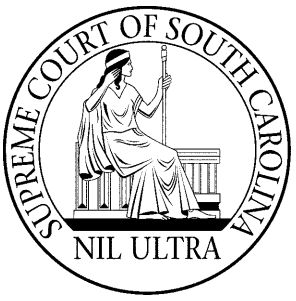

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 39
October 20, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

26555 – In the Matter of Kimla C. Johnson 12

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

26094 – The State v. John R. Baccus Pending

26442 – The State v. Stephen Christopher Stanko Denied 10/6/08

2008-OR-00337 – William C. McKinnedy, III v. Gregory Newell Denied 10/6/08

PETITIONS FOR REHEARING

26533 – Thomas Francis O'Brien, Jr. v. SC Orbit Pending

26543 – Donney S. Council v. State Pending

26547 – James Myrick, et al. v. Nexsen Pruett Jacobs Pollard & Robinson Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

Page

4441-Kevin Wayne Ardis (Deceased) Employee v. Combined Insurance Company, Employer, and Cambridge Integrated Services Group, Inc., Carrier 18

4442-Anna M. Buice and Jerry W. Buice v. WMA Securities, Inc., Steely Hubert Humphrey, Jr., Carl David Kennedy, and W. Lindsey Howell 28

4443-South Carolina Department of Social Services v. Scott K. and Nedra K. 38

4444-April D. Enos v. John Doe and Travelers Indemnity Insurance Co., 47

4445-Herwig Baumann, Vickie Baumann, Richard J. Dillard, Charles C. Fagan, III, William C. Ferguson, George H. Forrest, Christine L. Forrest, Frederick B. Killmar, Mary C. Killmar, Daniel Milligan, Barbara Milligan, Carol S. O'Neil, Richard O'Neil, Peter Panciera, Patricia C. Wetmore, William E. Whitmer, Mildred Wood, and Catherine Delesky v. Long Cove Club Owners Association, Inc. 65

4446-Vista Antiques and Persian Rugs, Inc. v. Noaha, LLC, Luxomnia Corporation, Gary A. Anglina, Jr., Patrick F. Anglin, and Gary A. Anglin, Sr. 75

UNPUBLISHED OPINIONS

2008-UP-560-The State v. Tommy Swinson Adams
(Edgefield, Judge John C. Few)

2008-UP-561-The State v. John A. Miller
(Sumter, Judge Howard P. King)

2008-UP-562-The State v. Lamar Graves
(Spartanburg, Judge J. Derham Cole)

2008-UP-563-The State v. John David Hudson
(Darlington, Judge James E. Lockemy)

2008-UP-564-The State v. Shawn L. Haynes a/k/a Vashaun L. Haynes
(Charleston, Judge Daniel F. Pieper)

2008-UP-565-The State v. Matthew W. Gilliard, III, #2
(Greenville, Judge G. Edward Welmaker)

2008-UP-566-The State v. Diego Reyes Campos
(Chester, Judge Joseph W. McGowan, III and Judge James R. Barber, III)

2008-UP-567-Evelyn Denise Sherbert v. Richard K. Beach
(Spartanburg, Judge John M. Rucker)

2008-UP-568-The State v. Lisa Peterson Pope
(York, Judge G. Edward Welmaker)

2008-UP-569-The State v. Furman Benjamin
(Florence, Judge John M. Milling)

2008-UP-570-The State v. Vernin Green
(Colleton, Judge James C. Williams, Jr.)

2008-UP-571-The State v. Jasper Terrell Barnes
(Georgetown, Judge Edward B. Cottingham)

2008-UP-572-The State v. Leroy Archie
(Anderson, Judge Alexander S. Macaulay)

2008-UP-573-The State v. Robert Shepherd
(Lexington, Judge Larry R. Patterson)

2008-UP-574-The State v. Frankie Lee Bryant, III
(Bamberg, Judge Doyet A. Early, III)

2008-UP-575-George Owens v. Town of Allendale
(Allendale, Judge Perry M. Buckner)

2008-UP-576-The State v. Clayton Smalls
(Charleston, Judge Daniel F. Pieper)

2008-UP-577-The State v. Sammy K. Cowan
(Anderson, Judge Lee S. Alford)

2008-UP-578-The State v. John Floyd
(Aiken, Judge Doyet A. Early, III)

2008-UP-579-The State v. Jamul Ratub El
(York, Judge John C. Hayes, III)

2008-UP-580-The State v. Sakima K. McCullough
(York, Judge Lee S. Alford)

2008-UP-581-Lucinda H. Smith v. Randy Smith
(Union, Judge Rochelle Y. Williamson)

2008-UP-582-The State v. David Shawn James
(York, Judge John C. Hayes, III)

2008-UP-583-The State v. Donald Miles
(Orangeburg, Judge James C. Williams, Jr.)

2008-UP-584-The State v. James Vell a/k/a Bobby J. Bell
(Richland, Judge Reginald I. Lloyd)

PETITIONS FOR REHEARING

4422-Fowler v. Hunter	Pending
4423-State v. D. Nelson	Pending
4436-State v. Whitner	Pending
4437-Youmans v. SCDOT	Pending
4438-State v. Martucci	Pending
2008-UP-214-State v. James Bowers	Pending
2008-UP-283-Gravelle v. Roberts	Pending
2008-UP-321-SCDSS v. Miller, R.	Pending
2008-UP-375-State v. Gainey	Pending
2008-UP-485-State v. Cooley	Pending

2008-UP-486-State v. T. Mack Pending

2008-UP-502-Johnson v. Jackson Pending

2008-UP-507-State v. R. Hill Pending

2008-UP-512-State v. Kirk Pending

2008-UP-517-State v. Gregory Pending

2008-UP-523-Lindsey v. SCDC Pending

2008-UP-526-State v. A. Allen Pending

2008-UP-531-State v. Collier Pending

2008-UP-534-State v. Woody Pending

2008-UP-539-Pendergrass v. SCDPP&P Pending

2008-UP-543-O'Berry v. Carthens Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4279-Linda Mc Co. Inc. v. Shore Pending

4285-State v. Danny Whitten Pending

4300-State v. Carmen Rice Pending

4304-State v. Arrowood Pending

4306-Walton v. Mazda of Rock Hill Pending

4307-State v. Marshall Miller Pending

4309-Brazell v. Windsor Pending

4310-State v. John Boyd Frazier Pending

4312-State v. Vernon Tumbleston Pending

4314-McGriff v. Worsley Pending

4315-Todd v. Joyner	Pending
4316-Lubya Lynch v. Toys “R” Us, Inc	Pending
4318-State v. D. Swafford	Pending
4319-State v. Anthony Woods (2)	Pending
4320-State v. D. Paige	Pending
4325-Dixie Belle v. Redd	Pending
4335-State v. Lawrence Tucker	Pending
4338-Friends of McLeod v. City of Charleston	Pending
4339-Thompson v. Cisson Construction	Pending
4342-State v. N. Ferguson	Pending
4344-Green Tree v. Williams	Pending
4350-Hooper v. Ebenezer Senior Services	Pending
4353-Turner v. SCDHEC	Pending
4354-Mellen v. Lane	Pending
4355-Grinnell Corp. v. Wood	Pending
4369-Mr. T. v. Ms. T.	Pending
4370-Spence v. Wingate	Pending
4371-State v. K. Sims	Pending
4372-Robinson v. Est. of Harris	Pending
4373-Partain v. Upstate Automotive	Pending
4374-Wieters v. Bon-Secours	Pending

4375-RRR, Inc. v. Toggas	Pending
4376-Wells Fargo v. Turner	Pending
4377-Hoard v. Roper Hospital	Pending
4382-Zurich American v. Tolbert	Pending
4383-Camp v. Camp	Pending
4384-Murrells Inlet v. Ward	Pending
4385-Collins v. Frasier	Pending
4386-State v. R. Anderson	Pending
4387-Blanding v. Long Beach	Pending
4388-Horry County v. Parbel	Pending
4391-State v. L. Evans	Pending
4392-State v. W. Caldwell	Pending
4394-Platt v. SCDOT	Pending
4395-State v. H. Mitchell	Pending
4397-Brown v. Brown	Pending
4401-Doe v. Roe	Pending
4402-State v. Tindall	Pending
4403-Wiesart v. Stewart	Pending
4405-Swicegood v. Lott	Pending
4407-Quail Hill, LLC v Cnty of Richland	Pending
4409-State v. Sweat & Bryant	Pending
4412-State v. C. Williams	Pending

4413-Snavely v. AMISUB	Pending
4414-Johnson v. Beauty Unlimited	Pending
4419-Sanders v. SCDC	Pending
2007-UP-125-State v. M. Walker	Pending
2007-UP-151-Lamar Florida v. Li'l Cricket	Pending
2007-UP-272-Mortgage Electronic v. Suite	Pending
2007-UP-350-Alford v. Tamsberg	Pending
2007-UP-364-Alexander Land Co. v. M&M&K	Pending
2007-UP-460-Dawkins v. Dawkins	Pending
2007-UP-498-Gore v. Beneficial Mortgage	Pending
2007-UP-513-Vaughn v. SCDHEC	Pending
2007-UP-544-State v. C. Pride	Pending
2007-UP-546-R. Harris v. Penn Warranty	Pending
2007-UP-554-R. Harris v. Penn Warranty (2)	Pending
2007-UP-556-RV Resort & Yacht v. BillyBob's	Pending
2008-UP-047-State v. Dozier	Pending
2008-UP-060-BP Staff, Inc. v. Capital City Ins.	Pending
2008-UP-070-Burriss Elec. v. Office of Occ. Safety	Pending
2008-UP-081-State v. R. Hill	Pending
2008-UP-082-White Hat v. Town of Hilton Head	Pending
2008-UP-084-First Bank v. Wright	Pending

2008-UP-104-State v. Damon Jackson	Pending
2008-UP-126-Massey v. Werner Enterprises	Pending
2008-UP-131-State v. Jimmy Owens	Pending
2008-UP-132-Campagna v. Flowers	Pending
2008-UP-135-State v. Dominique Donte Moore	Pending
2008-UP-140-Palmetto Bay Club v. Brissie	Pending
2008-UP-151-Wright v. Hiester Constr.	Pending
2008-UP-173-Professional Wiring v. Sims	Pending
2008-UP-187-State v. Rivera	Pending
2008-UP-192-City of Columbia v. Jackson	Pending
2008-UP-194-State v. D. Smith	Pending
2008-UP-200-City of Newberry v. Newberry Electric	Pending
2008-UP-204-White's Mill Colony v. Williams	Pending
2008-UP-205-MBNA America v. Baumie	Pending
2008-UP-207-Plowden Const. v. Richland-Lexington	Pending
2008-UP-209-Hoard v. Roper Hospital	Pending
2008-UP-223-State v. C. Lyles	Pending
2008-UP-240-Weston v. Margaret Weston Medical	Pending
2008-UP-244-Magaha v. Greenwood Mills	Pending
2008-UP-247-Babb v. Est. Of Watson	Pending
2008-UP-251-Pye v. Holmes	Pending

2008-UP-256-State v. T. Hatcher	Pending
2008-UP-261-In the matter of McCoy	Pending
2008-UP-271-Hunt v. State	Pending
2008-UP-279-Davideit v. Scansource	Pending
2008-UP-289-Mortgage Electronic v. Fordham	Pending
2008-UP-296-Osborne Electric v. KCC Contr.	Pending
2008-UP-297-Sinkler v. County of Charleston	Pending
2008-UP-310-Ex parte:SCBCB (Sheffield v. State)	Pending
2008-UP-320-Estate of India Hendricks (3)	Pending
2008-UP-331-Holt v. Holloway	Pending
2008-UP-332-BillBob's Marina v. Blakeslee	Pending
2008-UP-335-D.R. Horton v. Campus Housing	Pending
2008-UP-340-SCDSS v. R. Jones	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kimla C. Johnson, Respondent.

Opinion No. 26555
Heard August 20, 2008 – Filed October 20, 2008

INDEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Barbara Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Kimla C. Johnson, of Clinton, Maryland, pro se.

PER CURIAM: This is an attorney discipline case involving misconduct in three matters. The Commission on Lawyer Conduct Panel (Panel) unanimously recommended the following sanctions: (1) indefinite suspension; (2) respondent be required to pay the costs of the disciplinary proceedings; and (3) respondent make restitution to the Lawyers' Fund for Client Protection (Fund) and to victims in the amounts set forth herein.

The Office of Disciplinary Counsel (ODC) appeals and argues that the facts and similar case law call for a harsher sanction. For the reasons stated below, we are not persuaded that we should deviate from the Panel's recommendation. Therefore, we impose the recommended sanctions.

FACTS

This proceeding involves three separate matters. An investigative panel authorized formal charges, which were then filed in April 2007. A hearing was held before the Panel in October 2007 and the report of the Panel was published in April 2008.

Respondent moved to South Carolina in 1990 and began practicing law in this state. Following the birth of her second child, respondent began practicing law with her husband. Her husband (Husband) was placed on interim suspension in August 1999 and a number of Husband's clients elected for respondent to take over their cases.

