Judicial Merit Selection Commission

Post Office Box 142
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M E D I A R E L E A S E

September 21, 2005

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Jane O. Shuler, Chief Counsel
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* * *

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 37

September 26, 2005

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

L-J, Inc. and Eagle Creek Construction Co., Inc., Transcontinental Insurance Company, The Home Indemnity Company and The Maryland Commercial Insurance Group, Plaintiffs,

Of Whom Transcontinental Insurance Company, The Home Indemnity Company and The Maryland Commercial Insurance Group, are Respondents,

v.

Bituminous Fire and Marine Insurance Company, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Thomas J. Wills, Special Master, Circuit Court Judge

Opinion No. 25854
Heard April 21, 2004 - Filed August 9, 2004
Reheard April 19, 2005 - Filed September 26, 2005

REVERSED

Charles E. Carpenter, Jr., Francis M. Mack, and S. Elizabeth Brosnan, all of Richardson, Plowden, Carpenter & Robinson, P.A., of Columbia; and John J. Piegore, of Sanchez & Daniels, of Chicago, for Petitioner.

G. Trenholm Walker and Amanda R. Maybank, both of Pratt-Thomas, Epting & Walker, of Charleston, for Respondents.

George E. Mullen and Allison Burke Thompson, both of Mullen, Wylie & Seekings, of Charleston, for Amicus Curiae SC Community Association Institute, CCM & Benchmark.

Daniel T. Brailsford, of Robinson, McFadden & Moore, of Columbia, for Amicus Curiae American Subcontractors & Mechanical Contractors

Sean A. Scoopmire, of Clarkson, Walsh, Rheney & Turner, PA, of Greenville, for Amicus Curiae National Association of Mutual Insurance Companies.

Carmen Tevis Mullen, of Charleston, for Amicus Curiae South Carolina Trial Lawyers Association.

Thomas C. Salane, R. Hawthorne Barrett and Shannon F. Bobertz, of Turner, Padget, Graham & Laney, PA , of Columbia, for Amicus Curiae American Insurance and Property Casualty, etc.

D. Reece Williams, III, of Callison, Tighe & Robinson, LLC, of Columbia, for Amicus Curiae Independent Insurance Agents and Brokers of South Carolina.

David S. Jaffee, of Washington, DC; and Benjamin E. Nicholson, V, of McNair Law Firm, PA, of Columbia, for Amicus Curiae National Association of Home Builders, et al.

L. Franklin Elmore, of Elmore & Wall, PA, of Greenville, for Amicus Curiae The Carolinas Associated General Contractors'.

CHIEF JUSTICE TOAL: Bituminous Fire and Marine Insurance Company (Bituminous) brought the underlying declaratory judgment action seeking a determination as to whether a commercial general liability (CGL) policy issued to L-J, Inc. (Contractor) covered damage caused by the faulty workmanship of Contractor and its subcontractors on a road construction project. We granted certiorari to review the court of appeals' decision, which held that damage to the roadway constituted an "occurrence" and policy exclusions did not apply. *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 350 S.C. 549, 567 S.E.2d 489 (Ct. App. 2002). We withdraw our prior opinion on this matter and substitute it with this opinion. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

In 1989, Dunes West Joint Venture (Developer) hired Contractor to perform site-development work and build roads for the Dunes West subdivision. Contractor, in turn, hired subcontractors to perform most of the work. In 1990, the project was completed, and by 1994, the roads had deteriorated. Because of the deterioration of the roads, Developer brought the underlying action against Contractor for breach of contract, breach of warranty, and negligence.

In 1997, the underlying lawsuit settled for $750,000. After settlement, Contractor sought indemnification from Bituminous and the three other insurers (Respondents).[1] Respondents contributed $362,500 to the settlement amount, but Bituminous refused to indemnify Contractor.[2]

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[1] Other providers included Transcontinental Insurance Company, The Home Indemnity Company, and The Maryland Commercial Insurance Group.

[2] From 1989 to 1996, Contractor was insured under various policies. Bituminous issued Contractor a CGL policy covering the period from 1990 to 1992.

Consequently, Respondents brought a declaratory judgment action against Bituminous seeking contribution and indemnification for all defense costs. The circuit court referred the action to a special master, who found that the damage to the roadway system was covered under the Bituminous CGL policy. More specifically, the special master found that the damage constituted an "occurrence," and the "expected or intended" and "your work" exclusions did not apply to work performed by subcontractors. Finally, the special master found that the CGL "policy years" ran from 1989 to 1996, and because Bituminous's policy covered the two-year period from 1990 to 1992, Bituminous owed the other carriers a two-year contribution valued at $103,571.42.

Bituminous appealed and the court of appeals affirmed, finding that the property damage constituted an "occurrence" and that the policy exclusions did not apply. *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 350 S.C. 549, 567 S.E.2d 489 (Ct. App. 2002). After granting certiorari, we reversed, holding that the CGL policy did not cover damage caused by faulty workmanship. *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, Op. No. 25854 (S.C. Sup. Ct. filed August 9, 2004) (Shearouse Adv. Sh. No. 31 at 55).

On rehearing, we now consider the following issues for review:

I. Did the court of appeals err in finding that the road deterioration constituted an "occurrence" as defined by the CGL insurance policy?

II. Did the court of appeals err in finding that the road deterioration was, from the Contractor's perspective, neither expected nor intended?

III. Did the court of appeals err in finding that the "your work" exclusion restored coverage?

STANDARD OF REVIEW

Because this is an action at law, the findings of fact will not be disturbed unless there is no evidence to reasonably support the trial judge's conclusions. *Townes Assoc. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

I. "Occurrence"

Bituminous asserts that the court of appeals erred in finding that the road deterioration constituted an "occurrence" under the CGL policy. We agree.

The issue of whether property damage to the work product alone, caused by faulty workmanship, constitutes an occurrence is a question of first impression in South Carolina. A majority of other jurisdictions deciding this issue have held that faulty workmanship standing alone, resulting in damage only to the work product itself, does not constitute an occurrence under a CGL policy. *See, e.g.*, *Pursell Constr., Inc. v. Hawkeye-Security Ins. Co.*, 596 N.W.2d 67, 71 (Iowa 1999); *Amerisure, Inc. v. Wurster Constr. Co., Inc.*, 818 N.E.2d 998, 1004 (Ind. Ct. App. 2004) (holding that faulty workmanship is not an accident and therefore not an occurrence); *Helie v. Herrmann*, 736 N.E.2d 566, 568 (Ohio Ct. App. 1999) (holding that faulty workmanship does not constitute an occurrence when the damage is to the work product only); *Monticello Ins. Co. v. Wilfred's Constr.*, 661 N.E.2d 451, 456 (Ill. App. Ct. 1996) (finding that improper construction by a contractor and its subcontractors does not constitute an occurrence when the improper construction leads to defects).[3]

[3] In addition to the authority cited, Florida, Illinois, Louisiana, Maine, Maryland, Michigan, Missouri, New Jersey, and North Carolina have reported cases which hold that a CGL does not provide coverage for faulty workmanship where the property damage is to the work product only. Several different approaches are used in analyzing the issue, but a majority of

Although our courts have not addressed the specific issue of whether faulty workmanship constitutes an occurrence, we have addressed the issue of whether CGL policies are intended to cover faulty workmanship. For example, this Court has held that a CGL policy is not intended to cover economic loss resulting from faulty workmanship. *Century Indem. Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 563-64, 561 S.E.2d 355, 357 (2002). Moreover, our court of appeals has held that any liability that is incurred because of faulty workmanship is part of the insured's contractual liability, not an insurable event under a CGL policy. *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 16, 459 S.E.2d 318, 320 (Ct. App. 1995); *see also C.D. Walters Constr. Co., Inc. v. Fireman's Ins. Co. of Newark*, 281 S.C. 593, 596-97, 316 S.E.2d 709, 711 (Ct. App. 1984) (holding that faulty workmanship is a business risk that is not intended to be covered by a CGL policy).

In the present case, Bituminous's CGL policy, subject to certain exclusions, provides:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies….
>
> This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory."

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the states reach the same conclusion – a CGL policy does not cover faulty workmanship. However, there are several jurisdictions, including Minnesota, New Hampshire, and Wisconsin, that have found CGL policies to be ambiguous and construed the ambiguity against the drafter. *See e.g., Wanzek Constr., Inc. v. Employers Ins. of Wausau*, 679 N.W.2d 322, 329 (Minn. 2004) (holding the term subcontractor to be ambiguous and construing the ambiguity in favor of coverage).

The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Four years after Contractor completed construction of the Dunes West road system, the roads began to deteriorate, showing many signs of "alligator cracking," a form of cracking in asphalt that looks like alligator skin. Two expert witnesses testified in deposition as to the cause of the damage. The first deponent, Kenneth Humphries, testified that approximately 50% of the cracking was caused by insufficient road subgrade preparation, which was caused by Contractor's failure to properly (1) remove tree stumps from the subgrade and (2) compact the soft, wet clay in the subgrade. Humphries also opined that the cracking was caused by insufficiently thick road course, improper drainage, and excessive traffic. The second deponent, L.G. Lewis, testified that the primary cause of the cracking was improper drainage. Other causes, according to Lewis, included an inadequate "edge of curb detail and the increased frequency of heavy wheel loads on the pavement."

Although the alligator cracking may have constituted property damage, we find that an "occurrence," as defined under the CGL policy did not take place. According to the deposition testimony outlined above, the only "occurrences" were various negligent acts by Contractor during road design, preparation, and construction, which led to the premature deterioration of the roads. Those negligent acts included: (1) failure to prepare the subgrade by deciding not to remove the tree stumps and by failing to remove or compact the wet clay in the subgrade; (2) improperly designed drainage system; (3) ill-prepared, thin road course that could not handle heavy-wheel loads; and (4) improperly designed curb-edge detail.

We find these negligent acts constitute faulty workmanship, which damaged the roadway system only. And because faulty workmanship is not something that is typically caused by an accident or by exposure to the same general harmful conditions, we hold that the damage in this case did not constitute an occurrence.[4] We find the analysis used by the New Hampshire

[4] The CGL policy may, however, provide coverage in cases where faulty workmanship causes a third party bodily injury or damage to other property, *not in cases where faulty workmanship damages the work product alone*.

Supreme Court helpful in distinguishing between a claim for faulty workmanship versus a claim for damage to the work product caused by the negligence of a third party. *High Country Assocs. v. New Hampshire Ins. Co*., 648 A.2d 474 (N.H. 1994). In *High Country Assocs.*, the court held that a CGL provided coverage for property damage caused by continuous exposure to moisture when the complaint alleged negligent construction that resulted in property damage and not merely negligent construction damaging only the work product itself. *Id*. at 477. The complaint in *High Country Assocs.* alleged:

> [a]ctual damage to the buildings caused by exposure to water seeping into the walls that resulted from the negligent construction methods of High Country Associates. The damages claimed are for the water-damaged walls, not the diminution in value or cost of repairing work of inferior quality. Therefore, the property damage described in the amended writ, caused by continuous exposure to moisture through leaky walls, is not simply a claim for the contractor's defective work.

Id. As a result, the court held that the plaintiffs' alleged negligent construction was the result of an occurrence, rather than an allegation of faulty or defective work. *Id*. at 478.

In the present case, the complaint did not allege property damage beyond the improper performance of the task itself. The complaint alleged breach of contract, breach of warranty, and negligence. However, each of the claims repeated verbatim the same allegation – faulty workmanship in completing the project. As a result, the insurance policy will not stand to cover liability for the Contractor's contract liability for a claim that was for money damages to compensate for the defective work.

Accordingly, we hold that the damage in the present case did not constitute an "occurrence." If we were to hold otherwise, the CGL policy would be more like a performance bond, which guarantees the work, rather than like an insurance policy, which is intended to insure against accidents. *See State Farm Fire & Cas. Co. v. Tillerson*, 777 N.E.2d 986, 991 (Ill. App. Ct. 2001) (holding that if courts were to find that CGL policies covered faulty

workmanship, courts would effectively transforming CGL policies into performance bonds). A performance bond guarantees that the work will be performed according to the specifications of the contract by providing a surety to stand in the place of the contractor should the contractor be unable to perform as required under the contract. Consequently, our holding today ensures that ultimate liability falls to the one who performed the negligent work – the subcontractor – instead of the insurance carrier. It will also encourage contractors to choose their subcontractors more carefully instead of having to seek indemnification from the subcontractors after their work fails to meet the requirements of the contract.

CONCLUSION

Based on the reasoning set forth above, we reverse the court of appeals' decision, and hold that the damage to the Dunes West roadway system is not covered under Bituminous's CGL policy. Therefore, Bituminous is not required to indemnify Contractor. Because we find that the faulty workmanship does not constitute an "occurrence," we do not address Issues II and III to determine whether the policy exclusions apply.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Edward Freiburger, Appellant.

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

Opinion No. 26042
Heard May 18, 2005 - Filed September 26, 2005

AFFIRMED

John Dennis Delgado, John S. Nichols, of Bluestein & Nicholas, LLC, and Kathrine Haggard Hudgins, all of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Jeffrey A. Jacobs, and Solicitor Warren Blair Giese, all of Columbia, for Respondent.

JUSTICE WALLER: This matter was certified to this Court from the Court of Appeals pursuant to Rule 204, SCACR. Freiburger was convicted of the 1961 murder of a Columbia taxi-cab driver. He was sentenced to life imprisonment. We affirm.

