of receipt by NCCI of the cancellation notice).

ANDERSON, J. (dissenting): I respectfully dissent. I disagree with the reasoning and analysis of the majority. The holding of the majority misconstrues and misapplies the law extant in regard to the identity of a proper carrier for a Workers' Compensation claim. I **VOTE** to **AFFIRM** the order of the circuit court judge.

LAW/ANALYSIS

Travelers Property Casualty Company (Travelers) contends the circuit court erred in finding Travelers was the proper carrier in the Workers' Compensation claim. Travelers conceded, before the Appellate Panel, that it had an assigned risk policy with Willowglen Academy (Willowglen) with the effective dates of August 24, 1997 through August 24, 1998. However, Travelers claims that, pursuant to the National Council on Compensation Insurance (NCCI) rules, its policy covering Willowglen was canceled automatically when Willowglen secured a voluntary policy with United Heartland, which had an effective date of July 1, 1997. I disagree.

I. APPLICABILITY OF SOUTH CAROLINA WORKERS' COMPENSATION ACT

Initially, Travelers maintains the court erred in finding the South Carolina Workers' Compensation Commission's regulations are inconsistent with and supersede the rules of the NCCI and in refusing to apply the NCCI rules. This assertion is without merit.

The South Carolina Workers' Compensation Act (the Act) governs coverage issues in Workers' Compensation cases. South Carolina Code Ann. § 42-5-60 (1985) provides:

> Every policy for the insurance of the compensation provided in this Title or against liability therefor shall be deemed to be made subject to provisions of this Title. No corporation, association or organization shall enter into any such policy of

> insurance unless its form shall have been approved by the Chief Insurance Commissioner of South Carolina.

Neither § 42-5-60 nor another provision of the South Carolina Code suggests that Workers' Compensation policies are subject to the rules or regulations of any non-governmental advisory body.

The only mention of NCCI in the law of South Carolina is found in Regulations 67-404, 67-406, and 67-410. Pursuant to Regulation 67-406(A), NCCI is the Workers' Compensation Commission's "authorized agent" for filing a report of Workers' Compensation coverage and notice of termination. 25A S.C. Code Ann. Reg. 67-406(A) (Supp. 2002). In its capacity as filing agent, NCCI requires that certain forms be used by insurance carriers. Regulations 67-404 and 67-410 merely mention NCCI. See 25A S.C. Code Ann. Reg. 67-404, -410 (1990). NCCI has no additional power or authority by virtue of these regulations. Regulations 67-404, 67-406, and 67-410 do not bestow NCCI with any power or authority to promulgate binding regulations in South Carolina.

While NCCI has compiled its own "Basic Manual" for Workers' Compensation and Employers Liability insurance and a "South Carolina Workers' Compensation Insurance Plan," neither of these documents, nor any of the rules contained therein, have been formally adopted as regulations in accordance with the Administrative Procedures Act (APA). According to the APA, NCCI, by definition, is not authorized to promulgate regulations and any guidance it may provide the Commission "does not have the force or effect of law." Section 1-23-10 states in pertinent part:

> (1) "Agency" or "State agency" means each state board, commission, department, executive department or officer . . . authorized by law to make regulations or to determine contested cases;
>
> . . . .

> (4) "Regulation" means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. **Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law.**

S.C. Code Ann. § 1-23-10(1), (4) (Supp. 2002) (emphasis added); cf. S.C. Code Ann. § 1-23-40 (1986) (requiring that "[a]ll regulations promulgated or proposed to be promulgated by state agencies which have general public applicability and legal effect" must "be filed with the Legislative Council and published in the State Register."); S.C. Code Ann. § 1-23-120 (Supp. 2002) (mandating that "[a]ll regulations except those specifically exempted . . . must be submitted to the General Assembly for review"). The NCCI has no power or authority to promulgate regulations that have the force or effect of law. In fact, not even NCCI claims this authority. Instead, it is a self-described "rating organization or **advisory organization** licensed in this state to make and file rates, rating values, classifications, and rating plans for workers' compensation insurance." NCCI Basic Manual, South Carolina Workers' Compensation Insurance Plan, effective January 1, 1999 (emphasis added).