Matter A

Client A hired Husband to represent him in connection with an automobile collision that occurred in March 1999. Respondent took over representation of Client A when Husband was placed on interim suspension. In January 2000, respondent accepted a settlement offer on behalf of Client A in the amount of $40,000.00. Respondent did not disburse the proceeds of $26,667.67[1] to or on behalf of Client A, but instead used the funds for her own benefit and for the benefit of her law firm.

Respondent claimed that Client A agreed to loan the funds to her and Husband. However, respondent failed to produce any documentation proving the existence of the loan and the Panel found respondent's testimony in this regard lacking in credibility. The findings of the Panel are entitled to great weight, particularly when the inferences drawn from the testimony in the record depend largely on the credibility of witnesses. In re Yarborough, 327 S.C. 161, 165, 488 S.E.2d 871, 873 (1997). Respondent stated to ODC that her financial records were destroyed, but testified at the hearing that this was not true.

[1] Client A's net proceeds after attorney's fees.

ODC presented evidence that respondent allowed Husband to communicate with Client A regarding settlement negotiations, and that respondent communicated with Husband about demand figures.

Matter B

In November 1999, Client B hired respondent to represent her on a contingency basis in connection with claims arising out of an automobile collision. Respondent received settlement proceeds of $10,000.00 but did not place the proceeds in her client trust account. Respondent and Client B signed a settlement disbursement statement which provided that respondent would receive attorney's fees and pay Client B's medical providers from the proceeds. The remainder of the proceeds were to be paid to Client B. Respondent paid some of Client B's medical bills and disbursed additional proceeds to Client B, yet $1,925.67 of the settlement funds designated to pay medical providers was neither paid to providers nor disbursed to Client B.[2]

Matter C

In 1999, Client C hired respondent to represent her in an employment discrimination matter on a contingency basis. Respondent's fee arrangement was one-third of the recovery to increase to forty percent in the event that a lawsuit was filed. Disciplinary Counsel produced documents showing that in June 2000, respondent settled Client C's claim for $122,020.76. Respondent did not disburse the funds to Client C and instead misappropriated at least $75,822.18.[3]

Client C testified that she communicated primarily with Husband about the settlement. For a number of years, Client C contacted Husband numerous times to inquire about her settlement and, in response, he sent small amounts of cash to Client C by way of Western Union. ODC presented documents

[2] The Panel arrived at this figure by subtracting the following amounts from the $10,000 settlement proceeds: an attorney's fee in the amount of $3,333.33, a payment by respondent to one of the providers in the amount of $2,357.00, and payments to Client B in the amounts of $1,900.00 and $484.00.

[3] The Panel arrived at this figure by subtracting from the proceeds of approximately $122,000 a one-third contingency fee and the total amount of funds sent by way of Western Union by Husband to Client C in response to her inquiries about the settlement.

showing that between September 2001 and December 2006, Client C received approximately $5,525.00 by wire from Husband.

PANEL FINDINGS

With regard to all matters, the Panel found by clear and convincing evidence that Johnson violated several South Carolina Appellate Court Rules (SCACR); Rules of Professional Conduct (RPC), Rule 407 SCACR; and Rules for Lawyer Disciplinary Enforcement (RLDE), Rule 413 SCACR. The Panel found violations of Rule 417, SCACR, failure to maintain appropriate financial records, and the following RPC: (1) Rule 1.4, failing to reasonably communicate with client; (2) Rule 1.8, entering into a business transaction with a client without documentation; (3) Rule 1.15, commingling of lawyer and client funds; (4) Rule 5.5, assisting in the unauthorized practice of law; (5) Rule 8.1, false statement in connection with a disciplinary matter; (6) Rule 8.4(b), committing a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer; (7) Rule 8.4(d), engaging in conduct involving dishonesty, deceit, and misrepresentation; and (8) Rule 8.4(e), engaging in conduct prejudicial to the administration of justice.

DISCUSSION

This Court has the ultimate authority to discipline attorneys and the manner in which the discipline is given rests entirely with this Court. In re Long, 346 S.C. 110, 112, 551 S.E.2d 586, 587 (2001). This Court may make its own findings of fact and conclusions of law, and is not bound by the Panel's recommendation. In re Larkin, 336 S.C. 366, 371, 520 S.E.2d 804, 806-07 (1999). An attorney disciplinary violation must be proven by clear and convincing evidence. Id.

As to Matter A, we do not agree with two of the Panel's findings. First, though the Panel found that respondent did not loan funds to Client A, the Panel cited a breach of Rule 1.8(a), entering into a business transaction with a client without proper documentation. If no loan existed, then respondent cannot have violated this rule. Second, we find that ODC failed to prove by clear and convincing evidence that respondent assisted with the unauthorized practice of law. The Panel notes that respondent communicated with

Husband regarding demand figures after the date of his interim suspension. As Husband was the original attorney in the matter, respondent's communication with Husband concerning the status of the case does not constitute assisting with the unauthorized practice of law.

With regard to Matter C, we find that ODC failed to prove by clear and convincing evidence that respondent assisted with the unauthorized practice of law. ODC alleged and the Panel found only that Husband communicated with Client C regarding her case and sent funds by way of Western Union. While such actions may constitute the unauthorized practice of law by Husband, no evidence was presented to show that respondent assisted Husband in his actions.

In mitigation of the remaining violations, we note that respondent's mother died tragically and unexpectedly in 1999 as respondent was administering CPR. Respondent testified that her mother's death caused her to feel great grief and guilt, which persisted well after the event and contributed to her decision-making. Also in 1999, shortly after the death of her mother, Husband was placed on interim suspension from the practice of law. Respondent found herself solely responsible for their law practice and responsible for having to provide for her two special needs children. Respondent testified that the period of time in which the two events occurred constituted a very traumatic time in her life. Her misconduct occurred close in time to these events.

CONCLUSION

The unanimous findings and conclusions of the Panel are entitled to much respect and consideration. Larkin, supra, at 371, 520 S.E.2d at 806. Based on the facts and mitigating factors, we are not persuaded that a harsher sanction is warranted in this case. We therefore adopt the Panel's recommendation and indefinitely suspend respondent from the practice of law.

With regard to restitution, we agree with the Panel that Client A is entitled to restitution in the amount of $26,667.67 and Client B is entitled to restitution in the amount of $1,925.67. However, we note that the Panel's

recommendation as to Client C does not comport with the Lawyers' Fund for Client Protection Rules of Procedure.[4] Section IV of the Rules of Procedure states that before a client may be reimbursed by the Fund, the client must sign a subrogation agreement. The Rules also set forth the following procedure if the client later recovers from the offending attorney: "Any amounts recovered . . . by the client, in excess of the amount to which the Fund is subrogated . . . shall be paid to or retained by the client as the case may be." Id. We therefore order respondent to make restitution to all injured parties, including clients and the Fund. We emphasize that Client C shall not receive funds from respondent in restitution until the Fund is fully reimbursed for the $40,000.00 already paid to Client C from the Fund. The Office of Disciplinary Counsel shall implement a plan for restitution and payment of costs within thirty days of this opinion.

In summary, respondent must meet the following requirements before she may be re-admitted to the practice of law: (1) satisfy Rule 33(f), RLDE, Rule 413, SCACR; (2) pay costs of the disciplinary proceedings in accordance with the plan to be set forth by ODC; and (3) make restitution in accordance with the plan to be set forth by ODC.

Respondent shall file, within fifteen days of this opinion, an affidavit with the Clerk of Court stating that she has complied with Rule 30 of Rule 413, SCACR and shall also surrender her Certificate of Admission to the Practice of Law to the Clerk of Court.

INDEFINITE SUSPENSION.

TOAL, C.J., WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

[4] Client C has already received $40,000.00 from the Fund, the maximum available to an individual. In an effort to fully compensate Client C, the Panel ordered respondent to repay $40,000.00 to the Fund and to pay an additional $35,822.18 to Client C. While we appreciate the Panel's intent, where a client has received money from the Fund, the Fund must be repaid before the client can receive any additional restitution from the attorney. See Section IV, Lawyers' Fund for Client Protection Rules of Procedure.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kevin Wayne Ardis
(Deceased), Employee, Respondent,

v.

Combined Insurance
Company, Employer, and
Cambridge Integrated
Services Group, Inc.,
Carrier, Appellants.

Appeal From Sumter County
R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 4441
Heard September 18, 2008 – Filed October 14, 2008

AFFIRMED

James H. Lichty, Weston Adams, III and Ashley B. Stratton, of Columbia, for Appellants.

William Ceth Land, of Manning, for Respondent.

GEATHERS, J.: In this Workers' Compensation action, Combined Insurance Company (Combined) appeals the circuit court's affirmance of an order of the Appellate Panel of the Workers' Compensation Commission (the Commission) granting a lump sum award and burial expenses to the beneficiaries of Kevin Ardis (Ardis). On appeal, Combined argues Mr. Ardis' death occurred outside the scope and course of his employment, thus precluding compensation under the South Carolina Workers' Compensation Act (the Act). We affirm.

FACTS/PROCEDURAL HISTORY

At the time of Ardis' death, he was employed by Combined as an insurance sales representative. As an employee, Ardis attended a regional sales meeting from January 13-15, 2006, at the Holiday Inn in Marietta, Georgia. On Friday, January 13, Ardis and his girlfriend, Alicia Connor (Connor), drove approximately five hours from their hometown in Wedgefield, South Carolina to Marietta. On Friday evening, they checked into the Holiday Inn where the sales meeting was to take place the following day from 10:00 a.m. until 3:00 p.m.

Kevin Ristau (Ristau), a regional manager for Combined, testified his assistant booked Ardis' room at the Holiday Inn. Ristau also stated employees had the option of staying one or two nights at the hotel. Combined was responsible for paying for Ardis' room on both Friday and Saturday nights.[1] Ristau stated he was aware that Ardis and one other

[1] Combined attempted to argue to the circuit court and to this Court that it was unclear as to whether Combined ever paid for Ardis' room at the hotel due to Combined's direct billing system. In its brief, Combined stated under this billing system, it would pay the cost of the room up front and then charge the expense to the employee's account. However, because Combined offered sales incentives to its employees to offset the chargeback, an employee's room could be paid for if the employee reached certain sales achievements. Because the Commission found substantial evidence existed in the record to establish Combined paid for Ardis' room and because Combined concedes on appeal the facts are undisputed such that our review is limited only to legal errors, the Commission's factual determination on this issue is conclusive.

employee of Combined were spending Saturday night at the hotel. While Ristau did not stay at the Holiday Inn, he testified that he stayed at another hotel in Atlanta on Saturday night in preparation for a trip on Sunday to Nashville, Tennessee.

The purpose of the sales meeting was to train employees for a new company incentive program. Several employees, including Ardis, also received sales awards. Combined did not dispute that Ardis' presence in Marietta was directly related to and caused by Ardis' employment with Combined.

Because the drive back to Wedgefield was approximately five hours, Ardis and Connor chose to spend Saturday night at the hotel and drive back the next morning. After the meeting concluded on Saturday, Connor testified she and Ardis shopped, bowled, and ate supper before returning to the hotel between 11:30 p.m. and 12:00 a.m. They watched a movie in their room and fell asleep around 1:00 a.m. The couple was awakened by a fire alarm early Sunday morning and attempted to leave the hotel. However, due to the thick smoke, Ardis was unable to escape and died as a result of smoke inhalation.

As personal representative of Ardis' estate, Ardis' mother initiated a workers' compensation claim, requesting a lump sum settlement and burial expenses in accordance with South Carolina Code Sections 42-9-140 and 42-9-290 (1976). After a hearing, the Single Commissioner found that Ardis' decision to remain in Marietta was reasonable as Ardis "would have been required to travel approximately five hours after a complete day of training." As a result, the Single Commissioner concluded Ardis sustained a compensable fatal injury by accident and relied on the dual purpose doctrine to buttress his conclusion. Consequently, he awarded Ardis' beneficiaries $2,500 in burial expenses and a lump sum payment for the commuted value of 500 weeks of compensation at the rate of $396.58 per week. The Commission unanimously affirmed the Single Commissioner. On appeal, the circuit court affirmed the Commission. This appeal follows.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard of review for decisions by the Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Although we may not substitute our judgment for that of the Commission as to the weight of the evidence on questions of fact, we may reverse when the decision is affected by an error of law. Grant v. Grant Textiles, 372 S.C. 196, 200-01, 641 S.E.2d 869, 871 (2007). Our review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law. Id. at 201, 641 S.E.2d at 871. When the facts are not in dispute, as in the instant case, the question of whether or not the accident is compensable becomes purely a question of law. Douglas v. Spartan Mills, Startex Div., 245 S.C. 265, 266, 140 S.E.2d 173, 173 (1965).

LAW/ANAYSIS

I. Injury by Accident Arising Out of and in the Course of Employment

Combined contends the circuit court erred in affirming the decision of the Commission because Ardis' death did not occur within the scope and course of his employment. We disagree.

To be compensable, an injury by accident must be one "arising out of and in the course of employment." S.C. Code Ann. § 42-1-160 (Supp. 2007). The two parts of the phrase "arising out of and in the course of employment" are not synonymous. Osteen v. Greenville County Sch. Dist., 333 S.C. 43, 49, 508 S.E.2d 21, 24 (1998). Also, both parts must exist simultaneously before a court will allow recovery. Id. "Arising out of" refers to the injury's origin and cause, whereas "in the course of" refers to the injury's time, place, and circumstances. Id. at 50, 508 S.E.2d at 24.