FACTS

The victim in this case, John Orner, was a taxi-cab driver who regularly serviced soldiers at Fort Jackson in Columbia. Orner received his last dispatch call at 11:15 p.m. on the evening of February 28, 1961 to go to the NCO club at the fort. When he did not return home from his shift the next morning, his family reported him missing. Orner's bloody cab was found around 7:30 a.m. on March 1, 1961, in the 1200 block of Assembly Street. Orner was not in the cab. His body was found on March 3, 1961, on the side of the road of Highway 601 in lower Richland County. He had died from a gunshot wound to the brain, consistent with having been shot in the head by a passenger sitting in the back seat of the cab. Forensics examinations revealed Orner had been killed by a gunshot wound from a .32 caliber bullet fired from a Harrington and Richardson (H & R) revolver.

Freiburger was a private in the army stationed at Fort Jackson in 1961. Pawn shop records revealed that on February 28, 1961, Freiburger purchased a .32 caliber H&R revolver, serial number 9948, from Capital Loan and Pawn Shop at 1214 Main Street. A month later, on March 29, 1961, Freiburger was stopped by a Tennessee Highway patrolman, Donald Meredith, at approximately 11:00 p.m. for hitchhiking in Newport, Tennessee. Meredith testified he stopped Freiburger because it was dangerous to be out walking or hitchhiking on the road as people had been struck by cars in the vicinity. Patrolman Meredith questioned Freiburger, then patted him down, discovering a .32 caliber loaded H&R revolver, serial number W9948. Meredith testified that, although Freiburger was not under arrest at the time of the pat down search, "he was going to be for hitchhiking, or I was going to take him back to the jail." Upon finding the weapon, Meredith arrested Freiburger for "carrying arms," and the gun was confiscated.

After Freiburger's arrest, Richland County authorities (investigating Orner's murder) requested and were given the H&R revolver seized by Patrolman Meredith. Testing on the weapon was inconclusive as to whether it was the weapon used in Orner's death. No charges were filed at that time. Forty years later, in August 2000, the Richland County Sheriff's Department

reopened the Orner file. Re-testing of the gun and bullet fragments was initially inconclusive. However, SLED retained an independent expert, John Cayton, who concluded the weapon retrieved from Freiburger in 1961 was the murder weapon. Freiburger was arrested and charged with murder. The jury convicted him, and he was sentenced to life imprisonment.

ISSUES

1. Did the trial court properly admit the gun taken from Freiburger during the 1961 search in Tennessee?
2. Did the trial court err in denying Freiburger's motion to suppress the gun due to the State's failure to prove a sufficient chain of custody?
3. Did the trial court err in admitting certain pawnshop records under the Ancient Documents and Business Records as Evidence Act?
4. Did the trial court err in admitting evidence that Freiburger was at one time stationed at Fort Leavenworth, Kansas?
5. Did the court err in denying Freiburger's motion for a mistrial and/or for curative instructions as a result of the solicitor's improper comments during opening argument?
6. Did the court err in denying Freiburger's motion for a directed verdict?

1. 1961 SEARCH AND SEIZURE

Freiburger asserts the 1961 search and seizure of the H&R weapon was illegal, having exceeded the permissible scope of a Terry[1] search. The State contends the search was a lawful "search incident to arrest," such that the seizure was permissible. We agree with the State that the 1961 search of Freiburger was a lawful search incident to arrest.

Evidence seized in violation of the Fourth Amendment must be excluded from trial. State v. Khinggratasiphon, 352 S.C. 62, 572 S.E.2d 456 (2002), *citing* Mapp v. Ohio, 367 U.S. 643 (1961). Generally, a warrantless search is per se unreasonable and violates the Fourth Amendment prohibition

[1] Terry v. Ohio, 392 U.S. 1, 19, n. 16, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968).

against unreasonable searches and seizures. State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995). However, a warrantless search will withstand constitutional scrutiny where the search falls within one of several well recognized exceptions to the warrant requirement. Id. One such exception is in cases of a search incident to arrest. State v. Ferrell, 274 S.C. 401, 409, 266 S.E.2d 869, 873 (1980) (in the case of a lawful custodial arrest, the full search of a person does not require a search warrant and is considered reasonable under the Fourth Amendment). The burden of establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches is upon the prosecution. Dupree, supra; State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct.App.1995) (burden is upon State to justify warrantless search).

There are two historical rationales for the "search incident to arrest" exception to the warrant requirement: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial. Knowles v. Ohio, 525 U.S. 113, 116 (1998). A search may be conducted incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986). A warrantless search which precedes a formal arrest is valid if the arrest quickly follows. State v. Moultrie, 316 S.C. 547, 551, 451 S.E.2d 34, 37 (Ct. App. 1994). See also Rawlings v. Kentucky, 448 U.S. 98, 111, 100 S.Ct. 2556, 2564, 65 L.Ed.2d 633 (1980)(search may precede a formal arrest if the officer has probable cause to arrest at the time of the search and the fruits of the search were not necessary to support probable cause to arrest).

As noted above, there are situations in which a warrantless search which immediately precedes an arrest is held lawful, in cases where the police officer is held to have had probable cause from the outset. Moultrie, supra; Rawlings v. Kentucky. The rationale for such a warrantless search is that it is permissible incident to a lawful arrest because of legitimate concerns for the safety of the officer and to prevent the destruction of evidence by the arrestee. Chimel v. California, 395 U.S. 752 (1969) (when an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist

arrest or effect his escape). See also United States v. Robinson, 414 U.S. 218 (1973).

At the *in camera* hearing, Trooper Meredith testified that, although Freiburger had not been arrested at the time of the pat down search, he was going to be arrested for hitchhiking, or taken back to the jail. Trooper Meredith went on to testify that "we did a safety search before we put somebody in the car. You check them to see if they have any weapons."

Freiburger maintains that because he was not under arrest at the time of the search, and because he was ultimately arrested only for carrying arms, the search was illegal and the gun seized in 1961 should have been suppressed at trial. We disagree. As noted above, one of the rationales for the exception to the warrant requirement in the case of a search incident to arrest is the need to disarm the suspect in order to take him into custody. Here, Trooper Meredith's testimony that Freiburger was going to be arrested for hitchhiking and/or transported to the jail provides a sufficient basis upon which to conduct a limited pat-down search. It would simply be unreasonable to expect a police officer, out on a deserted road at 11:00 p.m., to transport a suspect to the jail without first conducting a pat down search for weapons.

Moreover, the fact that Freiburger was not ultimately arrested for hitchhiking is not dispositive. As recently stated by the United States Supreme Court, an officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. . . . 'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'" Devenpeck v. Alford, 125 S.Ct. 588, 94 (2004), *citing* Whren, supra, at 813, 116 S.Ct. 1769. Accordingly, the mere fact that Trooper Meredith did not arrest Freiburger for hitchhiking but, instead, arrested him for carrying arms upon finding the weapon does not vitiate the reasonableness of the underlying search. We find the search conducted by Trooper Meredith was a legitimate search incident to arrest, necessary to ensure his safety in order to transport

Freiburger to the jail. As such, there was no fourth amendment violation and the trial court properly denied Freiburger's motion to suppress.

2. CHAIN OF CUSTODY

Freiburger next asserts the state failed to prove a sufficient chain of custody of the gun, such that it should have been excluded from evidence on this basis. Initially, we agree with the state that Freiburger has failed to preserve this issue for review.

During the motion in limine hearing, Freiburger objected to the weapon only on the ground that there had been an impermissible pat-down search. He renewed the same objection when the gun was introduced into evidence. Accordingly, as the argument he now advances was not raised and ruled on below, it is not preserved. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) (issue not preserved for appeal where one ground is raised below and another ground is raised on appeal). In any event, the trial court properly admitted the weapon.

While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence- - that is, evidence that is unique and identifiable- - the establishment of a strict chain of custody is not required: If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. State v. Glenn, 328 S.C. 300, 305-306, 492 S.E.2d 393, 395 (Ct. App. 1997).

Given the serial number and markings on the gun, and the fact that a gun is a non-fungible item, we find the chain of custody established by the state in this case was sufficient.

3. ANCIENT DOCUMENTS/BUSINESS RECORDS EXCEPTION

Freiburger next contends the trial court erred in admitting certain pawn shop records pursuant to the Ancient Documents rule and the Business Records Exception, claiming they were not properly authenticated by the state. We find this issue is not adequately preserved for review, and the record is, in any event, insufficient to enable this Court to make an intelligent review.

It appears Freiburger primarily objects to admission of the Capital Loan and Pawn receipt and records which indicate Freiburger purchased the H&R revolver on February 28, 1961. However, there is no objection to their admission during the testimony of Ms. Russ, the then 77 year old daughter of the pawn shop owner. In fact, certain exhibits were specifically entered without objection. To the extent that Freiburger did object, the objections came long after the documents had been received into evidence, most of which had been introduced into evidence without objection.

The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal. State v. Bellue, 259 S.C. 487, 193 S.E.2d 121 (1972). Further, Freiburger has failed to present a sufficient record for review. State v. Mitchell, 330 S.C. 189, 194, 498 S.E.2d 642, 645 (1998) (the burden is on the appellant to provide a sufficient record for review).

Moreover, we find the testimony of Ms. Russ sufficiently authenticated the pawn shop records. The alleged deficiencies in Ms. Russ' testimony go to the weight of the pawn shop records, rather than their admissibility.

4. FORT LEAVENWORTH

Freiburger asserts reversible error in references to his being "stationed" at Fort Leavenworth, Kansas.[2] He asserts it is well-known Leavenworth is a military prison, and that, as such, this evidence was prejudicial. We disagree.

[2] Freiburger was sent to Fort Leavenworth in 1961 after his arrest by Trooper Meredith for carrying arms when it was learned he was AWOL from the army.

Contrary to Freiburger's contention, there was no mention of the fact that he was **incarcerated** at Leavenworth. Mere questioning as to whether he was **stationed** there simply does not equate with advising the jury he was confined in a military prison. Even assuming, *arguendo*, jurors were aware Leavenworth is a military prison, there is no reason to suspect they automatically believed he was imprisoned there, as opposed to having been being stationed there during his military career. We see no prejudice from admission of this testimony. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000) (error without prejudice does not warrant reversal).

5. SOLICITOR'S OPENING COMMENTS

Freiburger next asserts the trial court erred in denying his motion for a mistrial, or curative instructions, after the solicitor improperly commented, during opening arguments, that Freiburger had been arrested by the Tennessee Highway Patrol on March 29, 1961. We find no reversible error.

The jury in this case was well aware, both from the solicitor's opening argument and the testimony of Trooper Meredith, that Freiburger had been stopped in Tennessee on March 29, 1961 for hitchhiking, and that he was patted down by Meredith and a weapon retrieved and confiscated. The jury also learned that the weapon was subsequently turned over to the Richland County sheriff's department and became the focus of the investigation.

Given the jury's knowledge that Freiburger had been stopped and frisked, and the weapon retrieved from him, the fact that the jury also heard he was arrested for carrying arms was simply not prejudicial in his trial for murder. State v. Locklair, supra (error without prejudice does not warrant reversal).

6. DIRECTED VERDICT

Finally, Freiburger asserts the trial court erred in denying his motion for a directed verdict. We disagree.

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004). In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. Id. On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. Id. If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury. Id.

The evidence adduced at trial which tended to implicate Freiburger was as follows: 1) he was a soldier stationed at Fort Jackson on February 28, 1961, 2) he had a habit of pawning his personal property at downtown Columbia pawn shops, 3) he purchased a .32 caliber H&R revolver, serial number W9948, and bullets from the Capital Loan and Pawn shop on February 28, 1961, 4) the victim was shot on February 28, 1961 with a .32 caliber H&R revolver, 5) two days after the victim's cab was found, Freiburger stayed at a downtown motel in close proximity to where Victim's bloody cab was found, 6) Freiburger was arrested in Tennessee on March 29, 1961 carrying a .32 caliber H&R revolver, 7) a ballistics test conducted in 2001 indicated that the H&R revolver confiscated from Freiburger in 1961 was the same weapon which fired the shot killing the victim, and 8) Freiburger was evasive when talking to Richland County police investigators in Indiana in September 2000, claiming he did not recall having been in the army, or having been stationed at Fort Jackson.

Although circumstantial, we find the above-cited evidence sufficient to withstand Freiburger's motion for a directed verdict.

The judgment below is affirmed.

AFFIRMED.

MOORE, A.C.J., BURNETT, PLEICONES, JJ., and Acting Justice James W. Johnson, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jacqueline Z. Houck, Richard Perrini and All Others Similarly Situated, Appellants,

v.

State Farm Fire and Casualty Insurance Company, State Farm Insurance Group, John C. Mallet, Individually and in his Capacity as a Class Representative for State Farm Insurance Agents, and John Doe, Respondents.

Appeal From Beaufort County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 26043
Heard June 2, 2005 - Filed September 26, 2005

AFFIRMED

Donald E. Jonas, of Cotty & Jonas, of Columbia, and Gregory Milam Alford, of Alford & Wilkins, PC, of Hilton Head Island, for Appellants.

Monteith P. Todd, and Robert E. Horner, both of Sowell, Gray, Stepp & Laffitte, LLC, of Columbia, for Respondents.

JUSTICE WALLER: We certified this case from the Court of Appeals pursuant to Rule 204, SCACR. At issue is the liability of Respondent, State Farm Insurance Company, to Appellants, homeowners in Beaufort County (Homeowners), for allowing them to purchase Standard Flood Insurance Policies covering their homes, when Preferred Risk Policies were available for a lower cost. The circuit court granted summary judgment to State Farm, holding it was not liable to Homeowners. We affirm.

