OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 42

November 7, 2005

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

Owners Insurance Company, Plaintiff,

v.

Charles Salmonsen, individually and on behalf of all others similarly situated, CDG, Inc. f/k/a Charleston Gypsum Dealers & Supply Co., Inc., Frank Crider, Raymond G. Walford, Henry (Hank) Futch, and Harold Hal) Futch, Defendants.

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF SOUTH CAROLINA

David C. Norton, United States District Court Judge

Opinion No. 26059
Heard September 21, 2005 - Filed November 7, 2005

QUESTION ANSWERED

Morgan S. Templeton and Graham P. Powell, of Elmore & Wall, P.A., of Charleston, for plaintiff.

Mary Leigh Arnold, of Mt. Pleasant; and Steven L. Smith, of Smith, Collins & Newton, of Charleston, for defendants.

JUSTICE MOORE: We accepted this certified question to determine the meaning of the term "occurrence" in a commercial general liability insurance policy.

FACTS

The underlying action in this federal case is a products liability class action arising from the sale of defective Parex, a synthetic stucco distributed by Defendant CGD, Inc.[1] The defective stucco allegedly caused water intrusion that damaged class members' property. CGD was insured at the time under a commercial general liability insurance policy issued by Plaintiff Owners Insurance Company (Insurer). Insurer sought a declaratory judgment that the policy in question does not provide coverage for this class action.

The district court ruled in favor of coverage but found an issue remains regarding the amount of coverage depending upon the meaning of the term "occurrence." The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." If distribution of the stucco to various buyers is considered one occurrence, the policy's per occurrence limit of $1 million applies; if each sale is an occurrence, the aggregate limit of $2 million applies.

The following question was certified to this Court:

> To determine the number of occurrences for purposes of a commercial general liability insurance policy's liability limit, will South Carolina adopt the majority or minority rule?

[1]The seller of defective goods may be liable under S.C. Code Ann. § 15-73-10 (2005).

ISSUE

Is each individual sale of a defective product an occurrence or is the general act of distribution a single occurrence?

DISCUSSION

As discussed in various treatises, the majority rule in interpreting the meaning of "occurrence" in a liability policy is the so-called "cause test" which focuses on the cause of the damage rather than the number of claimants or injuries. The minority view, on the other hand, focuses on the effect of the insured's action and considers each event or each injury a separate occurrence. *See generally* Michael Sullivan, Annotation, What Constitutes Single Accident or Occurrence within Liability Policy Limiting Insurer's Liability to a Specified Amount Per Accident or Occurrence, 64 A.L.R.4th 668 (2004); Am.L. Prod. Liab. 3d § 58:28 (2005); 46 C.J.S. Insurance § 1129 (2005). The discussion of a majority-versus-minority view summarizes an amalgam of cases, including vehicle accidents, flooding, fist-fights, and so on,[2] and is not limited to product liability cases. Notably, there is no prevailing view in the specific context of product liability cases involving the distribution of a defective product. *Compare* Champion Internat'l Corp. v. Continental Cas. Co., 546 F.2d 502 (2d Cir. 1976) (repeated sale of defective paneling was only one occurrence), *and* Murice Pincoffs Co. v. St. Paul Fire & Marine Ins. Co., 447 F.2d 204 (5th Cir. 1971) (each sale of defective bird feed was separate occurrence). In light of the diverse contexts in which the meaning of "occurrence" may arise, we decline the district court's invitation to simply choose the majority or minority view and instead focus narrowly on the issue at hand.

This case involves the distribution of inherently defective goods, and not the defective distribution of otherwise satisfactory goods.[3] There is no

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[2]*See* Annot., *supra*, §§ 8-19.

[3]We are persuaded by Insurer's argument that Michigan Chem. Corp. v. American Home Assurance Co., 728 F.2d 374 (6th Cir. 1984), a products liability case, is distinguishable from the case before us. In that case, the

indication CGD defectively distributed the product in question. Further, the policy here provides coverage for an "occurrence" including a "continuous and repeated exposure to substantially the same general harmful conditions." Because the distributor has taken no distinct action giving rise to liability for each sale, we conclude under this policy definition that placing a defective product into the stream of commerce is one occurrence.

Accordingly, we limit our ruling on this issue by focusing on the specific context and policy language before us and conclude there has been a single occurrence.

QUESTION ANSWERED.

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

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federal court, applying Illinois law, concluded that each shipment was a separate occurrence where the insured accidentally shipped flame retardant instead of a feed supplement. The flame retardant was mixed into livestock feed sold to farmers whose animals had to be destroyed as a result of the contamination. It was the insured's defective distribution which caused the damage rather than an inherent defect in the product as manufactured.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gregory Tillotson, Respondent,

v.

Keith Smith Builders, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
Charles B. Simmons, Jr., Circuit Court Judge

Opinion No. 26060
Heard October 6, 2005 - Filed November 7, 2005

DISMISSED AS IMPROVIDENTLY GRANTED

James W. Logan, Jr., of Logan, Jolly & Smith, LLP, of Anderson, for Petitioner.

Kenneth C. Porter, of Porter & Rosenfeld, of Greenville, for Respondent.

Jack D. Griffeth, of Love, Thornton, Arnold & Thomason, of Greenville, for Amicus Curiae.

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals' opinion in Tillotson v. Keith Smith Builders, 357 S.C. 554, 593 S.E.2d 621 (Ct. App. 2004). We dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Gilbert Bowie, Petitioner.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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

Opinion No. 26061
Submitted October 18, 2005 - Filed November 7, 2005

AFFIRMED IN PART, VACATED IN PART

Assistant Appellate Defender Robert M. Pachak, of the South Carolina Office of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Attorney General Charles H. Richardson, all of Columbia, and Solicitor Warren Blair Giese, of Columbia, for Respondent.

PER CURIAM: Petitioner has filed a petition asking this Court to review the Court of Appeals' decision in State v. Gilbert Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004). We grant the petition, dispense with further briefing, and affirm the portion of the Court of Appeals' decision dealing with probable cause. However, we vacate the portion of the Court of Appeals' decision dealing with the issue of standing as the issue was not properly before the court.

AFFIRMED IN PART, VACATED IN PART.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur. MOORE, J., not participating.

The Supreme Court of South Carolina

In the Matter of Arthur T. Meeder, Petitioner.

ORDER

In 1997, petitioner was disbarred. In the Matter of Meeder, 327 S.C. 169, 488 S.E.2d 875 (1997). Petitioner has now filed a petition for reinstatement. The Committee on Character and Fitness recommends the petition be granted upon certain conditions.

We grant the petition for reinstatement, subject to the following conditions:

1. For a minimum of two years after his reinstatement, petitioner shall limit his practice to construction law.

2. For a minimum of two years after his reinstatement, petitioner shall be employed as an attorney with George Mullen, Esquire. During the first two years of petitioner's reinstatement and employment with Mr. Mullen, Mr. Mullen shall file quarterly reports with the Office of Disciplinary Counsel which detail petitioner's progress in returning to the practice of law.