For an injury to "arise out of" employment, the injury must be proximately caused by the employment. Douglas, 245 S.C. at 269, 140 S.E.2d at 175. An injury arises out of employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. Id. Further, the injury does not have to

be foreseen or expected, but after the event, it must appear to have originated in a risk connected with the employment and to have come from that source as a rational consequence. Id. An injury occurs "in the course of" employment when it happens within the period of employment at a place where the employee reasonably may be in the performance of the employee's duties and while fulfilling those duties or engaging in something incidental to those duties. Broughton v. South of the Border, 336 S.C. 488, 498, 520 S.E.2d 634, 639 (Ct. App. 1999).

Ardis' death arose out of his employment because he was expected to be in Marietta the weekend of January 13-15, 2006 for a company-sponsored sales meeting. The causal connection between Ardis' death and his employment is clear. Combined concedes Ardis would not have been in Marietta that weekend but for the conference. Ardis' presence in Marietta and ultimately his death at the hotel were direct consequences of attending the meeting that weekend.

Citing to Brownlee v. Wetterau Food Serv., 288 S.C. 82, 339 S.E.2d 694 (Ct. App. 1986), Combined argues Ardis' death occurred outside the course of employment because Ardis died after the meeting ended, away from Combined's premises, and at a time when Combined exercised no control over his activities. In Brownlee, Wetterau sent its employee, Kenneth Brownlee, to a training seminar in St. Louis, Missouri. Id. at 84, 339 S.E.2d at 695. The seminar took place from 7:00 a.m. until 10:00 p.m. each day at the hotel where Brownlee was staying. Id. Around 9:00 p.m. on the Thursday evening of the seminar, Brownlee and three other people attending the seminar decided to attend a movie. Id. Brownlee rode as a passenger in a company-owned vehicle to the movies. Id. At approximately 2:00 a.m. on the return trip to the hotel, all four people were killed in a three-car collision. Id. This Court found that Brownlee's death was not compensable because his activities were not job related or employer sponsored. Id. at 85, 339 S.E.2d at 695. Further, his death occurred some distance from the hotel and several hours after the last scheduled seminar event had concluded. Id. at 84, 339 S.E.2d at 695.

Brownlee bears factual similarities to the instant case, namely that Ardis died while attending an out-of-town seminar. However, Ardis' death

occurred in a distinctly different place and manner than that of the employee in Brownlee. At the time of Ardis' death, he was in the hotel where the seminar took place, sleeping in a room paid for and reserved by Combined. See 2 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 25.02, 25-2 (2008) (stating "[a] traveling employee who dies as a result of a fire or asphyxiation in a hotel or motel during the business trip is within the coverage of the compensation acts . . . [as] there is no difference in principle between the employee who is housed upon the employer's own premises and the employee who is housed in a hotel room paid for by the employer"). Moreover, Brownlee's decision to venture away from the hotel inevitably precipitated his death, whereas Ardis' death was the result of circumstances wholly outside his immediate control.[2] While his death in the hotel fire may not have been expected or even foreseeable, the possibility that he could be injured or perish while on an out-of-town business trip is a risk directly connected with the nature of Ardis' employment. See Stone v. Traylor Bros., Inc., 360 S.C. 271, 275, 600 S.E.2d 551, 552-53 (Ct. App. 2004) (stating the injury need not be expected or even foreseeable but must appear to have originated in a risk connected to the employment and to have flowed from that source as a rational consequence).

Combined maintains the business purpose of the trip ended at the conclusion of the seminar; therefore, Ardis' presence at the hotel on Saturday night was outside the scope of his employment since he was no longer in the performance of his duties. The seminar and Ardis' official business duties may have ended earlier that day, but it is reasonably foreseeable and incidental to the fulfillment of his duties for Ardis and Connor to have spent the night in Marietta before making the five-hour drive back to Wedgefield. See Beam v. State Workmens' Comp. Fund, 261 S.C. 327, 332, 200 S.E.2d 83, 86 (1973) (stating "an employee, to be entitled to compensation, need not be in the actual performance of the duties for which he was expressly

[2] In acknowledging that Brownlee was engaged in an activity planned by himself and other seminar participants at the time of his death, this Court noted that the record was devoid of evidence that Brownlee died while returning to the hotel from a restaurant, as eating and going to eat are viewed as being within the scope of employment on out-of-town business trips. Brownlee, 288 S.C. at 84-85, 339 S.E.2d at 695-96.

employed in order for his injury or death to be in the 'course of employment' [as long as] the employee is engaged in a pursuit or undertaking . . . which in some logical manner pertains to . . . his employment"); see also Broughton, 336 S.C. at 498, 520 S.E.2d at 639 (stating an employee is within the course of employment for purposes of coverage under the Act if injured while fulfilling work-related duties or engaging in something incidental to those duties).

Ardis had driven five hours the preceding day, had spent almost the entire afternoon in a meeting solely related to his employer's business, and arguably wanted to return to Wedgefield on Sunday morning following a good night's rest. Because the sun sets earlier in January, even if they left immediately after the conference ended, they would not arrive in Wedgefield until after dark. Although Ardis was not engaged in the actual performance of his business duties, Ardis' act of sleeping in the hotel room before returning home the next morning is a logical action given the circumstances and is therefore incidental to the business trip. see also Martin v. Georgia-Pacific Corp., 167 S.E.2d 790, 793 (N.C. Ct. App. 1969) (internal citation omitted) (stating "traveling employees, whether or not on call, usually do receive protection when the injury has its origin in a risk created by the necessity of sleeping and eating away from home. . . . [t]he hotel fire cases are the best illustration of this"); cf. Larson & Larson, supra, § 25.03[1] (stating that similar to injuries sustained by a traveling employee while sleeping away from home, injuries sustained by a traveling employee while dining have "been held compensable, even though the accident occurred on a Sunday evening, a day off, or *involved an extended trip* occasioned by the employee's wish to eat at a particular restaurant or bar") (emphasis added).

II. Substantial Deviation

Combined additionally argues Ardis participated in a series of personal activities that constituted a substantial deviation from the course of his employment. Combined argues Ardis' acts of going to dinner, shopping, and bowling were substantial deviations that rendered Ardis outside the scope of his employment at the time of his death. We disagree.

"An identifiable deviation from a business trip for personal reasons takes the employee out of the course of employment until the employee returns to the route of the business trip, *unless the deviation is so small as to be disregarded as insubstantial*." Gibson v. Spartanburg Sch. Dist., 338 S.C. 510, 522, 526 S.E.2d 725, 731 (Ct. App. 2000) (internal citation omitted) (emphasis in original).

Even assuming the above-mentioned activities were identifiable deviations, Ardis' death occurred while he was sleeping at the hotel such that any deviation was cured or abandoned by the time of the accident. Further, the act of sleeping, although a personal activity, was incidental to his employment such that his death arose out of his employment. Sleeping is expressly included within the scope of the personal comfort doctrine. The personal comfort doctrine states, "Such acts as are necessary to the life, comfort, and convenience of the [employee] while at work, though strictly personal . . . and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment." Id. at 519, 526 S.E.2d at 730 (citing Osteen, 333 S.C. at 46, 508 S.E.2d at 23). This includes "imperative acts such as eating, drinking, smoking, seeking relief from discomfort, preparing to begin or quit work, and *resting or sleeping*." Id. at 519-20, 526 S.E.2d at 730 (emphasis added).

Based on the circumstances, Ardis' decision to sleep at the hotel in Marietta on Saturday night was an act that was necessary to Ardis' "life, comfort, and convenience." See Larson & Larson, supra, § 25.01 (2008) (stating "[e]mployees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip . . . [t]hus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable"). Combined implicitly recognized the reasonableness of Ardis' decision to stay in Marietta by reserving and paying for Ardis' room. Furthermore, we believe a fundamental premise underlying the personal comfort doctrine is that while certain activities undertaken by an employee may immediately benefit the employee in a personal sense, a benefit ultimately inures to the employer as well. See Osteen, 333 S.C. at 46-47, 508 S.E.2d at 23 (stating that while an employee who engages in entirely personal activities may be "minister[ing] unto himself . . . in a remote sense

these acts contribute to the furtherance of his work"). Consequently, Ardis' death occurred during an activity that was incidental to his employment and thus was compensable under the Act.

III. Dual Purpose Doctrine

Last, Combined argues the dual purpose doctrine, as relied upon by the Commission, does not bring Ardis' death within the course of his employment because he substantially deviated from the business purpose of the trip at the time of his death.

The dual purpose doctrine states the following:

> [W]hen a trip serves both business and personal purposes, it is a personal trip if the trip would have been made in spite of the failure or absence of the business purpose and would have been dropped in the event of failure of the private purpose, though the business errand remained undone; it is a business trip if a trip of this kind would have been made in spite of the failure or absence of the private purpose, because the service to be performed for the employer would have caused the journey to be made by someone even if it had not coincided with the employee's personal journey.

Gibson, 338 S.C. at 520, 526 S.E.2d at 730.

Combined concedes Ardis' trip to Marietta was for a business purpose. While Ardis may have engaged in some personal activities during the business trip, he traveled to Marietta solely for the benefit of his employer. In the absence of the business purpose, Ardis would not have made the trip at all. See Gibson, 338 S.C. at 521, 526 S.E.2d at 731 (finding teacher's injury at Wal-Mart while buying school supplies as well as a lunch box for her child was compensable when trip served both a business and personal purpose but trip was made solely for benefit of school district and in absence of business purpose, the trip would not have occurred at all). Having already found Ardis

did not substantially deviate from this business purpose at the time of his death, we conclude the circuit court properly affirmed the Commission in finding Ardis' death occurred in the course and scope of his employment.

CONCLUSION

Accordingly, the circuit court's order is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case No.: 2005-CP-23-04718

Anna M. Buice and Jerry W. Buice, Respondents,

v.

WMA Securities, Inc., Steeley Hubert Humphrey, Jr., Carl David Kennedy and W. Lindsey Howell, Defendants,

Of Whom WMA Securities, Inc., Steeley Hubert Humphrey, Jr. and Carl David Kennedy are Appellants.

Case No.: 2005-CP-23-04719

Brenda B. Sprinkle, Respondent,

v.

WMA Securities, Inc., Steeley Hubert Humphrey, Jr., Carl David Kennedy, and W. Lindsey Howell, Defendants,

Of whom WMA Securities, Inc., Steeley Hubert Humphrey, Jr. and Carl David Kennedy are Appellants.

Case No.: 2005-CP-23-04720

Haley Nicole Smith Williams, Respondent,

v.

WMA Securities, Inc., Steeley Hubert Humphrey, Jr., Carl David Kennedy and W. Lindsay Howell, Defendants,

Of Whom WMA Securities, Inc., Steeley Hubert Humphrey, Jr. and Carl David Kennedy are Appellants.

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 4442
Heard September 17, 2008 – Filed October 14, 2008

AFFIRMED AS MODIFIED

Anthony E. Rebollo, Carmen Vaughn Ganjehsani and Charles E. Carpenter, Jr., all of Columbia, for Appellants.

Ben C. Harrison, Max Hyde and Jeremy A. Dantin, all of Spartanburg, for Respondents.

HEARN, C.J.: Steeley Humphrey, and WMA Securities, Inc. (collectively Appellants) appeal the circuit court's denial of their Motion to Dismiss, or in the Alternative, to Stay and Compel Arbitration in an action

filed by Respondents Jerry and Anna Buice, Brenda Sprinkle, and Haley Nicole Smith Williams (collectively Investors).[1] We affirm as modified.

FACTS

In early 1999, Investor Sprinkle met Howell, an agent/employee of WMAS, in the course of procuring supplemental health insurance for her elderly parents. During several resulting conversations between the two, Howell inquired about assisting Sprinkle with other aspects of her financial planning. Also during this same period, Sprinkle introduced Howell to several of her co-workers, including the Buices and Williams. Investors allege Howell recommended purchasing variable universal life insurances policies (Policies) as safe and prudent investments through which each could earn enough profit to cover all future insurance premiums. As a result of these conversations, and in reliance on Howell's advice, Investors separately purchased Policies between January of 1999, and June of 2000.[2] The Investors' applications were identical,[3] and each included an Arbitration Agreement.

The Arbitration Agreement appears under the heading "CLIENT PRE-DISPUTE ARBITRATION" and in relevant part provides:

> I (we) agree that unless unenforceable due to federal or state law, any controversy arising out of or related to my (our) accounts, the transactions with WMAS, its officers, directors, agents, registered

[1] Williams is not represented by counsel; however, she has agreed to be bound by the court's disposition of the case.

[2] Investors' complaints indicate the Buices invested $106,764.24, Sprinkle invested $95,828.00, and Williams invested $15,000.

[3] There are discrepancies between when Investors claim to have invested, and when documents submitted to the court indicate investments were made. The New Account Applications included in the record indicate Williams signed on April 14, 1999; the Buices signed agreements on December 6 and 16, 1999; and Sprinkle signed an agreement on January 6, 2000.

> representatives and/or employees for me (us), or related to this agreement or breach thereof, shall be settled by arbitration in accordance with the rules then in effect of the National Association of Securities Dealers, Inc. (NASD). Such arbitration shall follow the procedures as set forth by a national arbitration committee of the NASD. . . .