FACTS

Homeowners purchased flood insurance policies from State Farm for their homes in Beaufort County (on Hilton Head Island). State Farm issued the policies pursuant to the National Flood Insurance Program (NFIP), a program established by Congress in 1968 under the National Flood Insurance Act and administered by the Federal Emergency Management Agency (FEMA). 42 U.S.C. § 4001 et. seq. In 1983, FEMA promulgated regulations to allow private insurers, called Write-Your-Own insurance companies (WYO), to provide flood insurance under the NFIP. The policies issued are called Standard Flood Insurance Policies (SFIP's), and the terms, rates and costs of such policies are established by FEMA regulations. 44 CFR § 61 *et seq*. Although WYO companies write the flood insurance policies in their own names, coverage is actually provided by the federal government, with premiums being paid into the National Flood Insurance Fund in the United States Treasury.[1]

State Farm issued SFIP policies to Homeowners through its agent John Mallet. Premiums for flood insurance policies are based upon the flood zone, coverage limits selected by the policy holder, and other risk factors specified in the NFIP manual. Under the NFIP, insureds may, if they meet certain criteria, qualify for a Preferred Risk Policy (PRP).[2] Prior to 1995, coverage limits available under a Preferred Risk Policy were less than that available

[1] The WYO's fees and administrative costs are first deducted. 42 U.S.C. § 4017 (d).

[2] These criteria include living in a flood zone designated as B, C, or X, and other eligibility requirements, based on flood history.

under SFIP policies. However, in 1995, the federal government increased the coverage limits available under the Preferred Risk Policies from a maximum of $25,000 for contents and $100,000 for buildings, to maximums of $60,000 for contents and $250,000 for the building. This increase in available limits made the PRP's an alternative for many homeowners who were previously not interested due to the low coverage.

Subsequent to the 1995 increase in coverages available under the PRP's, State Farm began inserting brochures into its renewal premium bills, advising insureds of the increased coverage limits available, as well as reduced premiums for Preferred Risk Policies for insured in Zones B, C, and X. Insureds were advised to contact their agents for information.[3] According to the testimony of State Farm's coordinator of flood insurance, FEMA did not require the WYO's to notify insured of the increased coverage available under the Preferred Risk Policies.

Agent Mallet directly informed his clients about the availability of the Preferred Risk Policies if an insured scheduled a "family insurance check-up" or if insureds called with questions about their flood insurance coverage. Appellant, Jacqueline Houck, was notified of her eligibility for a Preferred Risk policy in 1999, after calling Mallet's office to inquire about a hurricane brochure sent by State Farm. Subsequent to speaking with Houck, Mallet increased his efforts to notify insureds in eligible zones of the availability of the PRP.[4]

In June 2001, Homeowners instituted this action contending that from 1995 to the present, State Farm owed them a duty to advise and inform them of their eligibility for a PRP, and to sell them the less expensive policy. Its failure to do so, they asserted, was negligent, and constituted a breach of its covenant of good faith, a conspiracy, and a breach of contract. State Farm

[3] Appellant Jacqueline Houck testified that over the years she may have received some brochures about the national flood insurance programs and she'd "sort of glance at them." Similarly, the only other homeowner whose deposition testimony is in the record, Richard Perrini, testified that he did not read the brochures included in his renewal notices.

[4] According to Mallet's deposition testimony, he had not previously directly advised insureds of the preferred policies because it appeared the brochures mailed from State Farm were working as people had been switching from the SFIP to the preferred policies.

moved for summary judgment, contending Homeowners had failed to demonstrate any duty owed to them, and that there was no evidence giving rise to a breach of contract claim. The circuit court agreed and granted State Farm summary judgment.

ISSUE

Did the circuit court err in granting summary judgment to State Farm?

SCOPE OF REVIEW

An appellate court reviews the grant of summary judgment under the same standard applied by the trial court. George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001). Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Cafe Assocs., Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991). The mere fact that a case involves a novel issue does not render summary judgment inappropriate. Medical University of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004).

To sustain an action for negligence, it is essential the plaintiff demonstrate the defendant breached a duty of care owed to the plaintiff. Sabb v. South Carolina State Univ., 350 S.C. 416, 429, 567 S.E.2d 231, 237 (2002); Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998). The existence of a duty owed is a question of law for the courts. Doe v. Batson, 345 S.C. 316, 323, 548 S.E.2d 854, 857 (2001); Washington v. Lexington County Jail, 337 S.C. 400, 523 S.E.2d 204 (Ct. App. 1999). In a negligence action, if no duty exists, the defendant is entitled to judgment as a matter of law. Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 39, 533 S.E.2d 312, 316 (2000). Accord Steinke v. South Carolina Dep't of Labor, Licensing and Reg., 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999) (in a negligence action, the Court must determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff).

DISCUSSION

Homeowners concede that as a general rule, an insurance agent has no duty to advise an insured at the point of application, absent an express or

implied undertaking to do so. See Sullivan Co. v. New Swirl, Inc., 313 S.C. 34, 437 S.E.2d 30 (1993); Pitts v. Jackson Nat'l Life Ins., 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002); Trotter v. State Farm, 297 S.C. 465, 377 S.E.2d 343 (Ct. App. 1988). A duty may be imposed, however, "if the agent, nevertheless, undertakes to advise the insured." Carolina Prod. Maint., Inc. v. United States Fid. & Guar. Co., 310 S.C. 32, 425 S.E.2d 39, 43 (1992) (*citing* Trotter, 377 S.E.2d at 347). Absent an express undertaking to assume such a duty, a duty can be impliedly created. Id. In determining whether an implied duty has been created, courts consider several factors, including whether: (1) the agent received consideration beyond a mere payment of the premium, (2) the insured made a clear request for advice, or (3) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on." Id. (*citing* Trotter, 377 S.E.2d at 347).

Essentially, Homeowners' contention is that State Farm and agent Mallet owed each and every insured who lived in a B, C, or X flood zone, and who had a SFIP policy, a duty to seek them out individually, independent of any notices from the State Farm headquarters or newsletters issued by Mallet, and advise them personally and specifically of the availability of the Preferred Risk Policies, and to change their insurance to that policy, at a lower premium. South Carolina caselaw does not support Homeowner's contention.

In Sullivan Co. v. New Swirl, Inc., 313 S.C. 34, 35, 437 S.E.2d 30 (1993), this Court addressed the issue of whether an insurance agent was required to obtain insurance for his clients "on the best possible terms and at the lowest prices." There, the insured, New Swirl, refused to pay its insurance premiums when it acquired insurance coverage through a new agent at a cost lower than that provided by its agent, Sullivan. This Court held "[t]he duty of an insurance agent to procure the represented coverage does not create a duty to obtain coverage at any particular rate, absent an express promise to do so." 313 S.C. at 36, 437 S.E.2d at 30, citing Tunison v. Tillman Ins. Agency, 184 Ga.App. 776, 362 S.E.2d 507 (1987). We found the view advanced by Sullivan, i.e., that its agent owed a duty to secure

insurance at the best possible rates "would impose an undue burden on insurance agents and brokers." Id.

Most recently, in Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 574 S.E.2d 502 (2002), the Court of Appeals addressed class action claims of breach of fiduciary duty and constructive fraud arising from the sale of preferred and non-preferred whole life insurance policies. In Pitts, a corporation had purchased a life insurance policy on its president. The corporation was not advised by the insurance agent that the president would have qualified for a less expensive "preferred" policy. The plaintiffs brought suit alleging five causes of action: unfair trade practices, breach of fiduciary duty/constructive fraud, negligence, fraudulent concealment, and unjust enrichment. The plaintiffs contended they were sold the higher priced policy when, in fact, they qualified for the less expensive policy. The Court of Appeals affirmed the grant of summary judgment to the insurer, finding the plaintiffs had failed to demonstrate any fiduciary relationship, or that the agent had breached any duty to them in failing to disclose the existence of preferred policies or to perform "full underwriting in order to inform every standard policy applicant of any eligibility for a preferred policy." 352 S.C. at 337, 574 S.E.2d at 502.

Similarly, in Trotter v. State Farm Mut. Auto Ins. Co., 297 S.C. 465, 377 S.E.2d 343 (Ct. App. 1987), the insured brought a claim alleging State Farm and its agent had been negligent in failing to advising him of an exclusion in his automobile insurance policies (excluding injuries to employees which arose out of their employment), and in failing to advise him he needed workers' compensation coverage. The Court of Appeals noted the basic principles that "[g]enerally, an insurer and its agents owe no duty to advise an insured. . . . If the agent, nevertheless, undertakes to advise the insured, he must exercise due care in giving advice." *Citing* Riddle-Duckworth, Inc. v. Sullivan, 253 S.C. 411, 171 S.E.2d 486 (1969). The Trotter court went on to note that an insurer may assume a duty to advise either by (1) expressly undertaking to advise the insured; or (2) by impliedly undertaking to advise the insured. Id. An implied undertaking may be shown if (1) the agent received consideration beyond a mere payment of the premium, (2) the insured made a clear request for advice, or (3) there is a

course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on.

We find no evidence of either an express or implied undertaking in this case. Accordingly, the circuit court properly held there is no genuine issue of material fact.

As to an express undertaking, Homeowners rely upon State Farm's assumption of responsibility as a WYO provider under the WYO agreement. The WYO agreement on which they rely sets forth the "Undertakings of the Company." These "undertakings" include policy administration, eligibility determinations, issuance, endorsements, cancellations, and correspondence. We see nothing in the language here which creates an express duty on the part of State Farm to sell the best policy at the best price.

Homeowners also rely on State Farm's Flood Insurance Operation Guide, the purpose of which is to provide State Farm regional offices with the background and guidance to underwrite flood policies. Pursuant to this guide, one of State Farm's responsibilities is to "Confirm eligibility (e.g., community risk, etc.) and **charge proper rates** - - additional guidance is provided in the Flood Manual." (emphasis supplied). It is undisputed that all rates for flood insurance under the WYO arrangement are set by FEMA under the NFIA. Essentially, Homeowners' claim is that the responsibility to charge "proper rates" equates with charging the **lowest** rates available. We have found no authority supporting this proposition, and such a ruling would be at odds with this Court's opinion in New Swirl, and the Court of Appeals' opinions in Pitts and Trotter that agents do not have a duty to procure insurance at the **best possible rates**. While the Operation Manual may oblige State Farm to charge **proper** rates, the rates which Homeowners were charged for the SFIP policies were proper. Simply because they were not the lowest-price available policies does not render the rates charged for them improper.

Lastly, Homeowners rely on the testimony of State Farm's coordinator of flood insurance, Jack DeCicco, as giving rise to an express undertaking

and therefore creating a duty in this case to ensure they were switched from the SFIP's to PRP's. We disagree. DeCicco testified that it was the policy of State Farm to **offer** the best available coverage at the lowest rate under the WYO program, and that State Farm did take the responsibility to notify policyholders of changes in the eligibility for preferred risk insurance whenever there was **an opportunity to do so**. However, it is undisputed that State Farm did in fact insert brochures in its policyholders' renewal notices advising them of the availability of PRP's and advising them to contact their agents if they had questions about their flood insurance policy. The only Homeowner testimony in the record is to the effect that they did not pay much attention to the brochures. DeCicco's testimony that State Farm had a policy of offering the best coverage at the best rate, and that they did in fact notify policyholders of changes in eligibility for coverages simply does not give rise to an express duty to individually and specifically contact each and every customer who lived in a B, C, or X flood zone and advise them of the availability of the lower priced coverage.

As to an implied duty, Homeowners acknowledge that they must show that (1) the agent received consideration beyond a mere payment of the premium, (2) the insured made a clear request for advice, or (3) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on. Trotter, supra.

Initially, Homeowners contend Mallet received consideration beyond mere payment of the premiums because State Farm incurs no losses for WYO flood polices as those losses are borne by the federal government. However, this is true for **any** flood insurance policy sold under the WYO, regardless of whether it is a SFIP or a Preferred Risk Policy. Accordingly, Homeowners have not demonstrated Mallet received additional compensation beyond payment of the premiums.

As to the insured making a clear request for advice, the record is simply devoid of any such evidence.

Lastly, we find no evidence of a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on. As noted previously, the only Homeowner testimony in the record is that of Houck and Perrini. Houck testified she had had no contact whatsoever with agent Mallet prior to her husband's death in 1995 and that, thereafter, the only direct contact she had with Mallet was a request to remove her deceased husband's name from their correspondence. She testified she **assumed** Mallet was her agent and would obtain the best coverage for her. Similarly, Perrini testified he did not recall ever speaking to Mallet about his insurance needs, and never spoke with anyone in Mallet's office about his flood insurance premiums. Although he periodically visited Mallet's office to pay premiums, and to have a photo taken of his classic 1967 Mustang, there is no testimony as to any specific conversations with Mallet about procuring the best flood insurance policy at the best price. It is patent that Homeowner's testimony is insufficient to establish a course of dealing. See Trotter, 297 S.C. at 473, 377 S.E.2d at 348 (plaintiff's "ongoing relationship" consisting of periodic visits to pay premiums, change vehicles, discuss insurance, and conduct routing business insufficient to prove a course of dealing).

We find as a matter of law that neither State Farm nor agent Mallet owed Homeowners a duty to sell them the best policy at the lowest available price. Accordingly, we find the circuit court properly granted summary judgment.[5]

AFFIRMED.