Travelers asserts the NCCI's rules should control the instant case. Travelers cites a paragraph in an "Assigned Risk Supplement" issued on January 1, 1998, which reads: "Any employer having voluntary coverage or an offer thereof in a state is ineligible for Plan coverage. The assigned risk coverage terminates at the effective date of the voluntary insurance." Travelers fails to reconcile the above statements with the NCCI South Carolina Workers' Compensation Plan, Section III. Paragraph 6 of that section provides in pertinent part:

> [A]ny insurer that wishes to insure an employer as voluntary business may do so at any time. If such insurer is not the assigned carrier, the assigned carrier shall cancel its policy pro rata and the **assignment** shall automatically terminate as of the effective date of the voluntary insurer's policy. (Emphasis added).

Paragraph 2 of Section III of the Plan declares in relevant part:

> If, after the issuance of a policy, the assigned carrier determines that an employer is not entitled to insurance, . . . the assigned carrier **shall initiate cancellation** and inform the Plan Administrator and appropriate state organization of the reason for such cancellation. (Emphasis added).

Therefore, despite Travelers' contentions, the NCCI advisory provisions do not militate against a finding that Travelers is the proper carrier with coverage in this case.

When an insured with an assigned risk policy obtains Workers' Compensation insurance on the voluntary market, Section III, Paragraph 6 of NCCI's South Carolina Workers' Compensation Insurance Plan provides for two separate and distinct results: (1) termination of the assignment agreement between the assigned carrier and the assigned risk pool; and (2) cancellation of the insurance policy. Essentially, NCCI advises that, before the assigned risk policy is "cancelled," the assigned carrier must be relieved of its duty to insure the assigned risk by the assigned risk pool with which it is associated. In his treatise on Workers' Compensation law, Professor Larson explained that if the assignment agreement is not terminated before the assigned carrier cancels the assigned risk policy, the cancellation of the policy would constitute a breach of the carrier's assigned risk agreement. See 9 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 150.05[3] (2000). The NCCI has suggested that the assigned risk carriers' obligations under the assigned risk agreement should automatically terminate when an insured obtains Workers' Compensation insurance on the voluntary market. Yet, as indicated in Section III, Paragraph 2 of NCCI's South Carolina Workers' Compensation Insurance Plan, the assigned risk policy itself must be properly cancelled in accordance with the procedures outlined in the Workers' Compensation Act and corresponding regulations.

The proper procedures for canceling a Workers' Compensation insurance policy in South Carolina are found in Regulations 67-405 and 67-

406. These regulations require that when an insurer wishes to cancel a policy, the insurer shall immediately notify the Workers' Compensation Commission by filing a Policy Cancellation Notice, Form WC-89-06-09-A, with the NCCI. The Workers' Compensation insurance policy is deemed continuous until the cancellation notice is duly filed and, even then, cancellation is not effective until after thirty days from the date NCCI receives the Form WC-89-06-09-A. See 25A S.C. Code Ann. Reg. 67-406(E)-(F) (Supp. 2002). No state law or regulation provides for automatic cancellation of a Workers' Compensation policy.

Even considering NCCI's Insurance Plan and Assigned Risk Supplement, Travelers is the proper carrier. No advisory opinion of the NCCI has the force or effect of a law or regulation in South Carolina. The NCCI rules do not supersede the South Carolina Workers' Compensation Act or the regulations promulgated thereunder. NCCI is subjugated to the law in South Carolina. The NCCI rules relied on by Travelers do not have the force or effect of law in South Carolina.

The majority opinion is infected with expository error. Because the NCCI rules have been approved by the Chief Insurance Commissioner, the majority elevates the NCCI rules to co-equal status with the regulations approved by the South Carolina General Assembly in the field of Workers' Compensation. The imprimatur of the Chief Insurance Commissioner is nonefficacious when juxtaposed to approval of a regulation by the South Carolina General Assembly. Is there a factual or legalistic harmonious nexus inter sese the NCCI rules and legislatively approved regulations? In fact, it is not a vel non because the NCCI rules inevitably occupy an inferior status.

The applicable statutory and regulatory provisions of the South Carolina Workers' Compensation Act govern the determination of coverage in this case.