(emphasis added). The Arbitration Agreement concludes, in pertinent part:

> I (we) understand that:
> (1) ARBITRATION IS FINAL AND BINDING ON THE PARTIES (I.E., YOU AND WMAS).
> (2) YOU AND WMAS ARE WAIVING RIGHTS TO SEEK REMEDIES IN COURT, INCLUDING THE RIGHT TO JURY TRIAL.
> . . .

Following each of their investments, Investors contend they discovered Appellants had materially misrepresented and omitted vital information regarding the Policies, upon which they had relied in their purchase. Investors allege Appellants failed to disclose that the Policies were actually "mutual fund type account[s] 'wrapped' inside [] insurance polic[ies]" requiring the separate purchase of life insurance regardless of an individual's need for ancillary life insurance. Investors further maintain Howell failed to disclose the higher sales commission he stood to earn from the Policies as compared to other investment alternatives, or that the Policies are generally considered high-risk securities.

Originally, Investors filed the necessary paperwork with the NASD to bring their action in arbitration. (emphasis added). However, shortly after filing, Investors received a return letter from the NASD stating WMAS's NASD membership had been terminated, and Investors "[could], but [are] not

required to, arbitrate [their] claim" based on NASD Code of Arbitration Procedure Rule 10301. Rule 10301[4] provides:

> 10301. Required Submission
> (a) Any dispute, claim or controversy eligible for submission under the Rule 10100 Series between a customer and a member and/or associated person arising in connection with the business of such member or in connection with the activities of such associated persons shall be arbitrated under this Code, as provided by any duly executed and enforceable written agreement or upon the demand of the customer. A claim involving a member in the following categories shall be ineligible for submission to arbitration under the Code unless the customer agrees in writing to arbitrate the claim after it has arisen:
>
> > 1. A member whose membership is terminated, suspended, canceled, or revoked;
> > 2. A member that has been expelled from the NASD; or
> > 3. A member that is otherwise defunct.

(emphasis added).

Investors then filed suit in circuit court against Carl Kennedy,[5] Howell, Humphrey, and WMAS, asserting eight causes of action: (1) violation of South Carolina's securities laws; (2) breach of fiduciary duty; (3) negligence; (4) breach of contract; (5) breach of covenant of good faith and fair dealing; (6) fraud; (7) breach of contract accompanied by a fraudulent act; and (8) control person liability. Kennedy, WMAS and Humphrey filed a Motion to

[4] NASD Rule 10301 was adopted on June, 11 2001.

[5] Kennedy was also an agent/employee of WMAS and was Howell's immediate supervisor.

Dismiss or in the Alternative, to Stay and Compel Arbitration. A hearing was held, and relying on Rule 10301 and a perceived ambiguity, the circuit court denied all the motions by written order. Ensuing Motions to Reconsider were also denied. This appeal followed. Before oral arguments to this court, Investors and Kennedy agreed by stipulation that Investors' claims against him are subject to arbitration before the NASD, and, therefore, Kennedy's appeal was dismissed.

STANDARD OF REVIEW

"The determination of whether a claim is subject to arbitration is subject to de novo review." Wellman, Inc. v. Square D Co., 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005). However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports 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. WMAS

WMAS first contends the agreement entered into by the parties stipulates that NASD rules "then in effect" would govern any dispute arising from the agreement, and that because Rule 10301 did not exist at the time the parties signed their agreement, it should have no applicability. WMAS also contends the circuit court erred in refusing, assuming Rule 10301's applicability, to compel arbitration, where the rule does not preclude arbitration, and the parties entered into an otherwise contractually binding arbitration agreement with respect to claims arising out of the contract. We disagree.

The crux of the analysis of the arbitration agreement hinges on a determination of how the phrase "then in effect" modifies the set of NASD rules to be applied in the arbitration. We find the phrase "then in effect" clearly and unambiguously refers to the NASD rules existing at the time the matter is sent to arbitration. Hawkins v. Greenwood Dev. Corp., 328 S.C.

585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) ("The construction of a clear and unambiguous contract is a question of law for the court."). Our analysis is bolstered by four previous decisions of courts around the country that have had the occasion to interpret NASD Rule 10301's effect on a terminated member's right to still compel arbitration after the rule's enaction. See In re Sands Bros. & Co., Ltd., 206 S.W.3d 127 (Tex. App. 2006); Gailey v. World Marketing Alliance, 2006 WL 1716871 (N.D.Miss. 2006); Provencio v. WMA Sec., Inc., 125 Cal. App. 4th 1028 (Cal. App. 2d 2005); Elston v. Toma, 2004 WL 1048132 (D.Or. 2004). Moreover, similar to the Elston court's deconstruction of a comparable contractual clause, we find WMAS' inclusion of the NASD as the specified arbitration forum and applicable rules, limits its ability to make a colorable argument that arbitration should be enforced despite the clear exclusion under NASD Rule 10301 for those whose memberships have been terminated. This is also represented in the legislative history of Rule 10301, where the NASD explained:

> NASD Dispute Resolution believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the [Securities and Exchange Act of 1934] which requires, among other things, that the Association's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. Because terminated, suspended, barred or otherwise defunct firms have a significantly higher incidence of non-payment of arbitration awards than do active firms, NASD Dispute Resolution believes that the proposed rule change will protect investors and the general public by giving customers greater flexibility to seek remedies against such firms.

66 Fed.Reg. 13362, 13364 (proposed Mar. 5, 2001). As a result, we affirm the circuit court's finding that Investors' claims against WMAS should be sent to arbitration only at their discretion, by subsequent written request as outlined by Rule 10301.

II. Humphrey

In addition, all parties to this appeal agree that WMAS and Humphrey's interests are identical. Nevertheless, the circuit court's order on appeal specifically delineates the two parties separately, and applies differing logic and legal analysis to uphold its finding that neither party should be able to compel arbitration. The basis upon which the circuit court denied Humphrey's Motion to Compel Arbitration was that the contract was ambiguous. We find this was error.

"It is a question of law for the court whether the language of a contract is ambiguous." S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). Because an arbitration clause is a contractual term, general rules of contract interpretation apply where the court must determine the clause's applicability. Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). In determining as a matter of law whether a contract is ambiguous, the court must consider the contract as a whole, rather than deciding whether phrases in isolation could be interpreted in various ways: "[O]ne may not, by pointing out a single sentence or clause, create an ambiguity." Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976). "Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract." Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975). Further, in determining the intent of the contracting parties, the court should construe the contract as a whole, and read together different provisions dealing with the same subject matter. Skull Creek Club Ltd. P'ship v. Cook & Book, Inc., 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct. App. 1993).

In finding the arbitration agreement ambiguous, the circuit court held:

> The first paragraph of the agreement references "WMAS, its officers, directors, agents, registered representatives and/or employee." . . . The [] paragraph [immediately following] states, in

> pertinent part: I (we) understand that: (1) ARBITRATION IS FINAL AND BINDING ON THE PARTIES (i.e., YOU AND WMAS). . . . This Court finds that this second paragraph is set forth with greater emphasis than the first and is inconsistent with the preceding paragraph as to who is to be controlled by the arbitration agreement.

We find there is no inconsistency or ambiguity between the clauses. Even acknowledging a difference, the most logical explanation is that the language of the first paragraph actually creates the agreement to arbitrate, and the second paragraph merely summarizes that agreement.

Moreover, assuming without deciding that the two clauses are incompatible, the first clause should be given greater weight. Our Supreme Court has held that where "there are two incompatible . . . clauses [in a contract] the first will prevail over the latter." Phipps v. Hardwick, 273 S.C. 17, 24, 253 S.E.2d 506, 510 (1979). Further, where two clauses are incompatible, "the [clause] which essentially requires something to be done to effect the general purpose of the contract is entitled to greater consideration than the other." 17A Am. Jur. 2d Contracts § 384 (2008). Here, the first paragraph of the Arbitration Agreement defines how an account holder would handle a dispute, which is an operative, rather than descriptive, clause. The second paragraph merely describes or summarizes the first. Under this view, the first paragraph, with its reference to WMAS's officers, directors, agents, registered representatives, and employees, would control.

Even though we disagree with the circuit court's finding that the provision is ambiguous, we nevertheless affirm its decision to deny Humphrey's Motion to Compel Arbitration. At this stage of litigation, we are willing to accept the parties' determination of their own rights, and both Humphrey and WMAS have taken the position before the circuit court and this court that their interests are indistinguishable. Accordingly, our finding above on Rule 10301 mandates affirmance of the circuit court's denial of Humphrey's Motion to Compel. The order of the circuit court is

AFFIRMED AS MODIFIED.

PIEPER, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services, Respondent,

v.

Scott K. and Nedra K., Appellants.

In the interests of A.K. and C.K., minor children under the age of 18.

Appeal From Aiken County
Dale M. Gable, Family Court Judge

Opinion No. 4443
Heard September 17, 2008 – Filed October 14, 2008

REVERSED

LeLand M. Malchow, of Augusta, Georgia, for Appellant Nedra K.

John A. Donsbach, of Martinez, Georgia, for Appellant Scott K.

Dennis M. Gmerek, of Aiken, for Respondent.

HEARN, C.J.: This appeal arises from a family court order granting the South Carolina Department of Social Service's request to order Nedra K.

(Mother) and Scott K. (Father) to comply with a Treatment Plan. We reverse.

FACTS

On October 20, 2006, the Aiken County Department of Social Services (DSS) received a call about Mother and Father's home, reporting, "there are bags of trash with maggots in them throughout the house . . . there is dog feces and dog urine on floors . . . there was the smell of marijuana in the home and marijuana smoke was seen." Ten days later, sheriff's deputy Ken Blackwell accompanied DSS caseworkers Kendra Upton-Williams and Evelyn Perry on an unannounced visit to the home.

When Blackwell entered the home, he observed "several bags of trash in the kitchen and dirty dishes in the sink. The living room . . . was really cluttered with a lot of books and stuff stacked around." Upton-Williams recorded her impression of the family's home in a report:

> [The home was] cluttered with bags of trash and toys, trash thrown about the home, stains on the carpet, the staircase is lined with debris, the front door is barricaded with debris and a small shelf, the utility/storage room is filled with boxes of unknown items that ha[ve] been there since the couple moved into the home . . . . The bottom of the floors in [the children's] room[s] cannot be seen in full.

Furthermore, Upton-Williams testified she discussed the condition of their home with Mother and Father; Mother said she "becomes overwhelmed and depressed when it is time to clean her home," and Father said he tried to develop a reward system to encourage the children to clean their rooms. On cross-examination, Upton-Williams admitted she found nothing in the family's home consistent with the allegations reported to DSS — no dog feces, no urine, no maggots, and no marijuana.

Mother's testimony regarding the condition of her home that day provides a different perspective:

> We were trying to get our house situated and the basement stuff done. . . . Our living room at the time had a bookcase in it to where we could get the stuff from [child's] room picked up and books put on shelves. . . . [T]he stuff outside[,] we were getting ready to take to Goodwill to make room in our house because we had no storage.

Father testified and explained the children were spending the week at their grandparents' home, while he and Mother were "cleaning the house and going through . . . boxes, rearranging things, painting . . . rooms, [and] doing a whole bunch of things with the house."

At the conclusion of their visit, Upton-Williams and Perry determined the physical condition of the home placed Mother and Father's children at "serious risk of harm." DSS asked Mother and Father to voluntarily comply with a "Safety Plan" it developed. The Plan required the children to remain with their grandparents, who would serve "as protectors" of their grandchildren and stated DSS would give Mother and Father three days to discard all trash, clean the home, make the beds with clean linens, and obtain drug screens. Mother testified she and Father initially had refused to sign the Plan, but they capitulated after DSS told them if they refused: "[O]ur kids would be taken away, and the officer would escort us out of the room, and we would be arrested."

Upton-Williams returned to the family's home two days later. She testified it now was clean and acceptable, and DSS allowed the children to return home. The following day, she reviewed the results of Mother's and Father's drug tests, which were negative. Upton-Williams testified she told Mother and Father the Plan would remain in effect, and DSS would "be coming back to the home to make unannounced visits," until DSS made a "case decision."

Upton-Williams prepared a Determination Fact Sheet to "let the family know [the] case [was] indicated" for physical neglect of the children based on the condition of the home. Upton-Williams noted on the Fact Sheet:

> [Father] does not see anything wrong with the condition of his home and feels that his case should be unfounded as none of the allegations were true. Although the home had been cleaned by 11/01/06, [Father] would no longer allow DSS back into his home. [Father] feels that his rights have been violated by DSS and the Aiken County Sheriff's Office.

Mother testified regarding the disruptive impact of the DSS investigation on her children's lives. She stated the children had been making A's and B's before DSS started its investigation; however, their grades began to drop because, "DSS was visiting [the children] at school and it was embarrassing to them. They were waking up at various times of the night[,] afraid DSS was going to take them away."