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

[5] As to the grant of summary judgment on Homeowners' breach of contract claim, we find Homeowners have effectively abandoned this argument. R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App.2000) (deeming an issue abandoned if the appellant's brief treats it in a conclusory manner).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James Ira Ruff, Respondent.

Opinion No. 26044
Submitted August 24, 2005 - Filed September 26, 2005

INDEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

James Ira Ruff, pro se, of Leesville.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) 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 provided by Rule 7, RLDE, Rule 413, SCACR. We accept the agreement and indefinitely suspend respondent from the practice of law in this state. The facts, as set forth in the agreement, are as follows.

FACTS

Client A

By letter dated January 31, 2005, ODC notified respondent of a complaint submitted by Client A and requested a response within fifteen (15) days. Respondent did not respond.

On February 24, 2005, ODC sent respondent a letter pursuant to In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982), and again requested a response. Respondent failed to respond to this letter. Respondent did not respond to ODC until after he was contacted by ODC's Chief of Investigations.

An Investigative Panel authorized a full investigation on March 18, 2005. Respondent received a Notice of Full Investigation on March 22, 2005. Respondent failed to respond to the Notice of Full Investigation within thirty (30) days. Respondent submitted he did not believe he was required to respond to the Notice of Full Investigation as he had responded to the Chief of Investigation's prior inquiry.[1]

Client B

While investigating Client A's complaint, ODC received a complaint against respondent from Client B. Client B complained respondent failed to pay taxes of $1,149.89 due to the South Carolina Department of Revenue relating to a real estate transaction on October 16, 2003. Payment of the taxes was to be made from the net proceeds of the real estate transaction. Respondent's failure to pay the taxes caused financial harm to Client B.

The original check payable to the tax authority, dated October 16, 2003, was located in Client B's file. Respondent expressed his desire to immediately make restitution to Client B. Respondent sent

[1] It was determined respondent did not commit misconduct in his representation of Client A.

an apology to Client B on May 27, 2005 and, on June 10, 2005, he sent Client B a certified check as full reimbursement.

Client C

During interviews with ODC, respondent acknowledged another client matter wherein a real estate closing occurred, but respondent failed to pay a tax authority. In this matter, respondent closed a real estate transaction for Client C on June 12, 2001, but failed to pay taxes of $2,240.00 to the South Carolina Department of Revenue. The taxes were to be paid from the proceeds of the real estate transaction. Respondent paid the outstanding taxes, plus interest, in June 2005.

Trust Account Matters

ODC requested respondent provide his law firm's financial records from 2000 through 2005. During this period of time, respondent maintained two trust accounts. Respondent admits he failed to comply with most requirements of the recordkeeping provisions of Rule 417, SCACR, since the rule's adoption on January 1, 1997. In particular, since 1997, respondent failed to reconcile the two trust accounts and failed to identify the majority of client funds deposited into the two trust accounts by failing to place a client name or file number on the deposit tickets. Respondent admits that, from 1997 to the present, he was unable to identify the clients whose monies were in his trust accounts or identify a client's existing fund balance at any given time.[2]

[2] Respondent's bookkeeping procedure consisted of removing the bank deposit slip relative to a client matter from the deposit book and placing the slip in the client's file. Based on this practice, ODC was unable to identify any deposit or trace client funds from 2000 through 2005. Respondent admits the only way to identify a trust account deposit was by retrieving the deposit slips from client files and comparing the deposit slips against the monthly bank statements.

Respondent admits he did not maintain client ledger sheets for non-real estate matters, but did maintain some form of disbursement sheet in the client file that may or may not have contained all information required by Rule 417, SCACR.

Respondent admits that for several years banks imposed monthly administrative fees and/or analysis fees against his two trust accounts. He admits he did not deposit funds in the trust accounts to cover these charges and the fees were paid out of client funds.

Respondent admits that there recently existed a client fund shortage of approximately $8,000.00. Respondent represents that, in June 2005, he deposited $6,000.00 of his personal funds into the trust accounts in an attempt to cover this shortage.

Misappropriation Matter

Respondent admits that, since his admission in 1975, he has misappropriated and converted between $12,000.00 and $15,000.00 of clients' funds from his trust accounts to his own personal use. Respondent has not repaid these funds.[3] Respondent has not maintained any list, register, or log to accurately identify the clients to whom the funds belonged or the amounts he converted. Respondent voluntarily disclosed this information to ODC.

Respondent produced bank deposit receipts for the two trust accounts. The receipts were not identified in any manner as to client name or file number. Respondent admits the only way to trace a client's funds using the bank receipt would be by obtaining the copy of the deposit ticket from the client's file and comparing that document against the monthly bank statements and bank receipts.

[3] As stated above, respondent represents he deposited $6,000.00 of his own funds into his trust accounts in an attempt to cover any shortages.

Commingling Matters

In 2004, respondent sold his own real property and deposited $9,433.24 into his trust account. Thereafter, respondent disbursed most, if not all, of these proceeds from his trust account using trust account checks. Respondent acknowledges he commingled his personal funds with client funds.

Respondent and a family member developed a small, informal business involved in a real estate venture. From 2001 until the venture dissolved, respondent used his law firm trust accounts as an "escrow account" for this venture. In doing so, respondent deposited non-client funds into the accounts and disbursed funds to non-client payees by use of trust account checks.[4] Respondent admits that this use of his trust accounts constitutes commingling.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing clients); Rule 1.15 (lawyer shall promptly deliver to client any funds or other property to which client is entitled); Rule 8.1(b) (lawyer shall not knowingly fail to respond to lawful demand for information from a disciplinary authority); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice). In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule

[4] In particular, respondent issued checks from the trust accounts for monthly obligations, annual taxes, insurance, and repairs related to real property owned by the business venture.

7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers), Rule 7 (a)(3) (it shall be ground for discipline to knowingly fail to respond to lawful demand from a disciplinary authority), Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law), and Rule 7(a)(6) (lawyer shall not violate the oath of office taken upon admission to practice law in this state). Finally, respondent admits he has violated the recordkeeping provisions of Rule 417, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and indefinitely suspend respondent from the practice of law. Respondent shall make full restitution to any clients, persons, or entities owed any money as a result of his misconduct within one year from the date of this opinion. Within fifteen days of the date of this opinion, respondent shall surrender his certificate of admission to practice law in this state to the Clerk of Court and shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.[5]

INDEFINITE SUSPENSION.

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

[5] The parties agreed to the appointment of an attorney to protect respondent's clients' interests if the Court suspended respondent for more than sixty (60) days. By separate order, the Court will appoint an attorney to protect respondent's clients' interests.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Martin Bray, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Berkeley County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 26045
Submitted September 7, 2005 - Filed September 26, 2005

AFFIRM

Assistant Appellate Defender Robert M. Pachak, of S.C. Office of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari from the denial of his third application for post-conviction relief (PCR). We grant the

petition, dispense with further briefing, and affirm the order of the PCR judge.

The PCR judge found that petitioner did not knowingly and intelligently waive his right to appellate review of the denial of his first PCR application because his PCR counsel failed to advise him of the right to seek appellate review. However, the judge found that petitioner's third PCR action was barred by laches.

This Court has never specifically required counsel to advise a PCR applicant of the right to appellate review of the denial of PCR. In *Sutton v. State*, 361 S.C. 644, 606 S.E.2d 779 (2004), we held that neither trial nor appellate counsel are required to advise a client of the right to file a PCR application or the time limits for filing. However, in *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), this Court held that an applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Appellate counsel is required to brief arguable issues, despite counsel's belief the appeal is frivolous, to safeguard the right to appeal. *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988). Further, Rule 71.1(g), SCRCP, expressly provides that, if the applicant wishes to seek appellate review, PCR counsel must file a Notice of Appeal, continue representation until relieved, and assist an indigent applicant in obtaining representation by the Office of Appellate Defense.

We now hold that counsel is required to advise an applicant of the right to appellate review of the denial of PCR. Accordingly, the PCR judge properly found that petitioner did not knowingly and intelligently waive his right to appellate review since counsel failed to advise him of the right. However, as discussed below, petitioner's application was properly dismissed.

Laches is "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party." *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002), *citing*

Hallums v. Hallums, 296 S.C. 195, 198-199, 371 S.E.2d 525, 527 (1988).

In this case, petitioner's PCR application was filed seven years after the denial of his first PCR application. He offered no explanation for the delay other than the fact that he only recently discovered he could seek a belated review of that denial. The tapes of petitioner's first PCR hearing have now been destroyed. Counsel had no notes on the PCR hearing, and neither petitioner nor his prior plea counsel or PCR counsel could specifically recall the testimony presented at the PCR hearing. Based on these facts, the PCR judge properly found that petitioner's claim was barred by laches. *McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995) (this Court must affirm the rulings of the PCR judge if there is any evidence to support the decision).

Further, successive PCR applications are disfavored, and the applicant has the burden of proving that the grounds could not have been raised in a prior PCR application. *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991). Although petitioner did not raise an allegation that he was denied the right to review his first PCR application in his second PCR action, he could have raised this allegation. Therefore, petitioner's third PCR application should have been dismissed as impermissibly successive.

AFFIRMED.

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

The Supreme Court of South Carolina

Sharon Brown, Administratrix of the Estate of Ronnie Lee Brown, Appellant,

v.

Suzanne E. Coe, Respondent.

ORDER

In an order dated July 7, 2005, this Court addressed respondent's motion to dismiss this appeal on the ground that the notice of appeal was served and filed by appellant, who is not a lawyer, in violation of S.C. Code Ann. § 40-5-310 (2001). The Court noted that it "has never specifically addressed whether a nonlawyer executor or personal representative can represent an estate in matters such as this appeal." We addressed that specific question by holding that because the filing of a notice of appeal on behalf of the estate and preparation of briefs that will be required to further perfect this appeal clearly constitutes the practice of law, appellant, who is not admitted to the practice of law, cannot represent the estate on appeal. S.C. Code Ann. § 40-5-310 (2001).

It has come to our attention that there is some confusion regarding the breadth of our ruling. We therefore take this opportunity to clarify that our order was narrowly tailored to the issue before us, specifically whether a nonlawyer executor or personal representative can represent an estate on appeal.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

September 22, 2005

The Supreme Court of South Carolina

In the Matter of John W. Rabb, Jr., Respondent.

ORDER

Respondent was suspended on August 29. 2005, for a period of ninety (90) days, retroactive to June 23, 2005. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

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

JEAN H. TOAL, CHIEF JUSTICE

BY s/Daniel E. Shearouse
Clerk

Columbia, South Carolina

September 22, 2005

The Supreme Court of South Carolina

In the Matter of James Ira Ruff, Respondent.

ORDER

The Office of Disciplinary Counsel seeks the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. See In the Matter of James Ira Ruff, Op. No. 26044 (S.C. Sup. Ct. filed September 26, 2005) (Shearouse Adv. Sh. No. 37). Respondent consents to the appointment of an attorney to protect his clients' interests.

IT IS ORDERED that James E. Bradley, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Bradley shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Bradley may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that James E. Bradley, Esquire, has been duly appointed by this Court.

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

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

s/James E. Moore A.C.J.
FOR THE COURT

Columbia, South Carolina
September 26, 2005

The South Carolina Court of Appeals

Wellman, Inc., a Delaware Corporation,Plaintiff,

v.

Square D Company, a Delaware Corporation, R. D. H. Consulatants, Inc., a North Carolina Corporation, Cameron & Barkley Company, a Delaware Corporation, Zimmer A.G. a division of MG Technologies AG, a German Corporation, individually and as co-venturer in the Zimmer/Raytheon Consortium, Fluor Enterprises, Inc., a Calfornia Corporation, and Fluor Facility & Plant Services, Inc., a South Carolina Corporation and Washington Group International, Inc., Ohio Corporation, successor to Raytheon Engineers & Constructors, Inc., Defendants,

of whom

Washington Group International, Inc., an Ohio Corporation, successor to Raytheon Engineers & Constructors, Inc., and Zimmer/Raytheon Consortium are the Appellants,

and

Wellman, Inc., a Delaware Corporation, and Zimmer A.G., a Division of MG Technologies, a German Corporation, Individually are the Respondents.

The Honorable James E. Brogdon, Jr.
Florence County
Trial Court Case No. 2002-CP-21-01131

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: Appellant has filed a Petition for Rehearing. Respondent has also filed a Petition for Rehearing with request for oral argument and a Motion to Supplement the Record. After a careful consideration of the Petitions for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petitions for Rehearing, as well as the request for oral argument be denied. The Motion to Supplement the Record is granted. The Court withdraws the filed opinion and substitutes the attached opinion.

s/ C. Tolbert Goolsby, J.

s/ Thomas E. Huff, J.

s/ H. Samuel Stilwell, J.

Columbia, South Carolina
September 21, 2005

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wellman, Inc., a Delaware Corporation,Plaintiff,

v.

Square D Company, a Delaware Corporation, R. D. H. Consulatants, Inc., a North Carolina Corporation, Cameron & Barkley Company, a Delaware Corporation, Zimmer A.G. a division of MG Technologies AG, a German Corporation, individually and as co-venturer in the Zimmer/Raytheon Consortium, Fluor Enterprises, Inc., a Calfornia Corporation, and Fluor Facility & Plant Services, Inc., a South Carolina Corporation and Washington Group International, Inc., Ohio Corporation, successor to Raytheon Engineers & Constructors, Inc., Defendants,

of whom

Washington Group International, Inc., an Ohio Corporation, successor to Raytheon Engineers & Constructors, Inc., and Zimmer/Raytheon Consortium are the Appellants,

and

Wellman, Inc., a Delaware Corporation, and Zimmer A.G., a Division of MG Technologies, a German Corporation, Individually are the Respondents.