II. IDENTITY OF PROPER CARRIER

A. Travelers had not Canceled Policy at Time of Accident

Travelers issued an assigned risk policy to Willowglen with the effective dates of August 24, 1997 through August 24, 1998. Travelers accepted the September 6, 1997 claim of Marty Avant and began paying benefits under the Workers' Compensation Act. Substantial evidence in the record indicates that Travelers had not initiated cancellation of the assigned risk policy covering Willowglen at the time of the September 6, 1997 accident.

Only Travelers' obligations under the assignment agreement would have automatically terminated when Willowglen obtained Workers' Compensation insurance on the voluntary market. This did not occur on July 1, 1997 as found by the Commissioner. When Willowglen renewed its voluntary coverage with United Heartland on July 1, 1997, the only holdings covered under the policy were its Wisconsin holdings.

Amy Gilland testified that Travelers issued a renewal quotation on June 19, 1997. On July 3, 1997, Travelers received a partial renewal payment from Willowglen in the amount of $466.03. The quoted premium was $46,603.00. According to Gilland, the partial payment was intended to be a full payment, but the check was mistakenly written for the wrong amount. On August 13, 1997, Willowglen issued a second check for the balance of the full premium to renew the policy insuring Willowglen. Subsequently, Travelers issued the renewal policy with effective dates of August 24, 1997 to August 24, 1998. The timing is significant. Willowglen did not decide to add South Carolina as an endorsement to its United Heartland policy until after Willowglen had already renewed the assigned risk policy with Travelers and fully paid the premium. According to Paul Hindtgen at United Heartland, notice of the new endorsement was sent to the NCCI on or about August 27, 1997. The effective date of this endorsement was July 1, 1997. Travelers was not notified of the endorsement and did not cancel the assigned risk policy covering Willowglen.

To cancel the policy with Willowglen, Travelers was required to follow the explicit cancellation procedure set out in Regulations 67-405 and 67-406. According to Regulation 67-405(E), "[i]f the employer fails to renew its insurance, or the insurer cancels the policy, the employer's insurer shall immediately notify the Commission that it no longer insures the employer by filing a notice of termination with the Commission." 25A S.C. Code Ann. Reg. 67-405(E) (1990). Regulation 67-406 provides in pertinent part:

> B. The insurance carrier shall file a . . . notice of termination directly with the NCCI. The date of receipt by the NCCI is deemed the date of filing with the Commission.
>
> . . . .
>
> E. Workers' compensation insurance is deemed continuous until notice of termination is filed according to R.67-405 and as provided in F below.
>
> F. To cancel workers' compensation insurance coverage, . . . the insurance carrier shall file with the NCCI an NCCI Form WC 89 06 09 A.
>
> . . . .
>
> (2) Insurance expiration, termination or cancellation shall not be effective until after thirty days from the date of receipt by NCCI of the NCCI Form WC 89 06 09 A.

25A S.C. Code Ann. Reg. 67-406 (Supp. 2002). NCCI acknowledges that cancellation of a Workers' Compensation insurance policy is regulated by state law. See NCCI Basic Manual, Rule X(A).

Travelers did not file a notice of cancellation form with the NCCI at any time prior to the September 6, 1997 accident. Travelers became aware of the existence of voluntary coverage as early as January 5, 1998. The

testimony from Amy Gilland and Joel Scott shows that notice of cancellation was received by the Commission on February 13, 1998, with an effective date of cancellation of March 19, 1998. This unequivocal notice that Travelers' policy was canceled effective March 19, 1998 is contained in the record. On April 2, 1998, Travelers sent a second notice of cancellation to Willowglen confirming the policy was cancelled effective March 19, 1998. Travelers did not, at any time prior to May 7, 1999, notify Willowglen or United Heartland that it intended to contest coverage for the Avant claim, even though Travelers was aware as early as January 5, 1998, that there was duplicate coverage. While Travelers later attempted to change the effective cancellation date to August 24, 1997, by sending a subsequent notice of cancellation on June 5, 1998, the second notice is null and void because the earlier notice had already cancelled the policy. Travelers was attempting to cancel a policy that had been canceled three months earlier. An insurance policy cannot be cancelled twice. Moreover, Regulation 67-406(F)(2) states that cancellation "shall not be effective" until thirty days after the proper notice of cancellation form is filed with the NCCI.