DSS concluded its investigation on November 20, 2006, and it classified the reported allegations as "indicated for physical neglect due to the condition of the home of the parents." Thereafter, DSS developed an "In-Home Treatment Plan," and required Mother and Father to comply with it for six months. The Plan instructed Mother and Father to: (1) keep the home clutter-free and pest-free; (2) wipe down the walls; (3) remove clothing from floors; (4) clean and maintain all rooms in the house; (5) dispose of plastic bottles, old shoes, and other items in the front yard; and (6) put clean linens on the beds. DSS stated it would monitor compliance through unannounced visits, photographs, and review of the children's school records. Mother and Father refused to sign the Plan and notified DSS they wanted to appeal its case determination. In March 2007, DSS brought an action alleging Mother and Father's children were physically neglected, they had failed to follow the treatment plan, and the "children cannot be protected adequately at this time

from further harm without the intervention of [DSS] and court-ordered services."[1]

On May 24, 2007, the family court conducted an intervention hearing. Guardian ad litem (GAL) Nona Mauzy testified she had visited the family's home on April 7 and May 20, 2007. Mauzy stated the home was indeed cluttered; however, she observed no signs the children were neglected:

> I thought that they had a good family working, just the way they got along together as a group. . . . I didn't see any dissension or uneasiness or fear of any kind. . . . [T]he house is cluttered, very cluttered, there is no doubt about that. . . . I didn't feel that it was contaminated or unsanitary. . . . It would be unsafe for me to walk through a lot of clutter on the floor because I am elderly and not as steady on my feet. . . . I don't think there is a potential risk of harm right now. I really don't.

Furthermore, Mauzy interviewed Mother and Father, the children, and their grandparents and teachers before writing her report, which stated:

> [Mother and Father] were cordial, polite and showed me through their home. It was cluttered but not dirty. The computer in the living room sits on a table and papers were piled all around it. There are makeshift shelves in the dining room across one wall containing groceries and some cleaning supplies. The kitchen is small and this looks like overflow from too few cabinets. I did not feel that the home was unsanitary.

[1] The following month, DSS amended its Treatment Plan to additionally require: (1) parenting classes; (2) Father to obtain a mental health evaluation; and (3) Mother to obtain depression screening. Noting their appeal was pending, Mother and Father refused to sign the amended Plan.

> . . . The girls were clean and looked healthy. They seemed very bright and active.

The children's grandfather told Mauzy, "DSS is overstepping [its] authority and that he would gladly testify that they are good parents but clutter did not bother either of them." Mauzy testified she returned to the home a month later and found, "[t]he parents were busy replacing the makeshift shelves in the dining room with a nice, big stainless steel shelving unit." She concluded:

> Based on my observations I feel [the children] are normal and well-adjusted for their ages. Both are friendly and outgoing and appear to have a normal, loving relationship with their Mother and Father. Their teachers state that they are doing well and have seen no signs of neglect. I feel that a referral for some Homemaker services could help [Mother and Father] become more organized. [Father] should obtain employment so as to support his family.

During the intervention hearing, Mother's counsel asked Mauzy why her written report recommended affirming the DSS finding that the children were at "a substantial risk of physical neglect." Mauzy replied, "[w]ell, that confuses me even." She added the GAL's office "help[s] me with phrases and terms, since I don't have the jargon. I am strictly a volunteer." Finally, when asked if the children were at substantial risk of physical neglect, Mauzy responded: "Change that word to 'possible.'"

Following the hearing, the family court determined: (1) the allegations of DSS against Mother and Father were supported by a preponderance of the evidence; (2) the children are neglected due to the poor condition of their home; (3) the children cannot be protected from further harm without the intervention of DSS; and (4) the DSS Treatment Plan will alleviate the "danger to these children and aid [Mother and Father]." Thereafter, the family court ordered Mother and Father to comply with the Treatment Plan. Mother and Father's appeal followed.

STANDARD OF REVIEW

"In appeals from family court, the appellate court has the authority to find the facts in accordance with its own view of the preponderance of the evidence." S.C. Dep't of Soc. Servs. v. Meek, 352 S.C. 523, 528, 575 S.E.2d 846, 848 (Ct. App. 2002).

LAW/ANALYSIS

First, Mother and Father argue DSS improperly classified the allegations concerning the condition of their home as, "indicated for physical neglect due to the condition of the home." Furthermore, Mother and Father contend the family court erred in finding a preponderance of the evidence supported the DSS indication and in finding the children could not be protected from future harm without intervention. As a consequence of these erroneous findings, Mother and Father assert the family court erred in ordering them to comply with the Treatment Plan. We agree.

A. Investigating Reports of Alleged Abuse and Neglect

"Any intervention by the State into family life on behalf of children must be guided by law, by strong philosophical underpinnings, and by sound professional standards for practice." S.C. Code Ann. § 20-7-480 (Supp. 2007).[2] Furthermore, the statutory scheme for child protection is guided by the principle that, "[p]arents have the primary responsibility for and are the primary resource for their children." § 20-7-480(A)(1).

[2] The General Assembly amended the Code of Laws of South Carolina, effective June 16, 2008, to add Title 63, the South Carolina Children's Code, and to transfer all provisions of Title 20, Chapter 7 to Title 63. See Act No. 361, 2008 S.C. Acts 3623 (stating "the transfer and reorganization of the code provisions in this act are technical . . . and are not intended to be substantive"). Because Title 63 has not yet been bound, all citations to the statute refer to Title 20.

South Carolina law states child abuse, neglect, or harm occurs when a person responsible for the child's welfare "fails to supply the child with adequate food, clothing, shelter, or education . . . and the failure to do so has caused or presents a substantial risk of causing physical or mental injury." S.C. Code Ann. § 20-7-490(2)(c) (Supp. 2007). The statute provides clear guidelines to DSS for investigating reports of suspected child abuse or neglect. S.C. Code Ann. § 20-7-650 (Supp. 2007). Within twenty-four hours of receiving a report of suspected child abuse or neglect, DSS must begin a thorough investigation. § 20-7-650(C). Furthermore, within sixty days, DSS must classify the report as either "unfounded" or "indicated."[3] § 20-7-650(F). "[I]t is presumed that all reports are unfounded unless [DSS] determines otherwise." § 20-7-490(10). "Just as SCDSS has the responsibility under the statutory scheme to bring meritorious allegations of child abuse and neglect before the family court, it also has the responsibility and duty to seek dismissal of those petitions subsequently determined by their investigation to be without merit." S.C. Dep't of Soc. Servs. v. Pritcher, 329 S.C. 242, 247, 495 S.E.2d 242, 244 (Ct. App. 1997). The goal of this statutory scheme "is to protect children while avoiding intervention into the family's life if at all possible." Id. at 248, 495 S.E.2d at 245.

After DSS classifies a report as indicated, it may petition the family court for authority to intervene and provide protective services if it makes the two-pronged determination: (1) by a preponderance of evidence, the child is an abused or neglected child, and (2) the child cannot be protected from harm without intervention. § 20-7-738(A) (Supp. 2007). In this case, DSS found a cluttered home, but its investigation failed to substantiate any of the reported allegations. Moreover, there was no evidence that Mother and Father's

[3] An unfounded report is one "for which there is not a preponderance of evidence to believe that the child is abused or neglected." § 20-7-490(10). On the other hand, an indicated report is "supported by facts which warrant a finding by a preponderance of evidence that abuse or neglect is more likely than not to have occurred." § 20-7-490(11). A preponderance of evidence means "evidence which, when fairly considered, is more convincing as to its truth than the evidence in opposition." § 20-7-490(13).

children had been harmed or were at risk of future harm. To the contrary, all the evidence showed the children to be healthy and well nurtured; in the words of the GAL, "they had a good family." Accordingly, we find DSS erred in classifying the reported allegations. Moreover, DSS compounded its error by equating Mother and Father's marginal housekeeping skills with the neglect of their children and in finding the children cannot be protected from further harm without intervention.

B. Family Court Intervention

The family court can order intervention and protective services only after it finds the allegations of the DSS petition requesting intervention are supported by a preponderance of the evidence, the child is abused or neglected as defined in section 20-7-490, and the child cannot be protected from further harm without intervention. § 20-7-738(D). Because a preponderance of the evidence did not support the allegations in the DSS petition, the family court erred in ordering intervention. Accordingly, the family court's intervention order is

REVERSED.

HUFF, J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

April D. Enos, **Appellant,**

v.

John Doe and Travelers Indemnity Insurance Co.,
Defendants,

of whom:

John Doe is the **Respondent,**

Appeal From Chester County
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 4444
Heard October 8, 2008 – Filed October 14, 2008

AFFIRMED

Mitchell J. Williams, of Columbia, for Appellant.

William P. Davis, of Columbia, for Respondent.

ANDERSON, J.: April D. Enos appeals the trial court granting a directed verdict in favor of defendant John Doe in an action arising out of a motor vehicle accident where the driver is unknown. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

April Enos (Enos) and her boyfriend left her home between 3:00 and 4:00 p.m. on Friday, September 13, 2002, "to go out drinking." They rode in her 1996 Jeep Grand Cherokee, but she does not recall who drove. The couple went to the Crow Bar in Rock Hill. Enos does not remember how long they were there, but later in the afternoon they drove to the Handle Bar about ten or fifteen minutes away. Enos verified she and her boyfriend got into an argument, and her boyfriend left. Enos returned to the bar and continued to drink to the point of "getting intoxicated."

Enos maintains she eventually went to her vehicle to go to sleep. She remembers getting into the Jeep's passenger seat, reclining the seat, and dropping her keys in the cup holder. The next thing she recollects is waking up in the hospital. Enos does not know who was driving her Jeep at the time of the collision nor anything about how the wreck occurred. She is not aware of any witness who observed the accident or who was driving. She testified that she was familiar with the location of the accident. She described the curve as "a very sharp curve" and "a fifteen mile an hour curve."

Daniel Leeman, a volunteer firefighter who responded to the accident, asserted that the Jeep appeared to have hit a bridge abutment located between two curves in the roadway. He declared there is a sharp left curve before the bridge when traveling south from Rock Hill, which was seemingly the vehicle's direction of travel. Leeman found Enos on the passenger side. He saw a hole in the passenger side of the windshield consistent with her hitting the windshield.

Jeffrey Scott Burch, a paramedic with Chester County EMS, arrived at the scene and discovered Enos sitting on the passenger side of the vehicle complaining of right shoulder pain. He verified most of the damage was to

the right front side of the vehicle and "the windshield was bulged out where her head hit." She had noticeable wounds to the right side of her neck, right ear, and a busted mouth and nose.

Enos brought an action against John Doe pursuant to her uninsured motorist coverage and sections 38-77-150 and 38-77-170 of the South Carolina Code, alleging that an unknown driver had driven her car into a bridge abutment while she was a passenger. Enos's insurance carrier, Travelers Indemnity Company (Travelers), answered in the name of John Doe denying the allegations and alleging comparative negligence. Travelers amended its answer to include several defenses, one of which was that Enos was without standing to prosecute the action because she failed to produce an affidavit from a witness, other than the owner or operator of the vehicle, attesting to the truth of the facts of the accident as required by section 38-77-170(2).

Travelers moved for summary judgment on the bases that (1) strict compliance with the statutes allowing an insured to recover UM benefits where damages are caused by an unknown driver is mandated; (2) S.C. Code section 38-77-150 requires the insured be "legally entitled to recover" from the owner or operator of an insured vehicle, but Enos admitted she had no information or evidence as to what actions, if any, of the alleged driver contributed to the collision and that she had not alleged any other vehicle was involved; (3) S.C. Code section 38-77-170 dictates, under the circumstances presented, the insured may not recover UM benefits unless a witness, other than the owner or operator of the insured vehicle, signs an affidavit attesting to the truth of the facts of the accident; (4) Enos confirmed she had no information or evidence that the collision in question was witnessed by anyone other than the vehicle's driver; and (5) Enos conceded she had no affidavit from any witnesses.

At the close of Enos's case, the court granted Travelers' motion for directed verdict on the grounds: (1) Enos had not complied with section 38-77-170(2) and (2) Enos failed to present evidence that the defendant proximately caused her injuries.

ISSUES

1. Did the trial court err in ruling that Enos was required to comply with the affidavit requirement of section 38-77-170(2) by submitting an affidavit from a witness, other than the vehicle's owner or operator, attesting to the facts of the accident?

2. Did the trial court err in directing a verdict on the additional ground that Enos failed to prove that her injuries were proximately caused by any negligence or recklessness on the part of the unknown driver of her vehicle?

STANDARD OF REVIEW

When reviewing a trial court's ruling on a directed verdict, this Court will reverse if no evidence supports the trial court's decision or the ruling is controlled by an error of law. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006); McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). The appellate court must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts as liberally construed in his or her favor. Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006); Erickson v. Jones St. Publishers, L.L.C., 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created and the motion should be denied. Proctor v. Dep't of Health & Envtl. Control, 368 S.C. 279, 292, 628 S.E.2d 496, 503 (Ct. App. 2006). A motion for directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability. Huffines Co. v. Lockhart, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2005). When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Wright v. Craft, 372 S.C. 1, 19, 640 S.E.2d 486, 496 (Ct. App. 2006) (citing Erickson, 368 S.C. at 463, 629 S.E.2d at 663).