Appeal From Florence County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 4018
Heard May 11, 2005 – File July 25, 2005
Withdrawn, Substituted and Refiled September 21, 2005

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Henry P. Wall, Wesley D. Peel, and Bruner, Powell, Robbins, all of Columbia, for Appellants.

Alan M. Warshauer, of New York; Elizabeth Van Doren Gray, A. Jackson Barnes and J. Calhoun Watson, all of Columbia; Mark W. Buyck, Jr. and Marian H. Lee, both of Florence; Thomas A. McDonald, Mark D. Howard, David S. Allen and Thomas A. Smith, all of Chicago, for Respondents.

HUFF, J.: Washington Group International, Inc., the successor to Raytheon Engineers and Constructors, Inc. (Raytheon/Washington), appeals the trial court's denial of its motion to compel arbitration on behalf of itself and the Zimmer/Raytheon Consortium. We affirm in part and reverse in part.

FACTS

Raytheon Engineers and Constructors, Inc. and Zimmer AG entered into a written agreement to form Zimmer/Raytheon Consortium for the purpose of constructing a manufacturing facility for Wellman, Inc. The Consortium agreement provides: "Zimmer shall act as the CONSORTUIM LEADER for the term of this AGREEMENT." In addition, the agreement contains the following arbitration provision:

> 10.9.1 Claims between the MEMBERS regarding their respective rights and obligations under this AGREEMENT and/or under the CONTRACT shall be first addressed by the Management Committee. If the Management Committee is unable to unanimously settle such claims within thirty (30) days, its settlement shall be determined according to Articles 10.9.2 through 10.9.4 below.
>
> 10.9.2 Not later than ninety (90) days after the end of said thirty day period either party may appeal its claim to non-binding

mediation to the American Arbitration Association to be held in the City of Columbia, South Carolina, under its then effective rules and regulations.

10.9.3 Within thirty (30) days of the MEMBER'S failure to reach agreement under such mediation and declaring an impasse or the conclusion of the mediation, either MEMBER may submit the claim to binding arbitration in accordance with the South Carolina Uniform Arbitration Act (S.C. Code § 15-48-10 et seq.) to be held in the City of Columbia, South Carolina.

. . . .

10.9.4 If and only if after all said measures have been undertaken by either MEMBER submit the claim to a Court of Competent Jurisdiction and then only to enforce such decision on its own terms or have it voided as arbitrary and capricious.

The agreement also contains an ipso facto provision stating, among other things, if a member of the Consortium becomes insolvent and commences a bankruptcy proceeding, the "Insolvent MEMBER (and/or receiver, trustee, liquidator or custodian) shall cease to have any further decision-making authority or vote under this AGREEMENT and the CONSORTIUM shall not require the vote, approval or authority of the Insolvent MEMBER as otherwise may have been required under this AGREEMENT."

The Consortium entered into a contract with Wellman for the construction of the facility. This agreement also contained a provision subjecting "[a]ny controversy or claim arising out of or relating to this CONTRACT or any breach thereof" to "binding arbitration in accordance

with the South Carolina Uniform Arbitration Act (S.C. Code § 15-48-10 et seq.)."

Subsequent to the construction of the facility, an issue arose about payments due to Raytheon and Zimmer from Wellman and other issues. As Raytheon and Zimmer disagreed as to how to handle these closeout issues, they entered into a settlement agreement to resolve the dispute. The settlement agreement contained the following provision regarding the leadership of the Consortium:

> 4. Raytheon as Leader of Remaining Consortium Activities
>
> (a) The rights and obligations of Raytheon and Zimmer under the Consortium Agreement are deemed completed and discharged in all respects and are of no further force or effect, except (i) for the sole and exclusive purpose of serving as the vehicle for Raytheon to assert claims against Wellman and recover damages thereby as contemplated by this Agreement (and to defend any claims which may be asserted by Wellman in connection therewith), and (ii) as otherwise specifically provided herein.
>
> (b) Raytheon shall hereafter become the Consortium "Leader" pursuant to Article 4 of the Consortium Agreement for the purposes described in paragraph (a) of this Section, specifically including the unilateral right to conduct

> negotiations with Wellman, to settle and resolve all claims and disputes with Wellman on behalf of the Consortium, but solely for the benefit of Raytheon, excluding, however, only those claims and disputes excepted from the application of Section 12 herein.

The settlement agreement also contained the following arbitration provision:

> 16. Arbitration
>
> Any dispute or controversy between the parties arising out of or relating to this Agreement which cannot be settled amicably shall be resolved by arbitration in the manner provided for in Article 10.9 of the Consortium Agreement, the provisions of which are incorporated herein by reference as if set forth at length herein.

After Raytheon submitted its claim to Wellman, an electric malfunction occurred in the facility, and Wellman suffered damages in excess of eight million dollars. Subsequently, Raytheon filed for bankruptcy pursuant to chapter 11 of the United States Bankruptcy Code. Washington Group International, Inc. acquired assets of Raytheon, including the division responsible for the Wellman project. Wellman ultimately filed suit against Raytheon/Washington and Zimmer, individually and as Consortium members, for damages associated with the electrical malfunction. Zimmer filed cross-claims against Raytheon/Washington for equitable and contractual indemnity.

Raytheon/Washington filed a motion to stay Wellman's claims against it and to compel arbitration based on the arbitration provision in the Consortium's agreement with Wellman. Zimmer opposed Raytheon/Washington's motion, asserting that it had the authority to speak

for the Consortium and it preferred to resolve the suit in litigation. Raytheon/Washington also filed a motion to stay Zimmer's cross-claim and to compel arbitration.

After reviewing the memoranda submitted by all the parties, the trial court denied Raytheon/Washington's motions to compel arbitration. The trial court found, pursuant to the ipso facto provision in the Consortium agreement, Raytheon lost its decision making authority regarding Consortium matters due to its insolvency and thus Raytheon did not have the right to demand arbitration in this matter when that action was contrary to the desires of Zimmer. In addition, the court found "that the interests of the parties and the court are best served by resolution of all related claims in one judicial forum." Thus it held all of the claims by Wellman should be litigated in court. Raytheon/Washington appeals the trial court's order.

STANDARD OF REVIEW

The determination of whether a claim is subject to arbitration is subject to de novo review. Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., 356 S.C. 202, 206, 588 S.E.2d 136, 138 (Ct. App. 2003). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if there is any evidence reasonably supporting the findings." Thornton v. Trident Med. Ctr., L.L.C., 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003).

LAW/ANALYSIS

I. Intertwining doctrine

Raytheon/Washington argues the trial court erred in denying its motions to compel arbitration based on its finding that "the interests of the parties and the courts are best served by resolution of all related claims in one judicial forum." We agree.

Wellman urges this court to adopt the intertwining doctrine. The Colorado Supreme Court explained the purpose of this doctrine is to prevent

inconsistent determinations by different forums. City & County of Denver v. District Court In & For City & County of Denver, 939 P.2d 1353, 1369 (Colo. 1997). The court elucidated:

> [The application of this doctrine] involves an analysis of the legal and factual issues relative to each of the factual allegations in the complaint. The court will consider whether the arbitrator would be required to "review the same facts needed to establish the . . . [non-arbitrable claim]" . . . . If the factual determinations and legal conclusions are inextricably intertwined, then the court must not sever the action. To hold otherwise would risk inconsistent determinations and could result in the arbitrator's infringing upon the court's duty to decide the [non-arbitrable claim]. . . .

Id. (quoting Lawrence St. Partners, Ltd. v. Lawrence St. Venturers, 786 P.2d 508, 511 (Colo. Ct. App. 1989)).

The United States Supreme Court expressly rejected the intertwining doctrine in Dean Witter Reynolds v. Byrd, 470 U.S. 213 (1985). The court held the Federal Arbitration Act (FAA)[1] requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums. Id. at 217. The FAA provides that written agreements to arbitrate controversies arising out of an existing contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1999). Considering this provision, the Supreme Court found:

> By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. §§ 3, 4.

[1] 9 U.S.C.A. §1 et seq. (1999).

> Thus, insofar as the language of the [FAA] guides our disposition of this case, we would conclude that agreements to arbitrate must be enforced, absent a ground for revocation of the contractual agreement.

Dean Witter Reynolds, 470 U.S. at 218.

Similarly, the Arizona Court of Appeals rejected the intertwining doctrine as being inconsistent with its state arbitration act. Hallmark Indus., L.L.C. v. First Systech Int'l, 52 P.3d 812 (Ariz. Ct. App. 2002). The Arizona Arbitration Act contains identical language to our Arbitration Act, providing:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

S.C. Code Ann. § 15-48-10(a) (2005); A.R.S. § 12-1501 (West 2003).

The Arizona Court of Appeals found, like the Supreme Court in Dean Witter Reynolds, that "this language does not confer discretion on a trial court to ignore a valid arbitration agreement merely because a case involves related arbitrable and non-arbitrable claims, even if the claims are factually related and difficult to separate." Hallmark, 52 P.3d at 814.

The South Carolina Arbitration Act, like the Arizona Arbitration Act, sets forth the procedure for when a case involves arbitrable and non-arbitrable issues. S.C. Code Ann. § 15-48-20(d) (2005); A.R.S. 12-1502(D) (West 2003). These identical sections provide:

> Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this

> section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

Id.

As the Arizona court noted, there is no language in this section authorizing a trial court to refuse to enforce an arbitration agreement. See Hallmark, 52 P.3d at 815. Instead, the trial court must stay the entire action or if the issues are severable, order the non-arbitratable issues to proceed with only the arbitrable issues being stayed.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). The words of a statute "must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation." Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). Looking to the language of the Arbitration Act, we find no indication the legislature intended for the courts to be able to ignore an otherwise valid arbitration provision for the sake of judicial economy. The Arbitration Act clearly provides the trial court must enforce an arbitration provision unless grounds "exist at law or in equity for the revocation of any contract." Thus, we find the intertwining doctrine is inconsistent with the intention of our legislature and decline to adopt it.

Furthermore, we find the intertwining doctrine is in conflict with South Carolina's judicial policy of favoring arbitration. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)(stating South Carolina's policy is to favor the arbitration of disputes). We recognize that having litigation and arbitration of intertwined issues may be inefficient and lead to inconsistent results. However as the Arizona Court of Appeals recognized: "Any inefficiency or risk of inconsistent results is a consequence of the parties' bargaining." Hallmark, 52 P.3d at 815. The court must enforce an unambiguous contract according to its terms, regardless of the wisdom or folly or the parties' failure to guard their rights carefully. Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). Furthermore, "[i]f

arbitration defenses could be foreclosed simply by adding as a defendant a person not a party to an arbitration agreement, the utility of such agreements would be seriously compromised." Paine, Webber, Jackson, & Curtis, Inc. v. McNeal, 239 S.E.2d 401, 404 (Ga. Ct. App. 1977) (quoting Hilti, Inc. v. Oldach, 392 F.2d 368, 369 n.2 (1st Cir. 1968)).

We conclude a trial court may not refuse to enforce an otherwise valid arbitration provision on the basis of judicial economy. Accordingly, we hold the trial court erred in denying Raytheon/Washington's motion to avoid "unnecessarily duplicate proceedings."

II. Novation

Raytheon/Washington also argues the trial court erred in denying its motion to compel arbitration because the settlement agreement acted as a novation of the Consortium agreement, and therefore, the provision in the settlement agreement assigning Raytheon as leader superseded the ipso facto provision contained in the Consortium agreement. Thus, Raytheon/Washington asserts it controlled the Consortium and had the authority to decide whether to enforce the arbitration provision in the Consortium's agreement with Wellman.[2]

We first question whether this issue is preserved for our review. Although Raytheon/Washington argued to the trial court that under the revised agreement, Raytheon/Washington was granted leadership in the Consortium and thus had authority to demand arbitration on behalf of the

[2] Raytheon/Washington argues the issue of control of the consortium should be sent to arbitration. In its order, the trial court determined the control issue against Raytheon/Washington. It did not specifically address whether this issue should be sent to arbitration. As Raytheon/Washington did not file a Rule 59, SCRCP, motion asking for the court to address this issue, it is not preserved. See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (where a trial court does not explicitly rule on an argument raised and appellant makes no Rule 59 motion to obtain a ruling, the appellate court may not address the issue).

Consortium, it did not specifically argue that the Settlement Agreement constituted a novation of the Consortium agreement. Furthermore, the trial court did not address the effect of the settlement agreement on the leadership of the Consortium, and Raytheon/Washington failed to request a ruling on the issue in a Rule 59, SCRCP, motion. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); Summer v. Carpenter, 328 S.C. 36, 43, 492 S.E.2d 55, 58 (1997) (where trial judge did not rule on issue at trial and party did not make a Rule 59, SCRCP, motion for a ruling, issue is not preserved for appellate review).

However, even on the merits, we find no error. "A novation is an agreement between all parties concerned for the substitution of a new obligation between the parties with the intent to extinguish the old obligation. The burden of proving novation is on the party asserting it." Wayne Dalton Corp. v. Acme Doors, Inc., 302 S.C. 93, 96, 394 S.E.2d 5, 7 (Ct. App. 1990) (citation omitted). "The circumstances attending the transaction alleged to be a novation must show the intention to substitute a new obligation in place of the existing one." Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 262, 199 S.E.2d 719, 722 (1973).