Additionally, Travelers issued a new policy to Willowglen after Willowglen had been insured by United Heartland on the voluntary market. Therefore, even if Travelers had cancelled the policy in effect at the time Willowglen obtained a voluntary policy in July 1997, the new Travelers policy issued in August 1997 would have been in effect on September 6, 1997.

The Travelers policy had not been canceled and was in effect at the time of Avant's September 6, 1997 accident. The Travelers policy remained in effect until March 19, 1998.

B. Travelers Policy had Later Effective Date

When Avant was injured on September 6, 1997, Willowglen was seemingly covered by two insurance policies. The Travelers policy became effective on August 24, 1997 and remained in effect until March 19, 1998. The record reveals United Heartland issued a policy covering Willowglen, with an effective date of July 1, 1997. In such cases, Regulation 67-409

determines which carrier is liable for benefits. See 25A S.C. Code Ann. Reg. 67-409 (1990). Pursuant to Regulation 67-409(A), "[w]hen duplicate or dual coverage exists by reason of two different insurance carriers issuing two policies to the same employer securing the same liability, the Commission **shall presume the policy with the later effective date is in force** and the earlier policy terminated on the effective date of the later policy." (Emphasis added). This mandatory language creates an irrebuttable presumption that the Travelers policy with the effective date of August 24, 1997 was in force on September 6, 1997, not the United Heartland policy.

This presumption is supported by the fact that Travelers accepted Avant's claim for the September 6, 1997 accident and paid benefits in excess of $40,000, even after discovering the dual coverage issue in early January 1998. Travelers did not pursue legal action until May 7, 1999, when Travelers filed a motion requesting the Workers' Compensation Commission to identify the proper carrier for the Avant claim. Willowglen continued to pay and Travelers continued to accept premiums after issuing the August 1997-98 renewal policy.

Because the renewal policy issued by Travelers effective August 24, 1997 has a later effective date than the United Heartland policy issued July 1, 1997, the law presumes the United Heartland policy was terminated after August 24, 1997. Therefore, by virtue of Regulation 67-409, only the Travelers policy was in effect on September 6, 1997. The Act and the regulations clearly presume the Travelers policy covers Avant's accident on September 6, 1997.

C. Retroactive Cancellation of Workers' Compensation not Permitted Under these Facts

Travelers argues the "circuit court erred in finding that retroactive cancellation of a policy is not permissible under any circumstances." This is a misstatement of the judge's order. The judge held: "South Carolina law does not permit retroactive cancellation of workers' compensation insurance except in one limited circumstance: where there are dual policies with the same effective date." (emphasis in judge's order). This is a correct statement

of law. The only provision for retroactive cancellation of a Workers' Compensation insurance policy is found at 25A S.C. Code Ann. Reg. 67-409(B) (1990). "When both policies carry the same effective date, one policy may be cancelled by filing a notice of termination retroactive to the date of the policy's inception." 25A S.C. Code Ann. Reg. 67-409(B) (1990).

The general rule is found at 25A S.C. Code Ann. Reg. 67-406(F)(2) (Supp. 2002): "Insurance expiration, termination or cancellation shall not be effective until after thirty days from the date of receipt by NCCI of the NCCI Form WC 89 06 09 A." Travelers cites no statute, regulation, or case that would permit Travelers to retroactively cancel a Workers' Compensation insurance policy under any other circumstance.

The Travelers policy and the United Heartland policy at issue do not have the "same effective date." Accordingly, the law does not permit Travelers to cancel its policy retroactively.

Furthermore, public policy dictates that retroactive cancellation of Workers' Compensation insurance be the exception, not the rule. Professor Larson articulated: "In view of the essential role of insurance in the compensation process, and the serious potential effects of noninsurance on both employer and employee, requirements for cancellation of insurance are generally exacting, and are **strictly construed and applied**." 9 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 150.03[1] (2000) (emphasis added). Thus, South Carolina's regulations on cancellation should be strictly construed and applied. These regulations cannot be circumvented by an advisory policy. Cancellation of a Workers' Compensation insurance policy is regulated by state law.

CONCLUSION

Travelers is the proper carrier with coverage. United Heartland has no liability for benefits in this case under the South Carolina Workers' Compensation Act. I **VOTE** to **AFFIRM** the order of the circuit court judge finding that Travelers is solely responsible for providing coverage of Avant's claim.