LAW/ANALYSIS

Section 38-77-170 of the South Carolina Code, entitled "Conditions to sue or recover under uninsured motorist provision when owner or operator of motor vehicle causing injury or damage is unknown" and known as the John Doe statute, states:

> If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, there is no right of action or recovery under the uninsured motorist provision, unless:
>
> (1) the insured or someone in his behalf has reported the accident to some appropriate police authority within a reasonable time, under all the circumstances, after its occurrence;
>
> (2) the injury or damage was caused by physical contact with the unknown vehicle, or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit;
>
> (3) the insured was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.
>
> The following statement must be prominently displayed on the face of the affidavit provided in subitem (2) above: A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

S.C. Code Ann. § 38-77-170 (2002).

I. Statutory Interpretation

The issue of interpretation of a statute is a question of law for the court. Univ. of S. Cal. v. Moran, 365 S.C. 270, 275, 617 S.E.2d 135, 137 (Ct. App. 2005); see also Catawba Indian Tribe v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007), cert. denied, Oct. 1, 2007; Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995).

The cardinal rule of statutory interpretation is to determine the intent of the legislature. Bass v. Isochem, 365 S.C. 454, 459, 617 S.E.2d 369, 377 (Ct. App. 2005); Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003); Smith v. S.C. Ins. Co., 350 S.C. 82, 87, 564 S.E.2d 358, 361 (Ct. App. 2002); see also Gordon v. Phillips Utils., Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("The primary purpose in construing a statute is to ascertain legislative intent."). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002); Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998); State v. Morgan, 352 S.C. 359, 365-66, 574 S.E.2d 203, 206 (Ct. App. 2002); State v. Hudson, 336 S.C. 237, 246, 519 S.E.2d 577, 581 (Ct. App. 1999). "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." S.C. Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

The legislature's intent should be ascertained primarily from the plain language of the statute. State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Stephen v. Avins Constr. Co., 324 S.C. 334, 339, 478 S.E.2d 74, 77 (Ct. App. 1996). The language must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Mun. Ass'n of S.C. v. AT & T Commc'ns of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004);

Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Hudson, 336 S.C. at 246, 519 S.E.2d at 582.

When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005); Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003); Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995); see also City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language."). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct. App. 2001). The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. Durham v. United Cos. Fin. Corp., 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998); Adkins v. Comcar Indus., Inc., 323 S.C. 409, 411, 475 S.E.2d 762, 763 (1996); Worsley Cos. v. S.C. Dep't of Health & Envtl. Control, 351 S.C. 97, 102, 567 S.E.2d 907, 910 (Ct. App. 2002); see also Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970) (observing that where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); Bayle, 344 S.C. at 122, 542 S.E.2d at 739.

If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. Morgan, 352 S.C. at 367, 574 S.E.2d at 207; see also

Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) ("[W]here a statute is ambiguous, the Court must construe the terms of the statute."). An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law. Hudson, 336 S.C. at 247, 519 S.E.2d at 582; Brassell, 326 S.C. at 561, 486 S.E.2d at 495; City of Sumter Police Dep't v. One 1992 Blue Mazda Truck, 330 S.C. 371, 376, 498 S.E.2d 894, 896 (Ct. App. 1998). In construing a statute, the court looks to the language as a whole in light of its manifest purpose. State v. Dawkins, 352 S.C. 162, 166, 573 S.E.2d 783, 785 (2002); Adams v. Texfi Indus., 320 S.C. 213, 217, 464 S.E.2d 109, 112 (1995); Brassell, 326 S.C. at 560, 486 S.E.2d at 494.

A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. Wieters v. Bon-Secours-St. Francis Xavier Hosp., Inc., 378 S.C. 160, 170, 662 S.E.2d 430, 436 (Ct. App. 2008); see also Georgia-Carolina Bail Bonds, 354 S.C. at 22, 579 S.E.2d at 336 ("A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute."). The real purpose and intent of the lawmakers will prevail over the literal import of the words. Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992).

Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. N.Y. Times Co. v. Spartanburg County Sch. Dist. No. 7, 374 S.C. 307, 312, 649 S.E.2d 28, 30 (2007); Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994); Grinnell Corp. v. Wood, 378 S.C. 458, 469, 663 S.E.2d 61, 67 (Ct. App. 2008). A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law. Houston v. Deloach & Deloach, 378 S.C. 543, 551, 663 S.E.2d 85, 89 (Ct. App. 2008); see also Mid-State Auto Auction v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) (stating that in ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole).

II. A Retrospection of the John Doe Statute

The South Carolina Supreme Court undertook a historical review of the John Doe statute in Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002). The court annunciated:

> Our General Assembly first enacted a John Doe statute in 1963. The statute as first enacted required "physical contact with the unknown vehicle" before the plaintiff could recover. See Act No. 312, 1963 S.C. Acts 535.
>
> In 1987, the General Assembly relaxed the physical contact requirement, and amended the John Doe statute to provide that a plaintiff has no right of action or recovery unless "the injury or damage was caused by physical contact with the unknown vehicle, or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle." Act No. 166, 1987 S.C. Acts 1122. Under the 1987 amendment, a witness-sworn affidavit was not required.
>
> The legislature again amended the statute in 1989, and added the sworn affidavit requirement. The statute at large effecting this most recent amendment provides that the act is "to amend section 38-77-170 relating to the requirements to recover under the uninsured motorist provisions when the at-fault party is unknown, so as to require a witness to the accident to sign an affidavit attesting to the truth of the facts about the accident and to provide a warning statement to be displayed on the affidavit." Act No. 148, 1989 S.C. Acts 439 (emphasis supplied).
>
> As written, section 38-77-170 contains requirements necessary to support a plaintiff's "right of action." Black's defines "right of action" as:

> 1. The right to bring a specific case to court. 2. A right that can be enforced by legal action; a chose in action. Cf. cause of action.
>
> Black's Law Dictionary 1324 (Bryan A. Garner ed., 7th ed, West 1999). Without a sworn affidavit, a plaintiff has no right of action. In other words, without the affidavit, she has no right to bring her case to court.

Collins, 352 S.C. at 466-67, 574 S.E.2d at 741.

In Unisun Insurance Co. v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000), the court addressed what qualifies as an uninsured motor vehicle. January O'Neale's father gave her a BMW with strict instructions not to let anyone else drive the car. Miss O'Neale and her friend Jennifer Hurst attended a party at Christopher Schmidt's house. During the party, Schmidt and Hurst got into the BMW. Schmidt later drove off in the car with Hurst asleep in the backseat. Schmidt lost control of the car and hit a tree, injuring Hurst. Hurst had the consent of the owner of the BMW and of the permissive user daughter to occupy the vehicle to, from, and while attending the party. Schmidt's driving of the automobile was not consensual, but Hurst's use of the vehicle was at all times consensual.

State Farm, the carrier for the BMW, successfully denied liability coverage due to the non-permissive use by Schmidt. Hurst then claimed the denial of liability coverage by State Farm rendered the BMW an uninsured motor vehicle. Hurst argued because she was a permissive occupant and/or guest and/or user of the car at the time of the accident, she was covered under State Farm's uninsured motorist policy and the uninsured motor vehicle insurance statutes. See S.C. Code Ann. § 38-77-150 (2002).

The trial court agreed and found Hurst was an insured under the uninsured motorist coverage of the State Farm policy in effect at the time on the O'Neale BMW, and the car was an uninsured motor vehicle. Jennifer Hurst could therefore make an uninsured motorist claim against the State

Farm policy insuring the O'Neale BMW. We reversed, and the Supreme Court granted certiorari. The court edified:

> First, the Court of Appeals erred in concluding the O'Neale vehicle was not a vehicle "to which the policy applied." The Court of Appeals followed the factually analogous case of Nationwide Mutual Insurance Co. v. Harleysville, 203 Va. 600, 125 S.E.2d 840 (1962), in interpreting the clause "to which the policy applies" to deny coverage. However, this Court has not interpreted the clause in such a restrictive manner. The "motor vehicle to which the policy applies" is "the motor vehicle designated in the policy." The words "to which the policy applies" are words of identification, and not words of exclusion as used by the Court of Appeals.
>
> Second, we disagree with the Court of Appeals' conclusion the O'Neale vehicle was not being "used with the consent of the insured." The Court of Appeals incorrectly focused on Schmidt's operation of the vehicle, rather than the "use" of the vehicle by Hurst, which Respondent stipulated "was at all times consensual."

Schmidt, 339 S.C. at 366-67, 529 S.E.2d at 282 (citations omitted).

On the second issue, as to whether the O'Neale vehicle was an uninsured motor vehicle, the court expounded:

> The purpose of the uninsured motorist law is "to provide benefits and protection against the peril of injury or death by an uninsured motorist to an insured motorist, his family, and the permissive users of his vehicle." In the instant case, a permissive user (Hurst) was injured by an uninsured motorist (Schmidt). When State Farm successfully denied liability, the O'Neale vehicle became an uninsured motor vehicle.

> The uninsured motorist statute does not appear to contemplate single-car accidents. We do not believe, however, the legislature intended an otherwise insured passenger to lose coverage when an unauthorized driver takes the wheel. The construction of the statute urged by respondent would relieve the carrier of responsibility when a named insured is the victim of a carjacking. We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. Our interpretation of § 38-77-30(13) comports with the plain language of the statute and advances its policies.

Id. at 368, 529 S.E.2d at 283 (citations omitted).

In Collins v. Doe, Collins took evasive action to avoid colliding with an unknown driver who failed to yield the right of way at an intersection. 352 S.C. at 464-465, 574 S.E.2d at 740. In doing so, she hit another vehicle. Collins failed to present a signed affidavit, but she did produce a witness who testified at trial that a vehicle driven by Doe caused the accident. Id. The trial court found that Collins's failure to supply an affidavit was fatal to her cause of action. Id. The Supreme Court articulated:

> In this case, the Court of Appeals held that the purpose of the sworn affidavit requirement is served where a witness testifies at trial. We disagree. We discern three purposes for the sworn affidavit requirement. The obvious purpose, fraud prevention, is seemingly served by the Court of Appeals' conclusion. By offering sworn trial testimony, the witness subjects herself to the criminal penalties for perjury. However, the statute reflects that the legislature's chosen vehicle for fraud prevention under these circumstances is a sworn affidavit prominently displaying the prescribed disclaimer. The disclaimer alerts the affiant that she may be subject to criminal penalties for providing untrue information. The affidavit also allows the defendant, at trial, to cross examine the witness regarding the statement. The Court of Appeals' holding forecloses the defendant's ability to conduct

> cross examination regarding the witness's statement in the affidavit.
>
> In addition, the affidavit constitutes tangible evidence that the insured has a good faith basis for making the claim.
>
> Finally, the sworn affidavit requirement fulfills a notice function: Providing, upon request, the defendant-insurer with information relating to the validity of the plaintiff's case. Without the affidavit, and without the opportunity to interview the witness, the insurer is deprived of valuable factual information with which to assess and evaluate the claim.

Id. at 469-70, 574 S.E.2d at 743 (footnote omitted).

The Supreme Court examined the statutory requirement of section 38-77-170(2) in Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d 626 (2004). Gilliland advanced that two young men waved at her from a pick-up truck as she was leaving a grocery store at night. The men began to follow her and "'rode her bumper' for a two-mile stretch." Id. at 198, 592 S.E.2d at 627. Gilliland sped up in an attempt to get away from the truck, but she lost control of her car, ran off the road, and hit a tree. She testified that the truck never made contact with her car and that the boys backed off when she began to lose control. Id. Gayle Norris was stopped at a nearby intersection when she saw the lights of two vehicles come around the curve. After Gilliland's accident, Norris observed the lights of an automobile behind Gilliland "'arc through a field' as if it were making a U-turn." Id. at 199, 592 S.E.2d at 627.

The jury returned a verdict for Gilliland, and the trial court denied Doe's motion for JNOV. This Court reversed and granted the JNOV. The Supreme Court considered whether Norris's testimony met the "independent witness" requirement of section 38-77-170:

> We find the record includes sufficient evidence that an unknown vehicle was involved in Petitioner's accident.

> In Marks v. Indus. Life & Health Ins. Co., 212 S.C. 502, 505, 48 S.E.2d 445, 446, this Court held that "[t]he attending circumstances along with direct testimony may be taken into account by the jury in arriving at its decision as any fact in issue may be established by circumstantial evidence, if the circumstances, which must themselves be proven lead to the conclusion with reasonable certainty."
>
> We now hold that the testimony of Gayle Norris contained circumstantial evidence that supports Petitioner's testimony that an unknown driver contributed to her accident. Norris's testimony that she saw the lights of an unknown car that was turning around and fleeing the scene of the accident sufficiently corroborates Petitioner's testimony creating a question of fact as to causation for the jury.

Id. at 202, 592 S.E.2d at 628-29.

In Shealy v. Doe, 370 S.C. 194, 634 S.E.2d 45 (Ct. App. 2006), cert denied, Aug. 9, 2007, we discussed the witness affidavit requirement. Eddie Bolin was driving a pickup truck owned by Dale Leaphart. Jason Shealy and Ronald Cromer sat in the bed of the truck. Bolin swerved abruptly, throwing Shealy and Cromer from the truck. Bolin later explained to Shealy and the police that he swerved to avoid hitting an unknown vehicle. Shealy filed a complaint against the unknown driver to recover against Leaphart's UM carrier for his injuries.