Based on the language of the settlement agreement and a letter written to Wellman from the members of the Consortium, we find the parties did not intend for the settlement agreement to act as a novation of the Consortium agreement. First, in our review of the settlement agreement, we find its purpose was only to deal with closeout issues with Wellman. The agreement provides:

> WHEREAS Zimmer and Raytheon desire to resolve amicably their various disputes and controversies relating to the claims raised by Wellman and to the claims between each other resulting from the execution of the Contract and the Consortium Agreement, with, among other things, Zimmer waiving and providing a full release to Raytheon of

> any and all claims which Zimmer may have against Raytheon and assigning to Raytheon its claims against Wellman in exchange for Raytheon waiving and providing a full release to Zimmer of any and all claims which Raytheon may have against Zimmer, all and to the extent as more fully set forth below.

Also, numerous provisions in the settlement agreement incorporate by reference the terms of the Consortium agreement. One example of this is the arbitration provision, which refers to the Consortium agreement for the procedures a party must follow in seeking to arbitrate a claim. In addition, Zimmer and Raytheon's intent upon entering into the settlement agreement is evidenced by a letter to Wellman from the Consortium notifying Wellman of the settlement agreement. This letter states, in part:

> This letter is to inform Wellman that from now on Raytheon will serve as Leader of the Consortium on the H-12 Project to address financial closeout-related issues. These closeout issues specifically include the defense of liquidated damages and backcharges assessed against the Consortium by Wellman, the recovery of unpaid Contract balances and the pursuit of affirmative claims by Raytheon against Wellman (hereinafter "closeout issues").

Therefore, we find the parties intended to modify, but not nullify, the initial Consortium agreement by executing the settlement agreement.

III. Enforceability of ipso facto provision

Raytheon/Washington further argues that even if the settlement agreement was not a novation, the ipso facto provision should not deprive it of its right to compel arbitration. It contends it emerged from bankruptcy prior to the filing of Wellman's action; thus, given the policy favoring arbitration, the trial court should have interpreted the ipso facto provision as inapplicable to resolve the matter in favor of arbitration. Second,

Raytheon/Washington argues the United States Bankruptcy Code invalidated the ipso facto provision contained in the Consortium agreement. The section upon which Raytheon/Washington relies prohibits the termination or modification of an executory contract, in which the debtor is a party, upon the commencement of a bankruptcy proceeding based on the debtor insolvency. 11 U.S.C.A. § 365(e)(1) (West 2004).

Raytheon/Washington did not raise to the trial court any argument concerning the inapplicability the ipso facto provision or the validity of the provision under the bankruptcy code. Additionally, the trial court's order denying Raytheon/Washington's motions does not specifically rule on these issues. Therefore, we find these arguments are not preserved for our review. See Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); Summer, 328 S.C. at 43, 492 S.E.2d at 58 (where trial judge did not rule on issue at trial and party did not make a Rule 59, SCRCP, motion for a ruling, issue is not preserved for appellate review).

II. Preemption of Right to Arbitrate

Finally, Raytheon/Washington argues that given the public policy favoring arbitration, its right to arbitration should not be impaired by it filing for bankruptcy.

Based on our reading of the trial court's order, we find this argument misplaced. The trial court's order provides in pertinent part:

> This Court finds that under the Consortium Agreement, due to the undisputed insolvency of Raytheon, Raytheon does not have the right to demand arbitration in this matter when that action is contrary to the desires of Zimmer. This result follows from Raytheon's insolvency and consequential loss of decision making authority regarding Consortium matters.

Based on the trial court's order, it did not determine Raytheon/Washington's bankruptcy preempted its right to arbitration. Rather, the trial court interpreted the provisions of the Consortium agreement and determined pursuant to that agreement, Raytheon/Washington did not have the right to make decisions for the Consortium, including the decision to enforce the arbitration provision under its agreement with Wellman. Accordingly, we find no merit to this argument.

CONCLUSION

We find no merit in Raytheon/Washington's argument that the settlement agreement constituted a novation. Furthermore, we find Raytheon/Washington's remaining arguments concerning the applicability and validity of the ipso facto provision are not preserved for our review. We also find Raytheon/Washington's argument the trial court's decision was in error because a party's right to arbitrate cannot be impaired by filing bankruptcy, is without merit. Accordingly, we find no error in the trial court's decision that Zimmer, rather than Raytheon/Washington, has the right to decide whether to arbitrate Wellman's claims against the Consortium. However, we find the trial court did err in holding that all claims must be resolved in one forum out of the interest of judicial economy. Thus, we affirm the trial court's denial of Raytheon/Washington's motion to compel arbitration only as it concerns Wellman's claims against the Zimmer and Raytheon/Washington as members of the Consortium. As to any other claims, the trial court's order is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GOOLSBY and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Phyllis J. Wogan, individually and as Personal Representative of the Estate of James J. Wogan, **Appellant,**

v.

Kenneth C. Kunze, M.D.; Hilton Head Gastroenterology, P.A.; Thomas P. Rzecycki, M.D.; Hilton Head General and Laparoscopic Surgery, P.A.; Gary W. Thomas, M.D.; and Gary W. Thomas M.D., P.A., **Respondents.**

Appeal From Beaufort County
Curtis L. Coltrane, Special Circuit Court Judge

Opinion No. 4026
Heard September 14, 2005 – Filed September 26, 2005

AFFIRMED

I. McDuffie Stone, III, of Bluffton and Timothy M. Wogan, of Hilton Head Island, for Appellant.

Elliott T. Halio, and Andrew S. Halio, both of Charleston and James S. Gibson, Jr., of Beaufort, for Respondents.

ANDERSON, J.: Phyllis J. Wogan, individually and as Personal Representative of the Estate of James J. Wogan, initiated this action for negligence, loss of consortium, breach of third-party beneficiary contract, breach of fiduciary duty, and violations of the South Carolina Unfair Trade Practices Act. The trial court granted summary judgment to Kenneth C. Kunze, M.D.; Hilton Head Gastroenterology, P.A.; Gary W. Thomas, M.D.; and Gary W. Thomas M.D., P.A.[1] (collectively "the Doctors") on the claims for unfair trade practices, breach of fiduciary duty, breach of a third-party beneficiary contract, and a portion of the negligence cause of action based upon their alleged failures to file Medicare claims. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Dr. Thomas administered chemotherapy to treat Mr. Wogan for rectal cancer. By the end of the chemotherapy, Mr. Wogan had developed a severe case of high output/high frequency diarrhea. The diarrhea caused malnutrition and dehydration, and consequently led to several hospitalizations. Mr. Wogan was referred to Dr. Kunze for treatment of the gastrointestinal problem. Dr. Kunze performed a colostomy in order to stop the diarrhea. Unfortunately, the procedure did not remedy the problem. The ordering and performance of this procedure makes up a portion of the medical malpractice action not subject to this appeal.

[1] The two remaining Respondents are not involved in this appeal.

Dr. Kunze placed Mr. Wogan on the drug Sandostatin SC to alleviate his diarrheic condition. After determining the drug was effective at controlling the diarrhea, Dr. Kunze informed the Wogans he would switch the prescription to Sandostatin LAR. Sandostatin SC was inserted subcutaneously three times a day and was not covered by Medicare. Sandostatin LAR is a long-acting version that would need to be injected once a month. Ms. Wogan alleged Medicare would cover the drug if the diarrhea resulted from Mr. Wogan's chemotherapy.

According to Ms. Wogan, Dr. Kunze originally indicated he would preorder the Sandostatin LAR, administer it in his office, and submit the claim to Medicare. Later, Dr. Kunze notified Ms. Wogan he would not preorder the drug. Dr. Kunze's nurse suggested that Ms. Wogan consult with Dr. Thomas to see if he would prescribe and administer the medication, but Dr. Thomas would not, and represented he did not believe the diarrhea resulted from the chemotherapy. Eventually, Dr. Kunze agreed to administer the Sandostatin LAR, but required Ms. Wogan to purchase the monthly doses from a pharmacy. He refused to file a Medicare claim for the drug. The Wogans purchased Sandostatin LAR at a cost of $2000 per month for several months, and continued to insist either Dr. Kunze or Dr. Thomas assist with a Medicare claim.

Mr. Wogan's debilitating diarrhea persisted and resulted in several hospitalizations. During one hospital stay, Dr. Thomas ordered Mr. Wogan to continue taking all prescribed medications, including the Sandostatin, but he did not actually write a prescription for the Sandostatin. Mr. Wogan died in October 2001.

Originally, Ms. Wogan filed this action against Kenneth C. Kunze, M.D.; Hilton Head Gastroenterology, P.A.; Thomas P. Rzecycki, M.D.; Hilton Head General and Laparoscopic Surgery, P.A. A year and a half later, Gary W. Thomas, M.D. and Gary W. Thomas M.D., P.A., were added as parties. The complaint asserts claims for (1) negligence based on both medical malpractice from the surgery and failures by the Doctors to file claims or help Ms. Wogan file a claim with Medicare for the Sandostatin LAR; (2) breaches of the Doctors' contracts with Medicare under which it

was alleged Mr. Wogan was a third-party beneficiary; (3) violations of the South Carolina Unfair Trade Practices Act; (4) breaches of fiduciary duty by the Doctors in failing to file the Medicare claim; and (5) loss of consortium.

The Doctors filed motions for summary judgment on all but the medical malpractice and loss of consortium claims. In their memoranda submitted to the court, they contend there is no private right of action provided in the Medicare statute, and Ms. Wogan's complaint for negligence regarding their failures to file Medicare claims was merely a claim for violation of the Medicare Act. Additionally, the Doctors maintained the action for unfair trade practices must fail because the medical field is a regulated industry. Finally, they argued there was no fiduciary duty to file the claim. Dr. Thomas contended he could not be found negligent because he never actually prescribed the medicine; thus, it would have been fraud had he submitted a claim to Medicare.

The trial court agreed with the Doctors and granted summary judgment as to the negligence action based on the failure to file a Medicare claim. The court found there is no private right of action, either expressed or implied, in the Medicare Act. Furthermore, the court ruled Ms. Wogan could not use a state law claim to assert an action based on the Doctors' failure to follow a federal act when the act does not provide for a private right of action.

According to the court, Ms. Wogan could not maintain her suit for unfair trade practices because as an individual she did not demonstrate an ascertainable loss, and the statute prohibits her from bringing a claim in a representative capacity. The court further rejected the breach of fiduciary duty claim because the only breaches alleged were for medical malpractice and failure to file a claim—both of which Ms. Wogan alleged in her negligence cause of action. Finally, the court concluded the allegations against Dr. Thomas failed, as he never prescribed the medicine, and therefore, had no duty to file a Medicare claim. Ms. Wogan's motion for reconsideration was denied.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005). If triable issues exist, those issues must go to the jury. Mulherin-Howell v. Cobb, 362 S.C. 588, 608 S.E.2d 587 (Ct. App. 2005).

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485 (2005); BPS, Inc. v. Worthy, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Willis v. Wu, 362 S.C. 146, 607 S.E.2d 63 (2004); see also Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003), cert. denied (Apr. 7, 2005) (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005); Montgomery v. CSX Transp., Inc., 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or

inferences to be drawn from them, summary judgment should be denied. Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004).

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rife, 363 S.C. at 214, 609 S.E.2d at 568.

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 593 S.E.2d 183 (Ct. App. 2004). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004); Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004).

LAW/ANALYSIS

Ms. Wogan contends the trial court erred in granting summary judgment to the Doctors on four of her claims. She maintains her negligence action is not based upon the Medicare Act, but upon state law claims. Additionally, she contends she should not be barred from bringing the causes

of action for breach of a third-party beneficiary contract, unfair trade practices, and breach of fiduciary duty. We disagree.

I. Medicare Act

A. Background

First, we address the issue of whether there is an express or implied right of action under the Medicare Act, 42 U.S.C.A. §1395. We find there is no right of action, either express or implied, relating to the failure of a physician to file a claim under 42 U.S.C.A. § 1395w-4(g)(4)(A).

The portion of the Medicare Act requiring submission of claims by physicians states:

> (4) Physician submission of claims
> (A) In general
>
> For services furnished on or after September 1, 1990, within 1 year after the date of providing a service for which payment is made under this part on a reasonable charge or fee schedule basis, a physician, supplier, or other person (or an employer or facility in the cases described in section 1395u(b)(6)(A) of this title)--
>
> (i) shall complete and submit a claim for such service on a standard claim form specified by the Secretary to the carrier on behalf of a beneficiary, and
> (ii) may not impose any charge relating to completing and submitting such a form.
>
> (B) Penalty
> (i) With respect to an assigned claim wherever a physician, provider, supplier or other person (or an employer or facility in the cases described in section 1395u(b)(6)(A) of this title) fails to submit such a claim as required in subparagraph (A), the

> Secretary shall reduce by 10 percent the amount that would otherwise be paid for such claim under this part.
>
> (ii) If a physician, supplier, or other person (or an employer or facility in the cases described in section 1395u(b)(6)(A) of this title) fails to submit a claim required to be submitted under subparagraph (A) or imposes a charge in violation of such subparagraph, the Secretary shall apply the sanction with respect to such a violation in the same manner as a sanction may be imposed under section 1395u(p)(3) of this title for a violation of section 1395u(p)(1) of this title.

42 U.S.C.A. § 1395w-4(g)(4).

Ms. Wogan concedes there is no express provision in the Act allowing her to sue the physicians for failing to file a claim. The Act provides for penalties and sanctions, but no private cause of action. Therefore, we must determine whether an implied right of action for failing to file a claim exists.