3. Petitioner shall maintain a patient-physician relationship with Dr. Ziad Nahas or someone of similar skill and expertise. For the two year period following petitioner's reinstatement, the physician shall provide ODC with quarterly reports addressing petitioner's progress.

Thereafter, the physician shall file semiannual reports with ODC which address petitioner's progress.

4. Within two (2) years from the date of his reinstatement, petitioner shall make restitution of $36,000 to Mr. and Mrs. Harold Coar. When he has completed payment of restitution, petitioner shall provide ODC with proof that he has made full restitution to the Coars.

5. Petitioner shall obtain the "Revised Lawyers Oath" continuing legal education video/DVD and related form affidavit from the South Carolina Bar. After viewing the video/DVD, petitioner shall complete the affidavit and return the video/DVD and completed affidavit to the South Carolina Bar. The South Carolina Bar shall notify the Clerk in writing that petitioner has completed this condition.

Once the South Carolina Bar notifies the Clerk that petitioner has signed the affidavit attesting to viewing the "Revised Lawyers Oath" video/DVD, petitioner shall be scheduled to be sworn in.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Moore, J., not participating

Columbia, South Carolina

November 2, 2005

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kenneth Shuler, Husband, Jason Brandon Shuler, Minor Child and William Bryant Shuler, Minor Child, Beneficiaries of Linda Shuler, Deceased Employee, Respondents,

v.

Gregory Electric, Employer and Comptrust AGC of South Carolina, Appellants.

Appeal From Lexington County
Alison Renee Lee, Circuit Court Judge

Opinion No. 4039
Heard September 13, 2005 – Filed November 7, 2005

AFFIRMED

Richard C. Detwiler and Mikell H. Wyman, both of Columbia, for Appellants.

E. Courtney Gruber and R. Walter Hundley, both of Charleston, and W. Scott Palmer, of Santee, for Respondents.

HEARN, C.J.: Gregory Electric appeals from an order of the circuit court affirming the single commissioner and full commission's award of workers' compensation benefits to the survivors of Linda Shuler, who died on her return home from a doctor's office where she received treatment for a previous compensable injury. We affirm.

FACTS

Shuler worked as an electrician's helper for Gregory Electric (Employer). In August of 2001, Shuler injured her right hand while holding a ladder for a co-worker. It is undisputed that Shuler's hand injury was work-related, and as a result of the injury, Shuler received treatment from an employer-authorized physical therapist and doctor in Columbia, South Carolina. On November 15, 2001, Shuler left her home in Orangeburg, South Carolina at approximately 2:20 p.m. to receive physical therapy on her hand. Although she did not have an appointment, she was able to see the physical therapist and doctor that afternoon, and left the doctor's office at 6:30 p.m.

While exiting off of I-77 South onto I-26 East, Shuler drove into the guardrail on the right side of the exit ramp, overcorrected, and crashed headfirst into the guardrail on the left side of the exit ramp. Some time after the accident occurred, Albert Chatfield, III, was driving on the exit ramp and had to swerve into the right lane in order to avoid Shuler's car, the trunk of which was protruding into the road. Chatfield testified that he was "not very sure" of what time it was when he discovered Shuler's car, but guessed it was somewhere between 7:30 and 8:00 p.m. Because Shuler's windows were very tinted and her doors were locked, Chatfield did not realize anyone was in the vehicle, but he called 911 because Shuler's vehicle posed a hazard for other motorists.

Trooper Brian E. Kyzer from the South Carolina Highway Patrol responded to Chatfield's call and arrived at the scene at 8:27 p.m. When Trooper Kyzer arrived, he shined a flashlight into Shuler's car

and saw that she was inside, slumped toward the passenger's seat. He called an ambulance, but Shuler's injuries were fatal.

The parties dispute Shuler's activities between the time she left the doctor's office and the time Shuler's car was found. Trooper Kyzer testified that he found bags from a grocery store and a dollar store in Shuler's backseat and that Shuler's daughter had told him Shuler planned to go shopping after her visit to the doctor.[1] Based on his investigation, Trooper Kyzer surmised that the accident occurred at 8:15 p.m., give or take a few minutes.

The single commissioner awarded benefits to Shuler's husband and her dependent children, finding the accident arose out of and in the course of her employment. In making this finding, the commissioner noted that Shuler was bound by the terms of the Workers' Compensation Act at the time of the accident and that she could have lost her right to weekly benefits if she failed to receive the authorized medical treatment as directed. The single commissioner further found that Shuler's car could have been on the side of the road for some time before it was discovered, that Trooper Kyzer's estimated time of the accident was not based on any personal knowledge, and that the exact time of Shuler's accident could never be definitively established. The commissioner took judicial notice of "the fact that 6:30 – 7:30 p.m. is considered by many to be the 'supper hour,'" and found that even if Shuler stopped at a grocery store after her visit to the doctor's office, "such a stop would be insubstantial and would be covered under the allowed 'personal comfort' deviation." Finally, the commissioner found that Shuler was being paid mileage by Employer for this trip to her physical therapist and doctor.

Employer appealed to the full commission, which adopted the single commissioner's order verbatim. Employer then appealed to the circuit court, which also affirmed the award of benefits. The circuit court found that because Employer reimbursed Shuler for mileage

[1] Shuler's daughter testified that she never told Trooper Kyzer her mother planned to go shopping before returning to Orangeburg.

while traveling to the doctor's office, her accident fell within an exception to the general rule that an employee is not covered by workers' compensation while traveling to and from work. The circuit court also found Shuler was performing a special errand by visiting her physical therapist and doctor, which qualified her trip for another recognized exception to the going and coming rule. While the circuit court disagreed that Shuler's trip to the store fell within the personal comfort doctrine, it found she was entitled to benefits because at the time of the accident she had resumed her business route. This appeal followed.

STANDARD OF REVIEW

Generally, it is a question of fact whether an injury arose out of and was in the scope of employment. Sharpe v. Case Produce, Inc., 336 S.C. 154, 159, 519 S.E.2d 102, 105 (1999) (citation omitted). Because causation is a question of fact, the full commission's decision on the issue must be affirmed if it is supported by substantial evidence in the record. Id. at 160, 519 S.E.2d at 105. However, we may reverse or modify the commission's decision if it is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Hargrove v. Titan Textile Co., 360 S.C. 276, 288-89, 599 S.E.2d 604, 610-11 (Ct. App. 2004). Substantial evidence is that which, in viewing the record as a whole, would allow reasonable minds to reach the conclusion the full commission reached. Gray v. Club Group, Ltd., 339 S.C. 173, 183, 528 S.E.2d 435, 440 (Ct. App. 2000) (citation omitted).

LAW/ANALYSIS

I. Arising Out of and in the Scope of Employment

Employer first argues Shuler's accident, which occurred on her way home from an unscheduled, unannounced doctor's appointment, neither arose out of nor was in the scope of her employment as an electrician's helper. In support of its argument, Employer cites to

Douglas v. Spartan Mills, Startex Div., 245 S.C. 265, 140 S.E.2d 173 (1965).