> The affidavit he attached to his complaint stated:
>
> Personally appeared before me, Jason Shealy, who being duly sworn deposes and says as follows:
>
> That he is Jason Shealy and that on or about June 7, 2003, he was a passenger in a pickup truck being driven by Eddie Bolin and, upon information and belief, owned by Dale Leaphart. That the pickup truck was being driven on Highway 391 near Batesburg-

> Leesville, South Carolina. That Eddie Bolin sharply, unexpectedly and suddenly swerved the truck near the entrance to Leaphart Acres, throwing the affiant and another passenger from the bed of the truck onto the roadway. That the day following the incident the affiant was told by Eddie Bolin that an unknown vehicle and driver had come onto the roadway in the path of the truck causing Eddie Bolin to sharply and unexpectedly maneuver the truck he was driving to avoid a collision.
>
> A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

Id. at 197, 634 S.E.2d at 46-47.

Additionally, Shealy submitted the affidavit of Ronald Cromer, which contained identical language to Shealy's affidavit. The trial court granted Doe's motion to dismiss, recognizing that evidence presented during the hearing converted the motion into one for summary judgment. The court held Shealy failed to comply with the witness affidavit requirement of section 38-77-170(2). We explained:

> Section 38-77-170(2) is clear on its face. It expressly requires that someone other than the owner or operator of the insured vehicle witness the accident. As stated in Wausau Underwriters Insurance Company v. Howser, 309 S.C. 269, 275, 422 S.E.2d 106, 110 (1992), "no physical contact with the unknown vehicle is necessary when a witness other than the owner or driver of the insured vehicle is able to **attest to the facts of the accident**." (Emphasis added.) See also Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 744 (2002) ("The plain language of § 38-77-170 requires that where the accident involves no physical contact between the insured's vehicle and the unidentified vehicle, the accident 'must have been witnessed by someone other than the owner or operator of the insured vehicle' and the 'witness must

> sign an affidavit attesting to the truth of the facts of the accident contained therein.'"). Shealy asserts section 38-77-170(2) does not require the witness affidavit to be based on personal knowledge. This argument directly contravenes the language of the statute. Shealy submitted affidavits of two people who apparently did not witness the accident; their affidavits do not attest to facts they perceived, but merely restate the perceptions of the vehicle's operator. Thus, Shealy produced no evidence that someone other than Bolin, the operator of the insured vehicle, witnessed the accident. Shealy's and Cromer's affidavits do not comply with this express directive.
>
> . . .
>
> According to Shealy, requiring the affiant to have witnessed the accident creates an unreasonably harsh result because a sleeping passenger or blind passenger injured by a John Doe driver might be precluded from recovery. Yet the statute indubitably bars an operator and lone occupant of a vehicle from recovery where no contact is made with the unknown driver and where no one else witnesses the accident. In both instances, the result is lamentable to the injured party, but mandated by the statute. Section 38-77-170 demonstrates a policy decision by the legislature which balances the interest of parties injured in accidents with unknown drivers, with the interest of insurance companies in preventing fraudulent claims. Where the legislature determines policy and promulgates a clear rule of law, there is no room for the courts to alter that decision.

Id. at 200-01, 634 S.E.2d at 48-49.

III. Application to the Case Sub Judice

Enos admits she cannot comply with the affidavit requirement of section 38-77-170(2). The only witnesses to the accident were Enos, the vehicle's owner, and presumably, the unknown operator of the vehicle. We

discussed the hypothetical consequence to a sleeping or blind passenger in Shealy v. Doe. 370 S.C. at 201, 634 S.E.2d at 49. We described the resulting bar to recovery as "lamentable to the injured party, but mandated by the statute." Id. The same outcome applies to an intoxicated passenger with no recollection, which embraces Enos on the morning of and night prior to the accident.

Even if Enos were not intoxicated and could remember who was driving at the time of the accident, the legislature has clearly dictated that recovery from an uninsured motorist carrier is only allowed when certain conditions are met. S.C. Code Ann. § 38-77-170 (2002) ("If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, **there is no right of action or recovery under the uninsured motorist provision, unless**: . . .") (emphasis added). Because there was no physical contact with another vehicle, Enos must present an affidavit from "someone other than the owner or operator of the insured vehicle" in order to bring an action or recover. S.C. Code Ann. § 38-77-170(2) (2002). The General Assembly has unequivocally spoken on the prerequisites to bringing an action against an uninsured motorist carrier, and Enos has failed to meet the sine qua non prescribed by the legislature.

Enos's argument that the legislature did not intend to require affidavits in single-vehicle accidents is unavailing. Enos is correct in her assertion that "[t]he uninsured motorist statute 'is remedial in nature, enacted for the benefit of injured persons, and is to be liberally construed so that the purpose intended may be accomplished.'" Schmidt, 339 S.C. at 366, 529 S.E.2d at 282 (quoting Gunnels v. Am. Liberty Ins. Co., 251 S.C. 242, 247, 161 S.E.2d 822, 824 (1968)). Section 38-77-170(2) requires an affidavit when there is no physical contact with an unknown vehicle, but it is not restricted to a collision caused by an unknown vehicle. The affidavit requirement applies equally to a single-car accident as an accident caused by an unknown vehicle. "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Thompson ex rel. Harvey v. Cisson Constr. Co., 377 S.C. 137, 157, 659 S.E.2d 171, 181 (Ct. App. 2008).

We do not reach Enos's second issue regarding evidence of Doe's negligence because her action is barred for her failure to comply with section 38-77-170(2).

CONCLUSION

Our courts have historically required strict compliance with section 38-77-170. Collins, 352 S.C. at 470, 574 S.E.2d at 743. The statute is clear and unambiguous. Enos may not maintain an action against an unknown driver where there is no witness to the accident other than the vehicle's owner or operator.

Accordingly, the judgment of the circuit court is

AFFIRMED.

WILLIAMS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Herwig Baumann, Vickie Baumann, Richard J. Dillard, Charles C. Fagan, III, William C. Ferguson, George H. Forrest, Christine L. Forrest, Frederick B. Killmar, Mary C. Killmar, Daniel Milligan, Barbara Milligan, Carol S. O'Neil, Richard O'Neil, Peter Panciera, Patricia C. Wetmore, William E. Whitmer, Mildred Wood, and Catherine Delesky, Plaintiffs,

Of Whom Herwig Baumann, Vickie Baumann, William C. Ferguson, Frederick B. Killmar, Mary C. Killmar, Daniel Milligan, and William E. Whitmer are Appellants/Respondents,

v.

Long Cove Club Owners Association, Inc., Respondent/Appellant.

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

Opinion No. 4445
Heard September 16, 2008 – Filed October 14, 2008

AFFIRMED

Thomas Kemmerlin, Jr., of Beaufort and William M. Bowen, of Hilton Head Island, for Appellant/Respondent.

Terry A. Finger, of Hilton Head Island, for Respondent/Appellant.

KONDUROS, J.: Appellants/Respondents (the Baumanns) appeal the trial court's failure to find Long Cove Club Owners Association, Inc. (Long Cove) violated certain covenants and award them attorney's fees. Additionally, Long Cove appeals the trial court's failure to award it attorney's fees. We affirm.

FACTS

Long Cove Club Subdivision is a residential subdivision located on Hilton Head Island. In addition to houses, the subdivision includes a golf course and club house. In 2004, "Amended and Restated General Declaration for Long Cove Club Subdivision and Provisions for the Long Cove Club Owners Association, Inc." (the Covenants) were adopted and recorded, establishing Long Cove as the owners association for the subdivision. All property owners in the subdivision are members of Long

Cove. Long Cove is governed by a Board of Directors (the Board), which the members elect.

The Covenants provide:

> Where specifically provided herein, the Members, or some specific portion thereof, shall have the power to approve or reject certain actions proposed or require certain actions to be taken by the Association by Referendum including but not limited to the levy by the Association of any Special Assessment, or changes to the Capital Assessments, or the addition or deletion of the functions or services which the Association is authorized to perform. In the event a majority, or more, of the votes actually returned to the Association within the specified time shall be in favor of such action, the Referendum shall be deemed to "pass" and the action voted upon will be deemed to have been authorized by the Members; provided however, that if a higher percentage vote required to "pass" shall be specifically expressed herein, that higher percentage shall control in that instance. The Board of Directors may not undertake any action requiring a Referendum without complying with the provisions hereof.
>
> Members may, upon written application to the Secretary of the Association signed by fifteen percent (15%) or more Members, all of whom are in good-standing with the Association and represent fifteen percent (15%) or more properties, call for a meeting of the membership to require the Association to take certain action by Referendum. The signed application submitted to the Secretary of the Association must state the issue(s), state the facts pertinent to the issue(s), and recommend alternative

> resolution(s). The Association shall within 10 days of receipt of such application, provide notice of a meeting to be called in accordance with the above. The notice of the meeting shall include a statement prepared by the Members requesting the meeting stating the reasons for the meeting.

(Emphasis added). The Covenants further provide:

> The assessment revenue collected from the Capital Assessment and the Initiation Fees shall only be used for capital purchases, major maintenance, asset replacement, and debt reduction (including lease payments). Any expenditure from these segregated funds in excess of $150,000.00 for a single item or project must be approved by the Membership either as part of the annual budget or in a separate Referendum.

(Emphasis added).

Additionally, the Covenants state:

> Section 1. Who May Enforce Generally. In the event of a violation or breach of any of the affirmative obligations or restrictions contained in this Declaration by any Property Owner or agent of such Property Owner, the Association or any other property owners or any of them jointly and severally shall have the right to proceed at law or in equity to compel a compliance with the terms hereof or to prevent the violation or breach in any event.
>
> Section 2. Enforcement In addition to the foregoing, the Association or a Property Owner shall have the right to proceed at law or in equity to

> compel compliance to the terms hereof or to prevent the violation or breach in any event.
>
> In the event of any litigation, the prevailing party shall be entitled to recover its reasonable attorney's fees and costs of such litigation. If the violation is not expeditiously terminated, the Association may engage legal counsel to bring an appropriate injunctive action, including any appeals, to enforce these covenants. Violators shall be obligated to reimburse the Association in full for all its direct and indirect costs, including but not limited to legal fees incurred by the Association in maintaining compliance with theses covenants.

(Emphasis added).

In January 2006, the Board approved a nine-year agreement with Club Car Corporation for $450,000, under which Club Car was to provide Long Cove with golf carts. Additionally, in June 2006, the Board approved a proposal for $525,000 from Plantation Interiors, Inc. to refurbish and redecorate the club house. Long Cove did not submit either of these expenditures for member approval at the annual meeting or in a separate referendum.

Ninety-two members of Long Cove submitted a request for a referendum on the two expenditures, which the Board determined to meet the fifteen percent required for referendum. The Board mailed the members information about a "Special Meeting of the Association" regarding the request for the referendum. The mailing included a "Notice of Special Meeting," which stated the purpose of the meeting was "[t]o receive the report from the Inspector of Elections on the results of an election to decide whether action by Referendum shall be required in connection with approval of the 'long-term plan to purchase golf carts and the $525,000.00 Redecorating and Refurbishing Plan.'" The mailing also included a statement from the members who had called for the meeting. In that

statement, the members explained they had called for the meeting to approve or disapprove the following two actions undertaken by the Board:

> At a Meeting of the Board of Directors on January 23, 2006 approved the execution of a long-term agreement, for approximately $450,000, with ClubCar Corp for the purchase and replacement of our golf cart fleet for the period 2006-2014 and;
>
> At an Executive Session of the Board on June 28, 2006 approved the redecoration and refurnishing of the clubhouse at a cost of approximately $525,000.

On September 18, 2006, the Board conducted a referendum. The choices for voters were "Do Not Require a Referendum" and "Require a Referendum." 251 votes were cast for "Do Not Require a Referendum" and 102 votes were cast for "Require a Referendum."

In September 2006, the Baumanns filed a declaratory judgment action seeking to compel Long Cove to comply with the Covenants. Following a bench trial, the trial court found for Long Cove.[1] The Baumanns filed a Rule 59(e), SCRCP, motion for reconsideration and Long Cove applied for attorney's fees. The trial court denied both the motion for reconsideration and Long Cove's application for attorney's fees. This appeal followed.

STANDARD OF REVIEW

"Restrictive covenants are construed like contracts and may give rise to actions for breach of contract." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006). "An action to construe a contract is an action at law reviewable under

[1] In the order, the trial court actually stated it was dismissing the Baumann's amended complaint with prejudice. However, in its order denying Long Cove's attorney's fees and the Baumanns' motion for reconsideration, it stated it had entered judgment in favor of Long Cove.

an 'any evidence' standard." Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). On appeal of an action at law tried without a jury, this court's review is limited to correction of errors at law. Epworth Children's Home v. Beasley, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005). The trial court's findings are equivalent to a jury's findings in a law action. King v. PYA/Monarch, Inc., 317 S.C. 385, 389, 453 S.E.2d 885, 888 (1995). Questions regarding credibility and the weight of the evidence are exclusively for the trial court. Sheek v. Crimestoppers Alarm Sys., 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989). "We must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary." Id.

LAW/ANALYSIS

I. The Baumanns' Appeal

A. Violation of Covenants

The Baumanns argue the trial court erred in refusing to find Long Cove violated the Covenants, based on the Business Judgment Rule asserting the Rule only protects a board when it acts within its authority. Additionally, the Baumanns contend the trial court erred in finding Long Cove had the right to frame the question for the referendum.[2] We disagree.