B. Other Jurisdictions

Although several federal courts have confronted the question whether the Medicare Act gives rise to an implied right of action, neither the state nor the federal courts in South Carolina have decided the issue. One case from a South Carolina Federal District Court stated the issue without answering it: ". . . this court expresses no opinion on the question of whether a private cause of action in favor of the Medicare recipients themselves could be implied under U.S.C. s 1395a." Home Health Servs., Inc. v. Currie, 531 F.Supp. 476 (D.S.C. 1982), aff'd 706 F.2d 497 (4th Cir. 1983). The Currie case, however, is of no help as it lucidly expresses no opinion whether or not a private cause of action may be implied under the Medicare Act.

A federal court in Florida opined:

> Congress has not, statutorily, provided any private federal right of action or remedy under the Medicare or Medicaid Acts.

> See 42 U.S.C. §§ 1395, 1396. Even if the Medicare and Medicaid Acts created some substantive rights, the statutes contain "numerous provisions short of judicial enforcement that are designed to redress recipients' grievances." See Stewart v. Bernstein, 769 F.2d 1088, 1093 (5th Cir. 1985). Congress did not intend to provide a private right of action under the Medicare or Medicaid Acts[.]

Estate of Ayres ex rel. Strugnell v. Beaver, 48 F.Supp.2d 1335, 1339-40 (M.D.Fla. 1999).

In Brogdon ex rel. Cline v. National Healthcare Corp., 103 F.Supp.2d 1322 (N.D.Ga. 2000), the court was presented with the question "whether Congress intended to authorize nursing home residents to file suit against nursing homes to enforce the standards required for participation in the Medicare and Medicaid programs." Id. at 1330. The court concluded "Congress did not intend to create such a remedy"[:]

> The great majority of courts have determined that the Medicare and Medicaid Acts do not authorize private causes of action against nursing homes. See Wheat v. Mass, 994 F.2d 273, 276 (5th Cir. 1993); Stewart v. Bernstein, 769 F.2d 1088, 1092-93 (5th Cir. 1985); Estate of Ayres v. Beaver, 48 F.Supp.2d 1335, 1339-40 (M.D.Fla. 1999); Nichols v. St. Luke Ctr., 800 F.Supp. 1564, 1568 (S.D.Ohio 1992); Chalfin v. Beverly Enters., Inc., 741 F.Supp. 1162, 1170-71 (E.D.Pa. 1989); Fuzie v. Manor Care, Inc., 461 F.Supp. 689, 697 (N.D.Ohio 1977). But see Roberson v. Wood, 464 F.Supp. 983, 988-89 (E.D.Ill. 1979). These courts found nothing in the text or legislative history of the Medicaid or Medicare Acts before the OBRA '87 amendments to suggest that Congress intended to create a private cause of action.

Brogdon, 103 F.Supp.2d at 1331-32.

Additionally, courts have ruled the Medicaid Act does not give rise to an implied right of action. In Solter v. Health Partners of Philadelphia, Inc.,

215 F.Supp.2d 533 (E.D.Pa. 2002), after reciting the Cort test, the court noted that the Supreme Court "has made clear that the second factor is the most important in determining whether an implied right of action exists. See Suter v. Artist M., 503 U.S. 347, 363, 112 S.Ct. 1360, 118 L.Ed.2d 1(1992) ('[T]he most important inquiry here . . . is whether Congress intended to create the private remedy sought by the plaintiffs.')." Id. at 538. "In making this determination, courts must examine the statute's language, structure, and legislative history. Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 91-94, 101 S.Ct. 1571, 67 L.Ed.2d 750 (1981)." Id. (footnote omitted). As to congressional intent, the Solter court found "there is no indication in the legislative history of the Medicaid Act that Congress intended to create a private remedy for a private care patient to bring a private action for money damages under the statute. Steward v. Bernstein, 769 F.2d 1088, 1093 n.6 (5th Cir. 1985)." Moreover,

> the Medicaid Act actually mandates that the participating states create a voluntary administrative process whereby beneficiaries may seek redress for an allegedly wrongful withholding of benefits . . . . This mandate is evidence that Congress anticipated that the states would provide the remedy for vindication of the guidelines and waiver provisions of the Medicaid Act. In other words, there is a remedy available to plaintiffs for the wrong they allege in a state-created forum, rather than in federal court.

Solter, 215 F.Supp.2d at 539.

Because there is no South Carolina authority resolving this question, and only minimal guidance from other jurisdictions, we turn to the United States Supreme Court's prescriptions and doctrinal edifications as to when a private right of action may be implied from a federal statute.

C. Implied Right of Action

During the early era of American jurisprudence, courts addressed the propriety of implying a private cause of action from a federal statute with the maxim, "For every wrong there is a remedy." See Susan J. Stabile, The Role

of Congressional Intent in Determining the Existence of Implied Private Rights of Action, 71 Notre Dame L. Rev. 861, 864 (1996) ("The early view of the courts on the question of when it is appropriate to imply a private cause of action from a federal statute that itself does not provide for such an action was that an individual is entitled to an adequate remedy for any legal wrong, whether common law wrong or statutory wrong.") "Since there was a remedy for all wrongs, if Congress did not provide for that remedy, the courts should and did." Id. However, towards the end of the nineteenth century, the paradigmatic tide began to shift as congressional intent increasingly began to inform courts' implied right of action analyses. See id., citing Johnson v. S. Pac. Co., 196 U.S. 1 (1904). With the New Deal and the efflux of federal legislation that followed came a "more restrictive notion of when to imply private causes of action from federal statutes." Id. at 865.

For example, in 1916, the Supreme Court, in Texas & Pacific Railway v. Rigsby, 241 U.S. 33 (1916), had implied a private cause of action under the "safety appliance acts." The Court observed that "[n]one of the acts, indeed, contains express language conferring a right of action for the death or injury of an employee; but the safety of employees and travelers is their principal object, and the right of private action by an injured employee, even without the employers' liability act, has never been doubted." 241 U.S. at 39 (citations omitted). Continuing, the Court explained:

> A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Comyn's Dig. title, 'Action upon Statute' (F), in these words: 'So, in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.'

Id. (citations omitted).

By 1934, the tenor of the Court's voice had changed slightly. In Moore v. Chesapeake & Ohio Railway Co., 291 U.S. 205 (1934), the Court held that the original Federal Safety Appliance Act,

> while prescribing absolute duties, and thus creating correlative rights in favor of injured employees, did not attempt to lay down rules governing actions for enforcing these rights. The original act of 1893 made no provision for suits, except for penalties. That act did impliedly recognize the employee's right of action by providing in section 8 that he should not be deemed to have assumed the risk of injury occasioned by the breach of duty. But the act made no provision as to the place of suit or the time within which it should be brought, or as to the right to recover, or as to those who should be the beneficiaries of recovery, in case of the death of the employee.

Id. at 215. Thus, the Moore Court "held that the adjudicatory consequences of the Federal Safety Appliance Act were limited to those expressly provided by Congress." 71 Notre Dame L. Rev. at 865.

> Moore was followed by the Supreme Court's decision in Erie Railroad v. Tompkins, which, although not itself an implication case, rejected the ability of federal courts to create federal common law in diversity cases. . . . In the wake of Erie, federal courts appeared less willing to borrow state law negligence concepts to justify implying causes of action from federal statutes.
>
> Following Erie, the Supreme Court frequently denied private rights of action. In doing so, the Court focused upon the availability of other means to enforce the statutory duty at issue. . . .
>
> Still, in the period prior to 1975, courts did create implied rights of actions when they were thought to be necessary to grant a plaintiff some remedy.

Id. at 866-67 (footnotes omitted).

The year 1975 brought the Supreme Court's ruling in Cort v. Ash, 422 U.S. 66 (1975). There, the Court delineated a four-factor test:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,'—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 78 (citations omitted). However, Cort's "new method of analyzing implication questions," soon gave way to "an exclusive reliance on legislative intent." 71 Notre Dame L. Rev. at 867-68.

> The movement started in Cannon v. University of Chicago, in which the Court held that there was a private right of action under section 901 of Title IX of the Education Amendments of 1972. Although the Court analyzed each of the four Cort factors, it expressly viewed the four factors as the means thorough which congressional intent could be discerned.

Id. at 868. See also Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1088 (5th Cir. 1980) (Goldberg, J., dissenting) ("Only a cave dweller . . . would not realize that there has been a remarkable change of attitude by the Supreme Court regarding the inference of private rights of action in the last fifteen years.") (quoted in Home Health Services, Inc. v. Currie, 531 F.Supp. 476 (D.S.C. 1982)).

The manner by which the Court currently determines whether an implicit private cause of action is created by a federal statute is exemplified by Touche Ross & Co. v. Redington, 442 U.S. 560 (1979):

> The question of the existence of a statutory cause of action is, of course, one of statutory construction. Cannon v. University of Chicago, 441 U.S. 677, 688, 99 S.Ct. 1946, 1953, 60 L.Ed.2d 560 (1979); see National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed.2d 646 (1974) (hereinafter Amtrak). SIPC's argument in favor of implication of a private right of action based on tort principles, therefore, is entirely misplaced. Brief for Respondent SIPC 22-23. As we recently have emphasized, "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." Cannon v. University of Chicago, supra, 441 U.S., at 688, 99 S.Ct., at 1953. Instead, **our task is limited solely to determining whether Congress intended to create the private right of action** . . . .

442 U.S. at 568 (emphasis added). The Court has further elucidated:

> In determining whether a federal statute that does not expressly provide for a particular private right of action nonetheless implicitly created that right, our task is one of statutory construction. See Touche Ross & Co. v. Redington, 442 U.S. 560, 568, 99 S.Ct. 2479, 2485, 61 L.Ed.2d 82. The ultimate question in cases such as this is whether Congress intended to create the private remedy—for example, a right to contribution—that the plaintiff seeks to invoke. See Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16, 100 S.Ct. 242, 245, 62 L.Ed.2d 146; Universities Research Assn., Inc., supra, at 770, 101 S.Ct., at 1461. Factors relevant to this inquiry are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the

likelihood that Congress intended to supersede or to supplement existing state remedies.

Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO, 451 U.S. 77, 91 (1981).

The Supreme Court's opinion in Alexander v. Sandoval, 532 U.S. 275 (2001) is particularly instructive:

> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. Touche Ross & Co. v. Redington, 442 U.S. 560, 578, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979) (remedies available are those "that Congress enacted into law"). The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979). Statutory intent on this latter point is determinative. See, e.g., Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1102, 111 S.Ct. 2749, 115 L.Ed.2d 929 (1991); Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 812, n. 9, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986) (collecting cases). Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. See, e.g., Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 145, 148, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985); Transamerica Mortgage Advisors, Inc. v. Lewis, supra, at 23, 100 S.Ct. 242; Touche Ross & Co. v. Redington, supra, at 575-576, 99 S.Ct. 2479. "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991) (SCALIA, J., concurring in part and concurring in judgment).

> Respondents would have us revert in this case to the understanding of private causes of action that held sway 40 years ago when Title VI was enacted. That understanding is captured by the Court's statement in J.I. Case Co. v. Borak, 377 U.S. 426, 433, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964), that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" expressed by a statute. We abandoned that understanding in Cort v. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975)—which itself interpreted a statute enacted under the ancien regime—and have not returned to it since. Not even when interpreting the same Securities Exchange Act of 1934 that was at issue in Borak have we applied Borak's method for discerning and defining causes of action. See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N. A., supra, at 188, 114 S.Ct. 1439; Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. 286, 291-293, 113 S.Ct. 2085, 124 L.Ed.2d 194 (1993); Virginia Bankshares, Inc. v. Sandberg, supra, at 1102-1103, 111 S.Ct. 2749; Touche Ross & Co. v. Redington, supra, at 576-578, 99 S.Ct. 2479. Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink.

532 U.S. at 286-87.

D. Application

Adverting our discussion from the historical evolvement of the implied right of action doctrine to the case sub judice, we find nothing in the language of the statute to indicate Congress intended an implicit right to file a private cause of action against a physician for failing to file a Medicare claim. As the United States Supreme Court stated in Northwest Airlines:

> "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or

> remedies, courts should not expand the coverage of the statute to subsume other remedies." National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed.2d 646.

451 U.S. at 94 n.30.

The Medicare Act provides for specific remedies in the form of sanctions and penalties, and this weighs against finding that Congress intended to create the remedy of a private right of action. Unless congressional intent can be "inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." Id. at 94. Here, we are unable to discover any manifestation of intent on the part of Congress to create a right to bring a private action against the physicians for failing to properly file a Medicare claim pursuant to 42 U.S.C.A. § 1395w-4(g)(4).

II. Negligence

We find the trial court properly granted summary judgment on the portion of the negligence cause of action based upon the Doctors' failures to file Medicare claims.

A. Failure to File

Mrs. Wogan contends the Doctors are liable for damages:

> In negligently and recklessly failing to address the constant pleas from the Decedent and the Plaintiff for help in submitting a Medicare claim;
>
> In negligently and recklessly failing to submit a Medicare claim on or about May 25, 2001, on or about June 22, 2001, on or about July 20, 2001, on or about August 24, 2001, and thereafter . . . .

Both of these claims arise specifically from the failure of the Doctors to follow the provision of 42 U.S.C.A. § 1395w-4(g)(4)(A) requiring them to submit a claim. Ms. Wogan relies on affidavits as well as guidelines, which refer to the Medicare Act and its requirement that physicians file claims. Essentially, Ms. Wogan is asserting an action for violation of the Medicare Act under the rubric of a state law claim. Accordingly, the trial court properly granted summary judgment to the Doctors on Ms. Wogan's cause of action for negligence based on the Doctors' failures to file a Medicare claim.