In Douglas, the claimant sustained a compensable injury while working as a doffer at a mill and received temporary disability benefits. He returned to work, but filed a claim seeking additional benefits for permanent partial disability and disfigurement. Id. at 266-267, 140 S.E.2d at 173-174. A hearing was set for the morning of September 20, 1965, but claimant misread the notice and reported for work that morning. Id. at 267, 140 S.E.2d at 174. Claimant's attorney called the mill, and claimant's supervisor notified him of his hearing and allowed him to leave. Claimant went home, changed clothes, and was on his way to the hearing when his steering gear failed, and he ran into a bridge abutment. Claimant sought workers' compensation benefits for the injuries he sustained in the accident, and the single commissioner, full commission, and circuit court all agreed that he was entitled to benefits. Id. However, the supreme court reversed, finding the accident did not arise in the course of employment. Specifically, the court stated: "The causative danger here was the defective steering apparatus on the claimant's automobile, which we think was clearly independent of the relation of master and servant and not incidental to the character of the business or the employment." Id. at 269, 140 S.E.2d at 175. The court further noted that "[t]he only connection which the employer had with the particular accident was that the employer cooperated with and accommodated the claimant and his attorney in notifying the claimant and letting him off from work for the purpose of attending a hearing which claimant had sought for his own benefit." Id. at 270, 140 S.E.2d at 175.

Like the claimant in Douglas, Employer points out that Shuler was operating her personal vehicle at the time of the accident and was exposed only to the dangers of driving an automobile on a public road. However, unlike the claimant in Douglas, Shuler was traveling from a medical visit, albeit unplanned, that was necessitated by her previous compensable injury. Because she was bound by the Workers' Compensation Act, she was required to visit this particular doctor's office in Columbia or she risked losing her benefits. See S.C. Code

Ann. § 42-15-60 (1985) ("The refusal of an employee to accept any medical, hospital, surgical or other treatment when provided by the employer or ordered by the Commission shall bar such employee from further compensation until such refusal ceases . . . unless in the opinion of the Commission the circumstances justified the refusal . . . .").

Not only is Douglas distinguishable from the case at hand, but so too are all reported South Carolina cases. Thus, we consider jurisprudence from other jurisdictions to determine the compensability of additional injuries a claimant sustains while journeying to or from a doctor's office for a previous work-related injury. Although there is authority to the contrary,[2] most states that have addressed this issue find an injury suffered during such a journey is compensable. 1 Arthur Larson & Lex K. Larson, Workers' Compensation Law, § 10.07 (Compensable Consequences) (2004).

In Taylor v. Centex Constr. Co., 379 P.2d 217 (Kan. 1963), the Kansas Supreme Court held that an injury sustained by an employee

[2] See, e.g., Wyoming ex rel. Wyo. Workers' Safety & Comp. Div. v. Bruhn, 951 P.2d 373, 377-78 (Wyo. 1997) (denying benefits to claimant who died while returning from treatment for a compensable injury because "[t]he accident was not a hazard of her employment that she would not have been subjected to apart from her job nor did it result from a risk reasonably incident to the character of the business"); Lee v. Industrial Comm'n, 656 N.E.2d 1084, 1088 (Ill. 1995) (refusing to award benefits for injuries claimant sustained while crossing the street after receiving treatment from an employer-approved medical clinic because the claimant was under no duty or obligation to receive treatment at the time he did); Gayler v. North Am. Van Lines, 566 N.E.2d 84 (Ind. Ct. App. 4 Dist. 1991) (denying compensation for injuries claimant suffered while on her way to pick up a piece of medical equipment that was part of her prescribed treatment for a previous work-related accident; the court found that even though the employer agreed to pay for the medical equipment and had authorized treatment, the intervening negligence of a third party broke the causal link between the claimant and her employment).

while traveling to medical treatment for a prior compensable injury arose out of and in the course of employment. In Taylor, claimant suffered an eye injury while working for Centex Construction as a cement mason foreman. Centex allowed him to visit a doctor for his injury, which claimant did. On his way back from the doctor, claimant had his truck greased at his son's service station and ate lunch. He then stopped by a convenience store, purchased a drink, and when he was within two miles of his job site, he collided with a road sweeper, sustaining serious injuries to his knee. Id. at 218. In finding that claimant's knee injuries were compensable, the Kansas Supreme Court noted that pursuant to the Workers' Compensation Act, an employer is under a duty to furnish medical care. Likewise, an employee is under a duty to submit to reasonable medical treatment. These statutory duties become part of the employment contract by implication, and therefore, an accidental injury sustained while en route to or from treatment for a compensable injury is work related because it is made pursuant to contractual obligations. Id. at 221.

We agree with the reasoning set forth in Taylor. Under the law of workers' compensation, employers must furnish, and employees must submit to, medical treatment for work-related injuries. See S.C. Code Ann. §§ 42-15-60 and 42-15-80 (Supp. 2004). Thus, when an employer authorizes an employee to seek medical attention for a prior injury and the employee sustains additional injuries while fulfilling her obligation to submit to medical treatment, such additional injuries are sufficiently causally related to employment to be compensable. See also Font v. New York City Bd. of Educ, 566 N.Y.S.2d 754, 755 (1991) (holding that injuries claimant suffered while traveling to a doctor's office for treatment of another compensable injury were work-related and compensable); Moreau v. Zayre Corp., 408 A.2d 1289, 1293-94 (Me. 1979) (awarding benefits to claimant who was injured in an automobile accident while driving home after receiving medical treatment for a previously compensable hand injury because the employee had a correlative duty to accept medical treatment for the initial compensable injury and therefore was fulfilling an implied duty of the employment contract when she got into the accident); Bero v. Workmen's Comp. Appeal Bd., 645 A.2d 342, 345 (Pa. Commw. Ct.

1994) (finding that "but-for" driving to his physical therapist for treatment of his work-related injury, claimant would not have been in the car accident that caused additional injuries, and therefore the additional injuries were compensable).[3]

Here, Shuler's fatal accident occurred while she was fulfilling her duty to submit to treatment for a previous compensable injury. Thus, her subsequent injuries arose out of and were in the scope of her employment.

