The Supreme Court of South Carolina

In the Matter of Michael T. Hursey, Respondent.

ORDER

By order dated August 11, 2006, respondent was placed on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR. In the Matter of Hursey, 370 S.C. 41, 634 S.E.2d 642 (2006). In its order, the Court specified that, should it determine it is in the best interests of respondent's clients or others to appoint an attorney to protect, the Office of Disciplinary Counsel (ODC) may file a petition seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. ODC has now filed a Petition to Appoint an Attorney to Protect Respondent's Clients' Interests.

The Petition to Appoint an Attorney to Protect Respondent's Clients' Interests pursuant to Rule 31, RLDE, is granted. Eldon D. Risher, III, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Risher shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Risher may make disbursements from respondent's trust account(s), escrow

account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

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

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

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

November 20, 2006

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
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N O T I C E

IN THE MATTER OF JOHN PLYLER MANN, JR., PETITIONER

John Plyler Mann, Jr., who was indefinitely suspended from the practice of law, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, January 12, 2007, beginning at 11:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina
November 22, 2006

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 45

November 27, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gary Wayne Bennett, Respondent

v.

State of South Carolina, Petitioner

ON WRIT OF CERTIORARI

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 26230
Submitted June 21, 2006 – Filed November 27, 2006

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott and Assistant Attorney General Julie M. Thames, of Columbia, for Petitioner.

Chief Attorney Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Respondent.

JUSTICE WALLER: This Court granted the State's petition for a writ of certiorari to review the grant of post-conviction relief (PCR) to respondent Gary Wayne Bennett. Because there is no evidence in the record to show that trial counsel offered inaccurate advice to respondent or was otherwise deficient, respondent failed to meet his burden of proving counsel was ineffective. Therefore, we reverse.

FACTS

On July 19, 2001, respondent pled guilty to first degree burglary, and the trial court sentenced him to 18 years imprisonment. Respondent had appeared before the trial court the day before and expressed that he had some "differences" with trial counsel. The trial court inquired on July 19 whether counsel and respondent had resolved those differences. Counsel and respondent both responded in the negative, and respondent "reiterate[d]" to the court that he did not "feel [he was] going to get a fair trial" with appointed counsel. He therefore asked the trial court for some time so his family could hire "a private lawyer."

Noting that the offense occurred on December 25, 1999, the trial court did not grant respondent a continuance.[1] Instead, the trial court asked whether he wanted to represent himself or go forward with appointed counsel. Respondent did not want to proceed *pro se*, and he told the trial court "I just want the opportunity to have a paid attorney." He explained that counsel was not "interested in defending" him. In response, counsel told the trial court there was another attorney who was familiar with the case, had been present at two of his meetings with respondent, and could be ready to represent respondent **at trial** in "15 minutes time." Respondent, however, was also not willing to have this other attorney from the Public Defender's office represent him for trial.

[1] Actually, respondent was not arrested until July 2000; nonetheless, he had been incarcerated for over one year by the time of the plea.

At that point, the trial court gave respondent the option of one, or both, of the public defenders, or self-representation. Respondent then privately spoke with his appointed counsel, and after conferring, counsel informed the trial court that respondent wanted to plead guilty. On the record, respondent confirmed for the trial court his desire to enter a guilty plea.

The trial court went over the indictment for first degree burglary, explained that this felony is considered a violent, most serious offense, and informed respondent that it "carries anywhere from 15 years to life." When the trial court separately asked respondent if he understood the charge and the possible punishment, respondent replied in the affirmative. After pleading guilty, the trial court then went over the constitutional rights respondent was waiving, including the right to a jury trial. The trial court specifically asked respondent if he was satisfied with counsel's "advice about this plea," and respondent said yes.[2]

The State explained to the trial court the facts surrounding the offense. Respondent and his then-girlfriend, Amber Vrooman, had entered the victim's vacation condominium in Surfside Beach during the nighttime hours; respondent had access to the condo because he worked a pest control job. The pair took a television, a vacuum cleaner, and a VCR. Vrooman was also charged in the case. According to the State, Vrooman had been the person who informed police about the case after she and respondent had an "altercation" and she was willing to testify as a State's witness to the facts of the crime. The trial court sentenced respondent to 18 years.

Respondent did not appeal, but he filed for PCR. In his PCR application, respondent alleged ineffective assistance of counsel and that his Sixth Amendment right to "counsel of choice" had been revoked.

At the PCR hearing, respondent testified that he first met with counsel in September 2000 for his bond hearing and then did not meet with him again

[2] Additionally, when the trial court made its on-the-record finding that respondent's plea was "freely, voluntarily, and intelligently made," the trial court specifically noted that although respondent had "some disagreements" with counsel, respondent was "satisfied with [counsel's] advice concerning this plea."

until January 2001.[3] In June 2001, respondent again met with counsel, and, according to respondent, counsel told him he could get him 15 years in a plea bargain with the solicitor. Respondent testified he told counsel he did not want to plead guilty because he had not committed **first degree** burglary; according to respondent's PCR testimony, he was not in the condo in the nighttime, but rather was there at eight in the morning. Significantly, respondent further testified that counsel told him if he went to trial and was found guilty, the trial judge would sentence him to life imprisonment.

The PCR court found: (1) respondent had not knowingly and intelligently waived his right to a direct appeal; and (2) counsel was ineffective. The PCR court granted respondent a new trial.

ISSUE[4]

Did the PCR court err in granting respondent a new trial based on ineffective assistance of counsel?

DISCUSSION

The State argues the PCR court erred in finding that respondent's trial counsel was ineffective in advising respondent to plead guilty. We agree.