A corporation can only exercise the powers granted to it by law, its charter or articles of incorporation, and any by-laws made pursuant thereto. Lovering v. Seabrook Island Prop. Owners Ass'n, 289 S.C. 77, 82, 344

[2] The Baumanns further maintain the trial court erred in finding under the Governance Principles the power to interpret the Covenants is vested in the Board. Because the Baumanns abandoned this argument in their brief, we will not address it. See Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

S.E.2d 862, 865 (Ct. App. 1986) aff'd as modified on other grounds, 291 S.C. 201, 352 S.E.2d 707 (1987) overruled on other grounds by S.C. Code Ann. § 33-31-302. "In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action." Goddard v. Fairways Dev. Gen. P'ship, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993); see also Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 599, 538 S.E.2d 15, 25 (Ct. App. 2000) ("Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith."). "Acts beyond the scope of a corporation's powers as defined by law or its charter are ultra vires." Lovering, 289 S.C. at 82, 344 S.E.2d at 865. The business judgment rule only applies to intra vires acts, not ultra vires ones. Kuznik, 342 S.C. at 605, 538 S.E.2d at 28.

The Covenants required Long Cove to obtain member approval by referendum or in the annual budget for expenditures over $150,000. Long Cove secured the member approval by referendum. Although the notice of the meeting included a statement prepared by the Members giving the reasons for the meeting, Long Cove did not phrase the referendum questions in the manner the Baumanns proposed. Nonetheless, the choices at the meeting amounted to either approving the expenditures or denying the expenditures. Because the majority voted for no referendum, the expenditures were approved by referendum. Accordingly, the record contained evidence Long Cove did not violate the Covenants.

B. Attorney's Fees

The Baumanns contend they were entitled to attorney's fees and costs under the Covenants. We disagree.

Generally, attorney's fees are not recoverable unless authorized by contract or statute. Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 383, 377 S.E.2d 296, 297 (1989). When a contract authorizes attorney's fees, the award of those fees is left to the discretion of the trial court and will not be

disturbed unless an abuse of discretion is shown. Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). Because the Baumanns did not prevail in proving Long Cove had violated the Covenants, the trial court did not err in failing to award them attorney's fees.

II. Long Cove's Appeal

Long Cove argues the trial court erred in failing to award it attorney's fees because the Covenants provided a prevailing party shall be entitled to recover attorney's fees and costs. We disagree.

In Queen's Grant II, 368 S.C. at 373-75, 628 S.E.2d at 919-20, this court reviewed covenants containing an attorney's fees clause similar to that in this case. The section of the covenants Greenwood Development relied upon to support its claim for attorney fees and costs provided:

> Enforcement. Greenwood shall have the right, but shall not be obligated, to proceed at law or in equity to complete compliance to the terms of this Agreement or to prevent violation or breach in any event. Violators shall be personally obligated to reimburse Greenwood in full for all its direct and indirect costs, including, but not limited to, legal fees incurred by Greenwood in maintaining compliance with this declaration, and such obligation shall constitute a lien upon the violator's property in accordance with Section 8-8.

Id. at 374, 628 S.E.2d at 920. This court found, "The question presented is whether Queen's Grant may be considered a 'violator' in filing and pursuing its Complaint, primarily seeking prospective declaratory relief." Id. The court determined, "The provision allows for the recovery of attorney fees only against 'violators' of the covenants. Because Queen's Grant may not be fairly characterized as a 'violator' of the covenants, we affirm the circuit

court's denial of Greenwood Development's motion for attorney fees." Id. at 375, 628 S.E.2d at 920.

The record contains evidence to support the trial court's decision that the Covenants only provided for attorney's fees for parties who demonstrate the opposing party violated the Covenants. Long Cove did not prove or even allege the Baumanns had violated any Covenants. Accordingly, we affirm the trial court's denial of Long Cove's request for attorney's fees.

CONCLUSION

Because the evidence in the record supports the finding that the expenditures were approved by referendum, the trial court did not err in finding Long Cove did not violate the Covenants. Additionally, the trial court did not err in failing to award the Baumanns because the Baumanns were not a prevailing party. Moreover, we affirm the trial court's denial of Long Cove's request for attorney's fees because it did not allege the Baumanns had violated the Covenants. Accordingly, the trial court is

AFFIRMED.

ANDERSON and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Vista Antiques and Persian Rugs, Inc., Respondent,

v.

Noaha, LLC, Luxomnia Corporation, Gary A. Anglin, Jr., Patrick F. Anglin, and Gary A. Anglin, Sr., Appellants.

Appeal From Richland County
Casey L. Manning, Circuit Court Judge

Charlotte B. Perrell, of Atlanta; Tucker S. Player, of Columbia, for Appellants.

Tobias G. Ward, Jr., of Columbia, for Respondent.

Opinion No. 4446
Heard September 18, 2008 – Filed October 17, 2008

REVERSED

KONDUROS, J.: This appeal concerns the circuit court's ruling that Noaha, LLC, Luxomnia Corporation, Gary A. Anglin, Jr., Patrick F. Anglin, and Gary A. Anglin, Sr. (collectively "Noaha") breached the terms of a settlement agreement as read into open court by failing to make an unconditional tender of settlement. We reverse.

PROCEDURAL BACKGROUND/FACTS

Vista Antiques and Persian Rugs, Inc. ("Vista") filed suit against Noaha alleging inter alia breach of contract. After the selection of a jury, but before opening arguments in the trial, the parties reached a settlement. The record of this agreement as read by Vista's attorney in open court is as follows:

> Your Honor, the settlement that's been reached is that this case will be dismissed with prejudice by an order of dismissal with prejudice to be consented to by the parties and signed by your honor.
>
> Furthermore, the defendants, each and every one of them, will consent to and sign and deliver to me a confession of judgment which will provide for the payment of $165,000 within 18 months. And there will be additional payment terms in there, $25,000 of the 165 within 30 days.
>
> Further, in kind consideration, in addition to the 165,000 the return of 15 rugs, three of which shall be room size Herizes, the confession of judgment will have an attorney's fee provision that in the event of default, that the cost of enforcing the judgment or collecting the judgment will be recoverable.
>
> And, finally, the confession of judgment will have a no contest stipulation. If it's required to be

> domesticated in some state other than South Carolina, the defendants agree not to contest the domestication.

Vista prepared a consent order and confession of judgment, which it forwarded to Noaha for execution. The order stated: "The Defendants agree to pay the Plaintiff $165,000 within 18 months, $25,000 of which shall be paid by February 3, 2006, and the balance of $140,000 in 4 equal installment payments of $35,000 plus interest beginning June 10, 2006." The confession indicated Noaha agreed to pay Vista "an attorney's fee of 25% of the amount then due in the event of any default in payment or performance under the Order."

Noaha tendered the $25,000 payment[1] to Vista accompanied by a letter stating it "had every intention of fulfilling the terms of the Settlement Agreement as expressed in Court . . . ." However, the letter further stated "Defendants do not agree with your attempt to add interest payments or to require any payment schedule beyond the initial payment and the remaining amount due within 18 months."

Vista filed a motion asking the court to award it the full settlement amount. Vista argued Noaha tendered the $25,000 but the tender was conditional thereby violating the settlement agreement. The circuit court judge[2] determined Noaha did not timely tender unconditional payment of the $25,000 as they had "agreed to 'additional terms' in open court and upon the record that were to be agreed upon, but have failed to agree to any such terms." The court ordered Noaha to pay the full $165,000 plus interest pursuant to section 34-31-20(A) of the South Carolina Code (Supp. 2006)

[1] Noaha also gave Vista the rugs contemplated by their agreement, and there is no dispute on that point.

[2] The trial was before Judge Reginald Lloyd who had been appointed as U.S. Attorney for South Carolina at the time of Vista's motion to enforce the settlement agreement. The motion was heard by Judge Casey L. Manning.

from February 2, 2006, the day the initial payment of $25,000 was tendered, to the date of the entry of judgment.[3] This appeal follows.

LAW/ANALYSIS

I. Breach of Settlement Agreement

Noaha contends the circuit court erred in finding it failed to make an unconditional tender to Vista. We agree.

Rule 43(k) of the South Carolina Rules of Civil Procedure provides no agreement between counsel shall be binding unless reduced in writing and entered into the record or "unless made in open court and noted upon the record." The purpose of Rule 43(k) is:

> [T]o prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes, which it has been said are often more perplexing than the case itself. The time of the court should not be taken up in controversial matters of this character.

Ashfort Corp. v. Palmetto Constr. Group, Inc., 318 S.C. 492, 495, 458 S.E.2d 533, 535 (1995) (quoting 83 C.J.S. Stipulation § 4 (1953)); see also Motley v. Williams, 374 S.C. 107, 111, 647 S.E.2d 244, 246 (Ct. App. 2007) (stating the application of Rule 43(k) will help avoid disputes regarding the terms of settlement).

Settlement agreements are reviewed by the circuit court in much the same way as contracts. Patricia Grand Hotel, LLC v. MacGuire Enters., 372 S.C. 634, 640, 643 S.E.2d 692, 695 (Ct. App. 2007). When "an agreement is

[3] The payment of $25,000 was tendered on February 2, 2006. The parties agree that payment was due on or before February 3, 2006.

clear and capable of legal construction, the courts [sic] only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." Messer v. Messer, 359 S.C. 614, 628, 598 S.E.2d 310, 317 (Ct. App. 2004). When an agreement is plain and unambiguous, the court does not have the authority to modify its terms. Patricia Grand Hotel, 372 S.C. at 640, 643 S.E.2d at 695. "However, where 'the language of a settlement agreement is susceptible of more than one interpretation, it is the duty of the court to ascertain the intentions of the parties.'" Id. (quoting Mattox v. Cassady, 289 S.C. 57, 60, 344 S.E.2d 620, 622 (Ct. App. 1986)).

Vista relies on the phrase "additional payment terms" to support its contention that the parties agreed to negotiate certain additional terms including a payment schedule, interest, and attorney's fees. Noaha claims it never agreed to additional terms and such terms were not part of the agreement as they were not read into the record.

The circuit court held a very brief hearing regarding Vista's motion to enforce the settlement agreement on the record. In this hearing, Noaha contended it never agreed to any terms other than what was specifically read into the record in open court. The circuit court judge then heard the parties in chambers so that any other evidence regarding intentions is not before us for review. Therefore, we are left primarily with the transcript of the settlement agreement to consider.

In this case, to read additional specific terms into the agreement, without evidence such terms were contemplated by the parties seems to reach beyond our judicial purview. It is possible no actual meeting of the minds occurred in this case. See Patricia Grand Hotel, 372 S.C. at 638-39, 643 S.E.2d at 694-95 (discussing Ozyagcilar v. Davis, 701 F.3d 306 (4th Cir. 1989) wherein the appellate court reversed the district court's enforcement of a settlement agreement upon a party's request when there was no meeting of the minds as to the specifics of the settlement agreement). However, neither party argues there was no meeting of the minds or seeks to have the agreement set aside in this case.

In Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 557 S.E.2d 708 (2001), the court considered whether attorney's fees were contemplated under a settlement agreement. The defendants offered $20,000 to the plaintiffs to settle all claims. Id. at 178, 557 S.E.2d at 711. The plaintiffs accepted the offer. Id. The court concluded no other terms were added, and the court was without the power to add them. Id. "We are without authority to alter a contract by construction or to make new contracts for the parties. Our duty is limited to the contract made by the parties themselves 'regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully.'" Id. (quoting C.A.N. Enters. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988)).

Looking at the settlement agreement, we believe Noaha made an unconditional tender of $25,000 to Vista and thereby did not breach the settlement agreement as read into the record.

II. Interest

Additionally, Noaha maintains the circuit court erred in awarding interest to Noaha from the date of the judgment. We agree.

A major point of contention in this case is if and when interest was due to Vista on the $165,000 settlement. Full payment of the $165,000 was due by July 6, 2007, eighteen months from the date of settlement, under either interpretation of the agreement.[4] Neither party disputes that this total sum was due under the settlement. Noaha contends that interest was not a part of the agreement, because it was not a term read into the record. However, interest is provided for by statute. Section 34-31-20(A) provides "[i]n all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum."

[4] Noaha did not pay the settlement amount to Vista on or before July 6, 2007, nor did Noaha pay the money into the court pending the resolution of this litigation.

Had Noaha breached the settlement agreement by placing conditions on the $25,000 tender, then payment of interest would accrue from the time of that breach, February 3, 2006. However, because we find Noaha made an unconditional tender that Vista refused, the running of interest stopped. See Ruscon Constr. Co. of Fla. v. Beaufort-Jasper Water Auth., 259 S.C. 314, 320, 191 S.E.2d 715, 717 (1972) ("It is a long recognized principle in our courts that a valid tender stops the running of interest."). Therefore, statutory interest applies, and it would not commence until the date the full payment was due to Vista, July 6, 2007.

CONCLUSION

We find Noaha made a valid tender of $25,000 to Vista in accordance with the terms set forth in the settlement agreement as read in open court. Furthermore, we would find Vista is entitled to statutory interest pursuant to section 34-31-20(A) of the South Carolina Code from July 6, 2007. Accordingly, the order of the circuit court is

REVERSED.

ANDERSON and WILLIAMS, JJ., concur.