II. "Going and Coming" Rule

Employer next argues the circuit court erred by finding Shuler's accident fell within an exception to the "going and coming" rule. Under this rule, an employee who is going to or coming from work is generally not considered to be engaged in performing any service growing out of or incidental to employment, and therefore, an injury sustained by accident at such a time does not arise out of and in the

[3] We acknowledge that some states, such as Florida, have a statute addressing this very issue. See Fla. Stat. § 440.092(5) ("Injuries caused by a subsequent intervening accident arising from an outside agency which are the direct and natural consequence of the original injury are not compensable unless suffered while traveling to or from a health care provider for the purpose of receiving remedial treatment for the compensable injury."). Notably, Florida's statute was enacted in 1990, and prior to its enactment, Florida courts had already awarded benefits to claimants who suffered injuries en route to medical treatment for a previous compensable injury. See, e.g., All American Wheel World, Inc. v. Gustafson, 499 So.2d. 876, 877 (Fla. App. Dist. 1 1986) (finding that the injury claimant sustained in an automobile accident while on his way to receive treatment from a chiropractor for a previous compensable injury was also compensable); see also IMC Phosphates Co. v. Prater, 895 So.2d 1263, 1269 (Fla. App. Dist. 1 2005) (discussing section 440.092(5) and the date of its enactment). Likewise, those jurisdictions cited above which favor compensation have made their rulings despite having no statute directly on point.

course of employment. McDaniel v. Bus Terminal Rest. Mgmt. Corp., 271 S.C. 299, 247 S.E.2d 321 (1978)). As discussed above, we believe Shuler was, at the time of her accident, performing a service that was incidental to her employment in that she was fulfilling her obligation under the Workers' Compensation Act to submit to treatment. Thus, her injuries were sufficiently related to her employment so as to place the accident outside the parameters of the "going and coming" rule.

III. Intervening Personal Deviations

Finally, Employer argues the award of death benefits should be reversed because of the intervening personal deviations between the time Shuler left the doctor's office and the time of her accident. We disagree.

The full commission found that even if Shuler stopped by the grocery store after her treatment in order to purchase supper for her family, such a deviation was "insubstantial and would be covered under the allowed 'personal comfort' [doctrine]." The circuit court found this ruling was erroneous because the application of the personal comfort doctrine "has consistently been limited to imperative acts such as eating, drinking, smoking, seeking relief from discomfort, preparing to begin or quit work, and resting or sleeping." Osteen v. Greenville County Schoool District, 333 S.C. 43, 47-48, 508 S.E.2d 21, 23 (1998). However, the circuit court found Shuler's injuries were compensable even in light of her deviation to the store because at the time of her accident, she had returned to the route of the business trip.

Upon reviewing the record, we note the commission never actually found Shuler had deviated from her route to go shopping. Rather, the commission first found that the time of the accident could never be clearly established and that Shuler may have stopped to eat dinner between 6:30 p.m. and 7:30 p.m. Only after making those findings did the commission go on to find that *even if* Shuler did stop by the grocery store to buy dinner for her family, such a trip would be encompassed by the personal comfort doctrine.

There is substantial evidence in the record supporting the commission's findings. See Gibson v. Spartanburg School Dist. No. 3, 338 S.C. 510, 516, 526 S.E.2d 725, 728 (Ct. App. 2000) ("In an appeal from the Commission, this Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law."). No one witnessed Shuler's accident, and as the Good Samaritan who called in the accident testified, numerous cars drove around Shuler's wrecked vehicle without calling authorities. Thus, her car may have been on the road for a substantial period of time before Trooper Kyzer investigated the scene. Furthermore, although Trooper Kyzer testified that Shuler's daughter told him her mother planned to stop at the grocery store after her doctor's visit, when Shuler's daughter testified, she denied ever saying such a thing. There was no evidence presented regarding how long the shopping bags had been in Shuler's backseat or whether the bags contained perishable items. Thus, there is substantial evidence to support a finding that Shuler did not deviate from her business trip.

CONCLUSION

Based on the foregoing, we find Shuler's death resulted from an accident arising from and in the course of her employment. The going and coming rule does not preclude her from receiving benefits, and there is substantial evidence Shuler did not deviate from her route home. Accordingly, the award of benefits is

AFFIRMED.

STILWELL, J., concurs, and KITTREDGE, J., dissents in a separate opinion.

KITTREDGE, J.: I respectfully dissent, for I believe that Linda Shuler's November 18, 2001, motor vehicle accident—following the unscheduled doctor's appointment—did not arise out of and in the course of her employment with Gregory Electric. I would reverse.

Since the essential facts are undisputed, the question before us is one of law. Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 517, 526 S.E.2d 725, 729 (Ct. App. 2000).

The disposition of this appeal requires a proper understanding and application of the statutory requirement that an injury, to be compensable, must "aris[e] out of and in the course of the employment." S.C. Code Ann. § 42-1-160 (Supp. 2004). I find our supreme court's decision in Douglas v. Spartan Mills, Startex Division, 245 S.C. 265, 140 S.E.2d 173 (1965), persuasive, both factually and legally.

There, David Douglas filed a workers' compensation claim against his employer, Spartan Mills. The Industrial Commission, predecessor to the Workers' Compensation Commission, scheduled a hearing at the Spartanburg Courthouse on the morning of September 20, 1961. Douglas misread the hearing notice and reported for work that morning at the Startex plant. A supervisor notified Douglas of the hearing about one hour before the hearing was to begin. Douglas left work, drove home to change clothes and then headed to the courthouse, about a three-mile drive. Douglas was injured in a motor vehicle accident en route to the courthouse. The accident was caused by a defective steering mechanism. Douglas filed a claim for compensation as a result of the September 20 accident. Id. at 267, 140 S.E.2d at 174.

The Commission found Douglas had sustained a compensable injury by accident, arising out of and in the course of employment. Id. at 266, 140 S.E.2d at 173. The circuit court affirmed. Our supreme court reversed and held, as a matter of law, that Douglas's injury did not arise out of and in the course of his employment:

> While the Workmen's Compensation Act has to be construed liberally in favor of coverage, and doubtful cases should be resolved in favor of the injured employee, we think the accident here clearly did not arise out of and in the

> course of the employment of the claimant, within the intent of the legislature in enacting the Workmen's Compensation Act.

Id. at 270, 140 S.E.2d at 175-176

The court's discussion of the separate elements—"arising out of" and "in course of employment"—is helpful in determining the compensability of Shuler's accident following her visit to the doctor on November 18, 2001. Both elements must be present for an accident to be compensable, and they must be concurrent and simultaneous. Id. at 268, 140 S.E.2d at 174. "'[T]he words 'arising out of' refer to the origin of the cause of the accident, while the words 'in the course of employment,' have reference to the time, place and circumstances under which the accident occurs.'" Id. at 268-69, 140 S.E.2d at 175 (quoting Eargle v. S.C. Elec. & Gas Co., 205 S.C. 423, 32 S.E.2d 240 (1944).

An injury "arises out of" the employment when a causal connection exists between the conditions under which the work is required to be performed and the resulting injury. Douglas, 245 S.C. at 269, 140 S.E.2d at 175 (quoting In re Employers' Liab. Assurance Corp., 102 N.E. 697 (Mass. 1913)). The court described this causal link as follows:

> Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would

> have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

Id.

With respect to the requirement that the accident arise "in the course of employment," the court explained:

> An injury arises in the course of employment within the meaning of the Workmen's Compensation Act when it occurs within the period of employment at a place where the employee reasonably may be in the performance of his duties, and while he is fulfilling those duties, or engaged in doing something incidental thereto.

Douglas, 245 S.C. at 269, 140 S.E.2d at 175 (quoting Fowler v. Abbott Motor Co., 236 S.C. 226, 113 S.E.2d 737 (1960)).