Ms. Wogan alternatively maintains the violations of the statute are either evidence of negligence per se, or "indicia of negligence" that should be considered in a broader scope than just as a violation of the Medicare Act. We disagree.

B. Negligence Per Se

Negligence per se is negligence arising from a defendant's violation of a statute. Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 134, 558 S.E.2d 271, 275 (Ct. App. 2001). In Rayfield v. South Carolina Department of Corrections, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988), we enunciated the test for determining when a duty created by statute will support an action for negligence:

> In order to show that the defendant owes him a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect.
>
> If the plaintiff makes this showing, he has proven the first element of a claim for negligence: viz., that the defendant owes him a duty of care. If he then shows that the defendant violated the statute, he has proven the second element of a negligence cause of action: viz., that the defendant, by act or omission, failed to exercise due care. This constitutes proof of negligence per se.

Id. at 103, 374 S.E.2d at 914-15 (footnote omitted). "In a subsequent decision, our Supreme Court further extended the analysis by stating that 'the plaintiff must prove violation of the statute was causally linked, both in fact and proximately, to the injury.'" Hurst v. Sandy, 329 S.C. 471, 478, 494 S.E.2d 847, 850 (Ct. App. 1997) (quoting Whitlaw v. Kroger Co., 306 S.C. 51, 55, 410 S.E.2d 251, 253 (1991)).

In the instant case, the Medicare Act was not created to protect from a harm, but instead to create "a voluntary insurance program to provide medical insurance benefits in accordance with the provisions of this part for aged and disabled individuals who elect to enroll under such program[.]" 42 U.S.C.A. § 1395j. While section 1395w-4(g) provides a requirement for the filing of a Medicare claim, it was not designed to protect from a harm. It is an administrative section designed to maintain the orderly operation and handling of the program. Accordingly, we reject the claim that the references to the Medicare Act provide a basis for a negligence per se claim.

C. Indicia of Negligence

Finally, Ms. Wogan's argument that the references are only "indicia of negligence" does not satisfy the requirements of a negligence claim. A party must show a duty that was breached. See Willis v. Wu, 362 S.C. 146, 154, 607 S.E.2d 63, 67 (2004) (finding plaintiff in a medical malpractice action must show duty on the part of the physician); Doe v. Marion, 361 S.C. 463, 470, 605 S.E.2d 556, 560 (Ct. App. 2004) ("In order to prove negligence, the plaintiff must show: (1) defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages."); Andrade v. Johnson, 356 S.C. 238, 245, 588 S.E.2d 588, 592 (2003) (same); Regions Bank v. Schmauch, 354 S.C. 648, 668, 582 S.E.2d 432, 443 (Ct. App. 2003) (same). There is no duty to either Mr. or Ms. Wogan unless an implicit right of action exists under the Medicare Act. Therefore, we find the trial court properly granted summary judgment to the Doctors on Ms. Wogan's claims of negligence based on the failure to file a Medicare claim.

III. Breach of Third-Party Beneficiary Contract

Ms. Wogan contends the trial court erred in granting summary judgment to the Doctors on her claim they breached their contract to provide Medicare-covered services. She maintains Mr. Wogan was a third-party beneficiary of the contract, and their failure to submit the claim renders them liable for breach. We disagree.

> Generally, a third person not in privity of contract with the contracting parties has no right to enforce a contract. However, when the contract is made for the benefit of the third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person.

Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 445, 494 S.E.2d 827, 833 (Ct. App. 1997) (citing Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 440 S.E.2d 890 (Ct. App. 1994)).

The only contract appearing in the record is the Medicare Participating Physician/Supplier Agreement. It states:

> The above-named person or organization [Dr. Kunze], called "the participant," hereby enters into an agreement with the Medicare program to accept assignment of the Medicare Part B payment for all services for which the participant is eligible to accept assignment under the Medicare law and regulations and which are furnished while this agreement is in effect.

This document defines assignment, sets forth the effective date of the contract, and establishes the terms for termination of the agreement. The contract contains no provisions specifically detailing the requirement to submit a claim or any liability resulting from the physician's failure to file.

Nothing in the contract creates liability outside the Medicare Act. Because the Act does not confer a private right of action to sue a physician

for failing to submit a claim, we refuse to allow an action against a physician on the ground he breached his contract to provide services outlined in the Medicare Act.

IV. Breach of Fiduciary Duty

Ms. Wogan argues the trial court erred in finding her claims that the Doctors breached their fiduciary duties were mere restatements of her claims for medical negligence. We disagree.

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. Ellis v. Davidson, 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct. App. 2004); Regions Bank v. Schmauch, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003); Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 476, 581 S.E.2d 496, 505 (Ct. App. 2003), cert. denied (Mar. 18, 2004). A fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence. Hendricks v. Clemson Univ., 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003).

South Carolina has recognized the doctor-patient relationship as a confidential relationship. McCormick v. England, 328 S.C. 627, 639, 494 S.E.2d 431, 437 (Ct. App. 1997); see also Hodge v. Shea, 252 S.C. 601, 608, 168 S.E.2d 82, 85 (1969). However, this state has not found that medical negligence or malpractice will support a cause of action for breach of fiduciary duty. Nor have our courts found the failure of a doctor to offer assistance in filing a Medicare claim or other claim is a breach of fiduciary duty.

In McCormick, this Court found actionable a doctor's breach of the duty to maintain the confidences of his or her patient where no compelling public interest or other justification for the disclosure exists. McCormick, 328 S.C. at 640, 494 S.E.2d at 437. In Hodge, the court found a doctor owed a duty not to use undue influence in a sale of land over a patient with

decreased mental capacity as a result of age and disease. Hodge, 252 S.C. at 608-09, 168 S.E.2d at 85.

In the action sub judice, Ms. Wogan's complaint asserted the cause of action for breach of fiduciary duty was based upon the Doctors' "fiduciary duty to provide appropriate medical treatment and care . . . in his time of need and in a prompt, efficient, proper, professional, ethical, competent and appropriate manner." The complaint alleges the Doctors had duties to:

> a. Promptly purchase the Sandostatin LAR while the Decedent, JAMES JOHN WOGAN, remained under their continuous care and treatment and then promptly submit a Medicare claim, failure to do so constitutes abandonment; or
>
> b. Promptly require the Decedent, JAMES JOHN WOGAN, to sign an Advanced Beneficiary Notice, promptly purchase the Sandostatin LAR Depot and then promptly submit a Medicare claim, failure to do so constitutes abandonment; or
>
> c. Provide the injection via an outpatient procedure; or
>
> d. Answer the pleas from the Decedent and/or the Plaintiff for assistance in alternative means of financing a Thirty Thousand ($30,000.00) Dollar a year medication; or
>
> e. Other duties.

These allegations are restatements of the basic charges raised in the medical negligence or malpractice cause of action in the complaint. We find the assertions do not rise to the level of a breach of fiduciary duty on the part of the Doctors. To hold the Doctors liable for failure to file the Medicare claim would render meaningless our ruling that there is no private right of action arising under the Medicare Act. Accordingly, we hold the trial court properly granted summary judgment to the Doctors on Ms. Wogan's cause of action for breach of fiduciary duty.

V. Unfair Trade Practices

Ms. Wogan asseverates the court improperly granted summary judgment to Dr. Kunze on the cause of action for violation of the Unfair Trade Practices Act, section 39-5-140 of the South Carolina Code (Supp. 2004). We disagree.

"An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." deBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct. App. 2000) (citation omitted). "Even a truthful statement may be deceptive if it is has a capacity or tendency to deceive." Id. (internal quotation marks and citation omitted). To be actionable under the UTPA, the unfair or deceptive act or practice must have an impact upon the public interest. Id. (citing Haley Nursery Co. v. Forrest, 298 S.C. 520, 381 S.E.2d 906 (1989)). "An impact on the public interest may be shown if the acts or practices have the potential for repetition." Singleton v. Stokes Motors, Inc., 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004) (citing Crary v. Djebelli, 329 S.C. 385, 387, 496 S.E.2d 21, 23 (1998)).

> The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts.

Id.

Section 39-5-140 states:

> Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages. If the court finds that the use or employment of the unfair or

> deceptive method, act or practice was a willful or knowing violation of § 39-5-20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper. Upon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs.

S.C. Code Ann. § 39-5-140(a) (Supp. 2004) (emphasis added).

The trial court granted summary judgment in favor of the Doctors because it found (1) Ms. Wogan brought the action in her representative capacity as the personal representative of her husband's estate; and (2) she, in her individual capacity, did not show evidence of an ascertainable loss suffered.

A. Preservation

First, Ms. Wogan argues the trial court improperly based its grant of summary judgment on a ground not raised by the Doctors. This issue is not properly preserved. While Ms. Wogan noted in her motion to alter or amend pursuant to Rule 59, SCRCP, that the court sua sponte made findings of fact regarding the claim, she presented no argument or authority to show this was error. Thus, the issue was not properly presented to the trial court. See In re Estate of Timmerman, 331 S.C. 455, 460, 502 S.E.2d 920, 923 (Ct. App. 1998) (holding if a trial judge grants "relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal").

B. Theory of Recovery

At the summary judgment motion hearing, Ms. Wogan's counsel argued the basis for the claim was Dr. Kunze's continued billing of Mr. Wogan for the injections of Sandostatin LAR. Her counsel specifically stated the cause of action was supported without any reference to the Medicare Act.

The bill was sent to Mr. Wogan and was based upon services rendered to him. Ms. Wogan never claimed an individual loss as a result of the "inaccurate, deceptive bill."

Ms. Wogan now maintains she suffered an ascertainable loss because she paid for the Sandostatin LAR at the pharmacy. However, payment of the drug did not form the basis of the argument she presented at the summary judgment hearing, and Ms. Wogan cannot now change her theory of recovery. See Easterlin v. Green, 248 S.C. 389, 395, 150 S.E.2d 473, 476 (1966) (finding a party may not argue one theory before the trial court and another on appeal); see also Crawford v. Henderson, 356 S.C. 389, 409, 589 S.E.2d 204, 215 (Ct. App. 2003) (citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); State v. Bailey, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (stating a party may not argue one ground at trial and then an alternative ground on appeal)).

C. Ascertainable Loss

Nevertheless, Ms. Wogan's Unfair Trade Practices Act claim is unprevailing on the merits.

> Under S.C. Code Ann. § 39-5-140(a) (1985), any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages.

Reynolds v. Ryland Group, Inc. 340 S.C. 331, 333, 531 S.E.2d 917, 918-19 (2000).

We are constrained to analyze the Unfair Trade Practices Act claim with reference to Ms. Wogan's original contention that the unfair trade practice was Dr. Kunze's billing for the administration of the Sandostatin

LAR. There is no evidence in the record that Ms. Wogan paid this bill for $11.76. Furthermore, the medical services at issue here were rendered to Mr. Wogan. She has not demonstrated an ascertainable loss based on the alleged unfair billing.

D. Representative Capacity

Finally, an unfair trade practices claim may not be brought in a representative capacity. S.C. Code Ann. § 39-5-140(a) (Supp. 2004) ("Any person who suffers any ascertainable loss of money . . . as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages.") (emphasis added). Losses incurred by Mr. Wogan are inapposite here because Ms. Wogan is not permitted to assert a claim on his behalf. Because she did not demonstrate an ascertainable loss, and an action for losses incurred by Mr. Wogan cannot be maintained, we find the trial court properly granted summary judgment.

VI. Dr. Thomas

Ms. Wogan contends the trial court improperly granted summary judgment to Dr. Thomas on the ground he never prescribed the medication. We disagree.

In order to support a cause of action for negligence, the plaintiff must prove the existence of a duty. See Sabb v. South Carolina State Univ., 350 S.C. 416, 429, 567 S.E.2d 231, 237 (2002); Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). "Generally, there is no common law duty to act. . . . Thus, a person usually incurs no liability when he fails to take steps to protect others from harm not created by his own wrongful conduct." Dennis by Evans v. Timmons, 313 S.C. 338, 342, 437 S.E.2d 138, 141 (Ct. App. 1993).

We find the court properly granted summary judgment to Dr. Thomas and Gary W. Thomas, M.D., P.A., because Dr. Thomas never prescribed the

medication Sandostatin LAR and had no duty to file a claim with Medicare, or to help Ms. Wogan file a claim with Medicare. Indubitably, Dr. Thomas has no duty to file a Medicare claim for medicine he has not prescribed. Accordingly, we rule the trial court properly granted summary judgment to Dr. Thomas and Gary W. Thomas, M.D., P.A. due to the inability of Ms. Wogan to demonstrate they owed her or her husband a duty.

CONCLUSION

We hold there is no private right of action created, either expressly or implicitly, by the Medicare Act. The trial court properly granted summary judgment to the Doctors on Ms. Wogan's claim for negligence arising from their failures to file Medicare claims and on her claim for breach of third-party beneficiary contract because the claims were an attempt to create a private cause of action where none exists. We find the court properly granted summary judgment on Ms. Wogan's claim for unfair trade practices. Finally, we rule the court did not err in granting Dr. Thomas and his practice summary judgment on the ground Ms. Wogan failed to prove they owed her or her husband a duty to file a claim or to assist her in filing a claim for medicine he did not prescribe. The decision of the trial court is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.