Applying these rules of reason to Douglas's accident while en route from work to his workers' compensation hearing, the supreme court found the accident "was clearly not a compensable one. The causative danger here was the defective steering apparatus on the claimant's automobile, which we think was clearly independent of the

relation of master and servant and not incidental to the character of the business or the employment." Douglas, 245 S.C. at 270, 140 S.E.2d at 175.

I think it is at least equally clear that Shuler's November 18 accident, following her doctor's visit for a prior work-related injury, lacked the requisite causal connection to her employment and was in no manner incidental to the character of her employment with Gregory Electric. Under Douglas, the accident must result from some exposure peculiar to the employment, and not a hazard to which all workers are equally exposed. Id. at 269, 140 S.E.2d at 175. Additionally, the injury arises in the course of employment only when it occurs at a place where the employee reasonably may be in the performance of her duties or "something incidental thereto." Id. The accident occurred while Shuler was driving her own vehicle on a public road. Her duties as an employee did not require anything of her at the time and place of the accident. See id. at 270, 140 S.E.2d at 175. Instead, the doctor's visit was required only for compensation under the statute.

The majority assigns significance to an injured employee's statutory obligation to pursue required medical treatment as a condition of continued entitlement to workers' compensation benefits. I do not view this "duty to submit to treatment" as a sufficient nexus to employment to satisfy the "arising out of" and "in course of employment" elements.

An employee does not need a statute to know there is a duty to report to work, for an employee must show up at work to keep her job. Yet we readily acknowledge that under normal circumstances the "going and coming" rule would preclude recovery to an employee injured while traveling to or from work. See McDaniel v. Bus Terminal Rest. Mgmt. Corp., 271 S.C. 299, 302, 247 S.E.2d 321, 322 (1978) (holding that pursuant to the "going and coming" rule, injuries sustained while an employee is going to or coming from work generally

are not compensable because the injuries do not arise out of and in the course of employment.) The rationale for the rule is straightforward—traveling risks are those shared by public.

Were Shuler going to or from her job at Gregory Electric, I do not believe we would entertain the notion that an accident was work-related. Application of the "going and coming" rule would foreclose such a claim. Since the court today professes continued adherence to the "going and coming" rule, it seems to me that today's policy decision—the finding of a compensable, work related injury—would serve to favor those going to or from a doctor's visit over those employees actually working who must travel to and from work. I do not understand the policy reasons for elevating the rights of those going to and from the doctor's office over workers traveling to and from work.

I believe that the Douglas holding and analysis controls here, and I would not resort to canvassing the law in other states, where the decisions predictably go both ways. I would follow the lead of our supreme court in Douglas:

> If it is the intent of the legislature to include within the terms of the Workmen's Compensation Act employees injured while engaged in activities not in the course of their employment, though arising indirectly by reason of their employment, then the Act will have to be accordingly amended.

Douglas, 245 S.C. at 270-271, 140 S.E.2d at 176 (quoting Fountain v. Hartsville Oil Mill, 207 S.C. 119, 32 S.E.2d 11 (1945)). See also Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003) (holding that because workers' compensation statutes provide an exclusive compensatory system in derogation of common

law rights, they must be strictly construed, leaving ambiguities to be resolved by the legislature).

The General Assembly has yet to accept this now 40-year-old invitation to amend the Workers' Compensation Act to provide for coverage in such circumstances. Nor has our supreme court sought to retreat from its holding in Douglas. Based on my view of prevailing South Carolina law, I would reverse the award of worker's compensation benefits to the estate of Linda Shuler.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Commander Health Care Facilities, Inc., Appellant,

v.

South Carolina Department of Health and Environmental Control and Heritage Home of Florence, Respondents.

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

Opinion No. 4040
Heard September 12, 2005 – Filed November 7, 2005

REVERSED AND REMANDED

Wm. Howell Morrison and Phyllis W. Ewing, both of Charleston, for Appellant.

Cheryl Harris Bullard and Matthew Summers Penn, both of Columbia and Karl A. Folkens and Philip B. Atkinson, both of Florence; for Respondents.

HEARN, C.J.: In this declaratory judgment action, Commander Health Care Facilities, Inc. appeals the circuit court's grant of summary judgment in favor of the South Carolina Department of Health and Environmental Control and Heritage Home of Florence. We reverse and remand.

FACTS

Commander Health Care Facilities and Heritage Home of Florence both operate nursing home facilities in Florence County. In 1997, Heritage Home applied for and was granted a certificate of need by the South Carolina Department of Health and Environmental Control (DHEC) for the replacement of 44 Medicaid beds with 44 residential care beds. In May 1998, Heritage Home applied for another certificate of need for the addition of 60 new nursing home beds to be dedicated to serving Medicaid patients.

In June 1998, the South Carolina legislature passed the 1998 Appropriation Bill, including Proviso 9.35 which appropriated funds for Medicaid patient days for the 1998-1999 fiscal year. This bill, which became effective on July 1, 1998, authorized a substantial number of additional Medicaid patient days and set forth provisions for granting permits for the additional Medicaid days "notwithstanding any other provision of law." At the time this bill passed, Heritage Home had already requested approval of additional Medicaid beds through the May certificate of need.

In September 1998, DHEC Commissioner Douglas E. Bryant wrote Senator Hugh Leatherman of Florence, requesting an interpretation of Proviso 9.35. As a result of that letter, Bryant and Senator Leatherman researched the legislative intent of the proviso and determined the proviso applied to currently licensed beds plus those nursing home beds issued under a 1998 certificate of need. Senator Leatherman also opined in the letter that Proviso 9.35 would allow for the expansion of Medicaid beds without requiring a certificate of need. Commissioner Bryant stated the "legislative intent was to maximize the number of beds available." Moreover, Albert Whiteside, Director of the Division of Planning and Certification of Need with DHEC, testified because the number of new Medicaid beds approved by

the legislature in 1998 exceeded the number of requests for additional Medicaid beds from nursing homes, no application for new Medicaid beds was denied in 1998.

On October 5, 1998, DHEC authorized Heritage Home to license 44 additional Medicaid beds under Proviso 9.35 and withdrew Heritage Home's pending May 1998 certificate of need. DHEC never issued a certificate of need for the new Medicaid beds; the only approval was pursuant to Proviso 9.35. Commander never applied for any of the additional Medicaid beds under Proviso 9.35. Nor did DHEC deny Commander approval for additional beds under the proviso.

In June 2000, Commander filed a declaratory judgment action seeking to overturn DHEC's approval of additional new Medicaid beds for Heritage Home. Commander also sought a declaration that DHEC's grant of permission to Heritage Home to build new Medicaid beds under Proviso 9.35 without obtaining a formal certificate of need was in violation of the provisions of the South Carolina Code prohibiting special legislation. In addition, Commander sought a permanent injunction prohibiting DHEC from authorizing the construction of new Medicaid beds under Proviso 9.35 without requiring facilities to obtain a formal certificate of need. Commander and Heritage, together with DHEC, filed cross-motions for summary judgment. Heritage Home and DHEC argued Commander lacked the standing necessary to maintain the declaratory judgment action. The circuit court agreed, and granted the motion. This appeal followed.

LAW/ANALYSIS

Commander argues the circuit court erred in (1) finding Commander lacked standing, and (2) granting summary judgment in favor of Heritage Home and DHEC. We agree.

I. Standing

Commander contends the circuit court erred in finding that it suffered no injury in fact, and therefore, lacked standing to maintain the declaratory judgment action. We agree.

As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation.[1] Glaze v. Grooms, 324 S.C. 249, 478 S.E.2d 841 (1996). Moreover, a private individual may not invoke the judicial power to determine the validity of an executive or legislative act unless the private individual can show that, as a result of that action, a direct injury has been sustained, or that there is immediate danger a direct injury will be sustained. Joytime Distribs. & Amusement Co., Inc. v. State, 338 S.C. 634, 639, 528 S.E.2d 647, 649-50 (1999). The injury must be of a personal nature to the party bringing the action, not merely of a general nature that is common to all members of the public. Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 34, 530 S.E.2d 369, 371 (2000).

However, "the rule of standing is not an inflexible one." Thompson v. South Carolina Comm'n on Alcohol & Drug Abuse, 267 S.C. 463, 467, 229 S.E.2d 718, 719 (1976). Standing may be conferred upon a party "when an issue is of such public importance as to require its resolution for future guidance." Baird v. Charleston County, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). Recently, South Carolina courts have held standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance. See Sloan v. Wilkins, 362 S.C. 430, 608

[1] "A party seeking to establish standing must prove the 'irreducible constitutional minimum of standing,' which consists of three elements: (1) the plaintiff must have suffered an injury in fact; (2) the injury and the conduct complained of must be causally connected; and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision." Sea Pines Ass'n for the Prot. of Wildlife v. South Carolina Dep't of Natural Res. & Cmty. Servs. Assocs., Inc., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 55 (1992)).

S.E.2d 579 (2005); see also Sloan v. Sanford, 357 S.C. 431, 593 S.E.2d 470 (2004) (finding standing existed to challenge governor's commission as an officer in the Air Force reserve); Sloan v. Greenville County, 356 S.C. 531, 548, 590 S.E.2d 338, 347 (Ct. App. 2003) (finding standing to bring declaratory judgment action alleging county failed to comply with ordinances governing procurement of construction services on design-build public works projects).

In Sloan v. Wilkins, 362 S.C. 430, 608 S.E.2d 579 (2005), a taxpayer sought to challenge a legislative enactment as violative of the South Carolina Constitution. Sloan challenged the legislative enactment as violative of the South Carolina Constitution's "one subject provision" as found in Art. 3, section 17. Wilkins argued Sloan lacked the standing necessary to maintain an action challenging the legislative enactment. The supreme court, in its original jurisdiction, found Sloan had the standing to challenge the legislative enactment "in light of the great public importance of this matter." Wilkins, 362 S.C. at 437, 608 S.E.2d at 583. The supreme court held that "standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." Id.

Similar to the action taken in Wilkins, Commander seeks to challenge a legislative enactment, Proviso 9.35 of the 1998 Appropriations Bill, as violating the established certificate of need program as required by the State Certificate of Need and Health Facility Licensure Act contained in section 44-7-110, et seq. of the South Carolina Code (2002). We deem the legislature's funding and regulation of the state's nursing home facilities, especially the regulation of Medicaid and Medicaid spending, an issue of great public importance. Moreover, the legislature has the opportunity in each year's Appropriations Bill to regulate the nursing home industry and corresponding Medicaid requirements. Therefore, in light of the great public importance and need for future guidance for the legislature in this area, we find Commander has standing to maintain this action.

II. Summary Judgment

Commander argues the circuit court erred in granting summary judgment in favor of Heritage and DHEC. Specifically, Commander

contends a material issue of fact exists as to whether the term "Medicaid patient days" as used in Proviso 9.35 is synonymous with the use of "Medicaid patient beds" as used in the certificate of need program. We agree.

In reviewing the grant of a summary judgment motion, the appellate court must apply the same standard which governs the trial court under Rule 56, SCRCP. South Carolina Elec. & Gas Co. v. Town of Awendaw, 359 S.C. 29, 34, 596 S.E.2d 482, 485 (2004). Summary judgment is appropriate when there are no genuine disputes of material facts and a party is entitled to a judgment as a matter of law. Rule 56, SCRCP; Etheridge v. Richland School Dist. One, 341 S.C. 307, 311, 534 S.E.2d 275, 277 (2000). "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Id.

Here, Heritage applied for the additional Medicaid beds under Proviso 9.35, and its original certificate of need for the beds was withdrawn. Based on Heritage's application for the beds under the Proviso, DHEC issued 44 additional Medicaid beds. Proviso 9.35 addresses provisions for granting permits for the "additional Medicaid days" while the Certificate of Need program focuses on "additional Medicaid beds." DHEC maintains the terms are used interchangeably, and that one Medicaid bed equals 365 Medicaid patient days, therefore enabling DHEC to grant the 44 beds under the Proviso. However, DHEC cannot point to any case, statute, regulation, or provision that has established this "formula" to be the universally accepted definition in the nursing home community. Therefore, we find a material issue of fact exists as to whether the term "Medicaid patient days" as used in Proviso 9.35 is synonymous with the use of "Medicaid patient beds" as used in the certificate of need program. Accordingly, the circuit court erred in granting summary judgment in favor of Heritage Home and DHEC.

CONCLUSION

Because the circuit court erred in finding Commander lacked standing, and in granting summary judgment in favor of Heritage and DHEC, the decision of the circuit court is hereby

REVERSED and REMANDED.

BEATTY and SHORT, J.J. concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Maurice Bessinger and Piggy Park Enterprises, Inc., Appellant,

v.

BI-LO, Inc, Respondent.

Maurice Bessinger and Piggy Park Enterprises, Inc., Appellant,

v.

The Kroger Co. and Mark Gray, Respondents.

Maurice Bessinger and Piggy Park Enterprises, Inc., Appellant,

v.

Publix Super Markets, Inc. and John Easterbrook, Respondents.

Maurice Bessinger and Piggy Park Enterprises, Inc., Appellant,

v.

Piggly Wiggly, Inc., Respondent.

Appeal From Lexington County
William P. Keesley, Circuit Court Judge

Opinion No. 4041
Heard September 13, 2005 – Filed November 7, 2005

AFFIRMED

George McMaster, of Columbia and Glen Winston La Force, Sr., of Hilton Head Island, for Appellant.

C. Mitchell Brown, of Columbia, John Y. Tiller and Elizabeth Applegate Dieck, both of Charleston, Kenneth E. Young, of Greenville, Kevin A. Dunlap, of Spartanburg and Steven Daniel Weber, of Charlotte, for Respondents.

GOOSLBY, J.: Maurice Bessinger and Piggie Park Enterprises, Inc. (collectively "Plaintiffs") appeal the dismissal of their claims against various retail grocers and store managers (collectively "Defendants") filed under the South Carolina Unfair Trade Practices Act (SCUTPA). We affirm.

FACTS/PROCEDURAL BACKGROUND

The facts in this appeal are restricted to the allegations of Plaintiffs' complaint and are assumed to be true for the purpose of our review of the appealed order.[1]

[1] See Overcash v. South Carolina Elec. & Gas. Co., 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005) ("A motion to dismiss a claim pursuant to Rule

Maurice Bessinger is a native South Carolina businessman and an officer and principal shareholder in Piggie Park Enterprises, Inc. After opening his first restaurant in 1953 in Charleston, South Carolina, Bessinger expanded his business enterprise to include eleven restaurants in the Midlands Area of South Carolina as well as a large bottling and packaging plant for mass production of barbecue sauce and meat for sales in retail stores. Until September 2000, numerous supermarket chains continuously stocked and sold Plaintiffs' products for between fifteen and thirty years.

In July 2000, after the Confederate battle flag was removed from the Statehouse dome, Plaintiffs began flying a Confederate flag at each of their restaurants. In August 2000, The State newspaper published an article that criticized Plaintiffs for this action and for distributing religious literature at their restaurants. Subsequently, other stories appeared in both print and broadcast media about Bessinger's political and religious views, with special emphasis on the controversy surrounding the Confederate battle flag.

During the next two months, several retail grocers discontinued selling Plaintiffs' products and removed the remaining items in stock from their shelves. The only reason these various retailers gave for dropping Plaintiffs' products was Bessinger's political and religious views. There was never any allegation that Plaintiffs' products were unpopular with consumers or of less than the highest quality. The only symbol with any political significance at all on the packaging of Plaintiffs' products was a small American flag on the labels of Bessinger's barbecue sauce.

On August 16, 2001, Plaintiffs sued nine corporate entities and several individual store managers in the Lexington County Court of Common Pleas alleging Defendants' discontinuation of and refusal to display Plaintiffs' products constituted violations of the SCUTPA. After filing the original

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12(b)(6), SCRCP, must be based solely on the allegations set forth on the face of the complaint.").

complaint as a joint action, Plaintiffs decided to proceed against the various defendants separately.

On June 21, 2002, the amended complaint was further amended to name BI-LO as a separate defendant. On July 25, 2002, BI-LO moved to dismiss the case under Rule 12(b)(6), SCRCP, for failure to state a cause of action. After oral argument on the motion, Circuit Judge Kenneth G. Goode issued an order on December 27, 2002, denying the motion. His order stated: "[I]t appears to this Court that the Amended Complaint does state a valid claim for relief. Plaintiffs have alleged facts sufficient to constitute a cause of action under the SCUTPA." On June 17, 2003, Circuit Judge James Williams filed a consent order permitting Plaintiffs "to file and serve a Second Amended Complaint repleading allegations as to damages, after [BI-LO] will be able to respond and plead additional constitutional defenses to the amended complaint." Plaintiffs' amended complaint pursuant to this order was filed July 18, 2003.

The remaining corporate and individual defendants were served with amended complaints as separate actions during July and August of 2003. From August through October 2003, five of the nine corporate defendants[2] and their individual store managers removed their cases to federal court based on diversity of citizenship and moved to dismiss the actions against them under Rule 12(b)(6), FRCP. After a consolidated hearing on October 20, 2003, United States District Court Judge Joseph F. Anderson, Jr., issued an order dated November 20, 2003, upholding the removals to federal court and dismissing the actions.[3]

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[2] The corporate defendants removing the actions against them to the district court were Food Lion, Winn-Dixie, Sam's Club, Wal-Mart, and Harris Teeter.

[3] Bessinger v. Food Lion, Inc., 305 F. Supp. 2d 574 (D.S.C. 2003). The Fourth Circuit affirmed Judge Anderson's order in an unpublished opinion dated November 19, 2004. On May 16, 2005, the United States Supreme Court denied Bessinger's petition for certiorari without comment. Bessinger v. Food Lion, LLC, 125 S. Ct. 2270 (2005).

After Judge Anderson dismissed Plaintiffs' lawsuit in the federal court, BI-LO moved again to dismiss the state court action under Rule 12(b)(6) in the Lexington County Court of Common Pleas.[4] The remaining state court defendants joined in the motion.[5] On January 6, 2004, Chief Justice Jean Hoefer Toal signed an order vesting Circuit Judge William P. Keesley with exclusive jurisdiction to hear and dispose of Plaintiffs' state court actions.

Judge Keesley heard the motions to dismiss on March 1, 2004. On March 12, 2004, he issued an order specifically adopting the reasoning in Judge Anderson's order and ruling that (1) he was not bound by Judge Goode's earlier ruling denying BI-LO's first motion to dismiss because the complaint against BI-LO had been amended in a substantial way; and (2) under the facts as alleged in their complaints, Plaintiffs could not recover under the SCUTPA.

Plaintiffs appeal.[6]

LAW/ANALYSIS

1. We reject Plaintiffs' contention that Judge Keesley erred in determining he was not bound by Judge Goode's order denying a previous

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[4] BI-LO's second motion to dismiss is not in the record on appeal; however, its memorandum in support of the motion was dated January 6, 2004.

[5] These defendants were Publix and the manager of its Lexington County Store, Kroger and the manager of its Lexington County store, and Piggly Wiggly.

[6] BI-LO moved to transfer the appeal from this court to the supreme court on the ground that the case involved a matter of significant public interest and legal principle of major importance. The supreme court denied this motion on June 25, 2004.

Rule 12(b)(6) motion by BI-LO to dismiss the case for failure to state a cause of action upon which relief could be granted. It is clear from South Carolina case law that "[t]he denial of a Rule 12(b)(6) motion does not establish the law of the case nor does it preclude a party from raising the issue at a later point or points in the case."[7] BI-LO, therefore, was free to file a second motion to dismiss Plaintiffs' complaint at a later time.[8]

2. We disagree with Plaintiffs' argument that they sufficiently pled the elements of an "unfair" act to state an actionable grievance under the SCUTPA.

The SCUTPA declares unlawful "unfair . . . acts or practices in the conduct of any trade or commerce."[9] "An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive."[10]

We agree with the trial court that the allegations in the complaint do not suggest Defendants committed acts that would be unfair under the SCUTPA. Assuming without deciding that Defendants terminated their business relationships with Plaintiffs solely because of Bessinger's statements, there is

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[7] Huntley v. Young, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995).

[8] Furthermore, contrary to Plaintiffs' argument, regardless of whether Judge Keesley correctly determined that the complaint against BI-LO had been amended in a substantial way, the "law of the case doctrine" did not prevent him from granting BI-LO's second motion to dismiss. See Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard, 334 S.C. 244, 245, 513 S.E.2d 96, 96-97 (1999) (noting the law of the case doctrine "applies only to subsequent proceedings in the same litigation following an appellate decision").

[9] S.C. Code Ann. § 39-5-20(a) (1985).

[10] Gentry v. Yonce, 337 S.C. 1, 12, 522 S.E.2d 137, 143 (1999).

no First Amendment violation.[11] Moreover, as free market participants, the defendant grocery store chains and their respective managers have the right to choose with whom they conduct their business.[12] Although Plaintiffs are correct that this right "is not an absolute, unfettered privilege," recent case law indicates that in South Carolina the enactment of the SCUTPA has not affected this right.[13] Moreover, we agree with Judge Anderson's statement

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[11] See White People's Party v. Ringers, 473 F.2d 1010, 1015 (4th Cir. 1973) ("There is no dispute that the first amendment protects from state interference the expression in a public place of the unpopular as well as the popular . . . .") (emphasis added); Allston v. Lewis, 480 F. Supp. 328, 334 (D.S.C. 1979) (finding a trade publication of the state bar association did not serve as a public forum; therefore, its refusal to publish an advertisement did not constitute a First Amendment violation unless its practices were arbitrary, capricious, or invidious), aff'd, 688 F.2d 829 (4th Cir. 1982).

[12] See McMaster v. Ford Motor Co., 122 S.C. 244, 247, 115 S.E. 244, 246-47 (1921) ("[T]he law allows one to determine for himself with whom he will contract; hence, one may refuse to contract with another or to buy or sell his goods without incurring liability for resulting damage, even though his refusal be prompted by the intent to injure the other.") (emphasis added); cf. FTC v. Paramount Famous-Lasky Corp., 57 F.2d 152, 156 (2d Cir. 1932) ("A distributor of films by lease or sale has the right to select his own customers and to sell such quantities at given prices, or to refuse to sell at all to any particular person for reasons of his own."); Yachting Promotions, Inc. v. Broward Yachts, Inc., 792 So. 2d 660, 664 (Fla. Dist. Ct. App. 2001) ("Refusing to do business with a company because of past litigation is not an unfair or deceptive trade practice."); PMP Assocs. v. Globe Newspaper Co., 321 N.E.2d 915 (Mass. 1975) (sustaining a demurrer in a lawsuit against a newspaper for allegedly refusing to sell advertising space to a business enterprise providing escort services to the general public, holding that the plaintiff had failed to state facts constituting an unfair trade practice).

[13] See Camp v. Springs Mortgage Co., 310 S.C. 514, 517, 426 S.E.2d 304, 306 (1993) (affirming the dismissal under Rule 12(b)(6) of a claim under the SCUTPA involving allegations by an attorney that the defendant mortgage

that, despite Plaintiffs' assertion that their products were never unprofitable, the business decision to discontinue the sale of these items is best left to "the one who bears the risk of the decision."[14] It follows, then, that the courts should not mandate that a private enterprise maintain an association that it believes is not conducive to any facet of its business, including its marketing, public image, and organizational structure.[15]

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company had informed a customer that the plaintiff, who had closed several loans for the defendant in the past, was "not acceptable" and holding that the alleged communications by the defendant to prospective borrowers concerning the plaintiff did not constitute "an unfair act in the conduct of trade or commerce").

[14] See Dockside Ass'n v. Detyens, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987) ("[T]he business judgment rule precludes judicial review of actions taken by a corporate governing board absent a showing of a lack of good faith, fraud, self-dealing or unconscionable conduct."); Smithy Braedon Co. v. Hadid, 825 F.2d 787, 790 (4th Cir. 1987) ("[A]t least it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear.") (quoting Dr.Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 411 (1911) (Holmes, J., dissenting)); Richland Wholesale Liquors v. Glenmore Distilleries Co., 818 F.2d 312, 317 (4th Cir. 1987) (reversing a judgment in favor of a wholesaler against a distributor arising from the termination of a distributorship, holding the termination was supported by reasonable business considerations and noting "it is not fair for the courts or juries to second-guess" certain business decisions).

[15] Cf. America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., 347 F. Supp. 328, 333 (D. Ind. 1972) (upholding the defendant newspapers' adoption of an advertising policy limiting the content of advertisements from movie houses and other business establishments showing unrated adult films and noting that one reason for the policy was the defendants' concern that they would lose their "family image," which, the court determined, did not reflect an anticompetitive purpose).

3. In their brief, Plaintiffs suggest that opinions from the Fourth Circuit supporting an analogous tort claim for the wrongful termination of a distributorship could potentially sustain a claim for an unfair act under the SCUTPA. To the extent this argument was preserved for appeal, we disagree. None of the pleadings before the trial court had any allegations akin to those for wrongful termination of a distributorship, and, notwithstanding authority from the Fourth Circuit to the contrary, this court has observed that no South Carolina decision recognizes a cause of action in tort for termination of a contractual relation in a manner contrary to equity and good conscience.[16]

4. Plaintiffs argue that the trial court further erred when overlooking their allegation that Defendants physically removed from the shelves in their stores those bottles of sauce that had been previously stocked. We find no reversible error. It was incumbent on Plaintiffs to raise this alleged omission to the trial court by way of a post-trial motion. The record does not indicate that Plaintiffs moved to alter or amend the appealed order; therefore, the argument has not been preserved for appeal.[17]

5. Plaintiffs argue the grant of the motion to dismiss was improper because "the case presents a set of novel circumstances that are inappropriate for resolution by Rule 12(b)(6) in an area of unsettled law." We disagree. When "the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss."[18]

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[16] Love v. Gamble, 316 S.C. 203, 212, 448 S.E.2d 876, 881 (Ct. App. 1994).

[17] See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (stating that if the trial court does not explicitly rule on an argument raised and the appellant makes no Rule 59 motion to obtain a ruling, the issue is not properly before the court of appeals).

[18] Madison v. Am. Home Prods. Corp., 358 S.C. 449, 451, 595 S.E.2d 492, 494 (2004); see also Brown v. Theos, 338 S.C. 305, 313, 526 S.E.2d 232, 237

Regardless of the assertion that this case is a matter of first impression, the heart of the controversy is the applicability of the SCUTPA to the facts alleged in Plaintiffs' complaints. As we have explained above, Plaintiffs have not alleged facts to support a cause of action under the SCUTPA; therefore, we hold further development of the record would not aid in resolution of the issues.

6. Because we have determined that the acts alleged in Plaintiffs' complaints were not "unfair" under the SCUTPA, we do not address the rulings in the appealed order addressing the question of whether the allegations in their complaint support a finding that Defendants' conduct had an adverse public impact.[19]

AFFIRMED.

BEATTY and SHORT, JJ., concur.

(Ct. App. 1999) ("[W]hile our courts have held important questions of novel impression generally should not be decided on demurrer, this is not always true."), aff'd, 345 S.C. 626, 550 S.E.2d 304 (2001).

[19] See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review the remaining issues when its determination of a prior issue is dispositive of the appeal).