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[3] At this time, respondent also had a pending murder charge, and respondent testified that they discussed matters related to the murder charge but did not discuss the first degree burglary charge at issue in the instant case.

[4] We note there is no belated direct appeal issue before the Court because respondent did not file for review as required by the Appellate Court Rules. See Rule 227(i)(1), SCACR (when the PCR court has affirmatively found that the right to a direct appeal was not knowingly and intelligently waived, a petition for a writ of certiorari shall contain a question raising this issue; in addition, a brief addressing the direct appeal issues shall be served and filed); Davis v. State, 288 S.C. 290, 291 n.1, 342 S.E.2d 60 (1986) (even where the PCR court makes a finding that the right to a direct appeal was not knowingly and intelligently waived, the PCR court "may not grant relief on this basis;" instead, the PCR applicant must petition this Court for review).

There is a two-prong test for evaluating claims of ineffective assistance of counsel. The first prong of the test requires that a defendant show that his counsel's performance was deficient such that it falls below an **objective** standard of reasonableness. Strickland v. Washington, 466 U.S. 668 (1984); Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991). The second part of the test requires a defendant to show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985); Alexander v. State, supra. Furthermore, "[a] defendant who pleads guilty upon the advice of counsel may only attack the voluntary and intelligent character of the guilty plea by showing the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases." Richardson v. State, 310 S.C. 360, 363, 426 S.E.2d 795, 797 (1993).

In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The Court, however, will not uphold the findings when there is no probative evidence to support them. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

We find the PCR court erred in finding that counsel was deficient. Both the plea transcript and respondent's testimony at the PCR hearing clearly indicate that counsel did consult with respondent and advised him that he should enter a guilty plea. Taking respondent's version of events, counsel specifically stated that if respondent went to trial and a jury found him guilty, he would get a life sentence.[5] Thus, counsel advised respondent to plead

[5] Counsel testified at the PCR hearing that respondent never told him the burglary did not occur in the nighttime and that Vrooman was ready to take the witness stand for the State on the day respondent entered his plea. Finally, counsel testified that he thought it was in respondent's best interest to plead guilty because if respondent went to trial and was convicted, he would not have been surprised at

guilty based, at least in part, on the likelihood of what counsel believed the sentence would be. We find that this is not an inappropriate concern for counsel to communicate to his client. Cf. Wade v. State, 698 S.W.2d 621, 623 (Mo. Ct. App. 1985) (where appellant claimed his guilty plea was not voluntary because counsel told him he would receive a life sentence if he went to trial, the court rejected the claim, stating that "[c]ounsel should discuss with clients the potential results of trial, and life imprisonment was a possible sentence on both charges" against appellant).

Indeed, counsel's advice that respondent would have gotten a life sentence was not technically incorrect because life is the maximum sentence for first degree burglary. See S.C. Code Ann. § 16-11-311(B) (2003) (first degree burglary "is a felony punishable by life imprisonment"); see also Carter v. State, 329 S.C. 355, 361, 495 S.E.2d 773, 776 (1998) (where counsel's advice regarding possible maximum sentence was correct, the Court held that counsel's performance was not deficient or ineffective); Wade v. State, 698 S.W.2d at 623 (counsel should discuss the potential results of trial with clients).[6]

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a life sentence. According to counsel, he told respondent that the trial court "may very well" sentence him to life imprisonment if he went to trial; counsel denied telling respondent that the trial court **would** sentence him to life. The PCR court, however, obviously believed respondent's testimony because it specifically found counsel told respondent that if he was convicted, he would be given a life sentence by the trial judge. That determination is entitled to deference. Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (the Court gives great deference to a PCR court's findings when matters of credibility are involved).

[6] Regardless, even where counsel offers misinformation, this deficiency can be cured where the trial court properly informs the defendant about the sentencing range. See Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) (even if counsel gives erroneous advice, an applicant is not entitled to PCR where any misconceptions are cured by the colloquy during the guilty plea proceeding); Burnett v. State, 352 S.C. 589, 576 S.E.2d 144 (2003) (any possible misconceptions on PCR applicant's part were cured by the colloquy during the plea proceeding); see also Moorehead v. State, 329 S.C. 329, 333, 496 S.E.2d 415, 416 (1998) ("the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing"). Here, the trial court clearly told respondent that

Moreover, while respondent certainly **subjectively** believed that counsel was unprepared for trial, respondent's own testimony at the PCR hearing also established that the two primary fact witnesses at trial would have been him and Vrooman. Because any trial would essentially be respondent's word against Vrooman's, there can be no claim that counsel should have further investigated the case to discover other evidence or witnesses. Finally, it is evident from the plea transcript that counsel was willing to go to trial, or would have allowed his associate from the Public Defender's office to try the case, but respondent obviously wanted a privately retained attorney.

Respondent simply did not meet his burden of proving the first prong of the Strickland test. E.g., Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (the applicant has the burden of proving the allegations of the PCR petition). In order for respondent to get relief, he must demonstrate it was because of counsel's deficiency that he was induced to plead guilty. What respondent did prove, however, is the following: (1) he wanted to go to trial, but only with a private attorney; (2) the trial court did not grant him a continuance to allow his family more time to hire a private attorney; and (3) after conferring with counsel, he decided to enter a guilty plea. It appears that respondent's real argument on PCR is that the trial court should have granted respondent's request for a continuance to enable him to retain private counsel. Trial error, however, "does not constitute an appropriate basis for a finding of ineffective assistance of counsel." Wolfe v. State, 326 S.C. 158, 162 n.2, 485 S.E.2d 367, 369 n.2 (1997); cf. Richardson v. State, supra (where a defendant pleads guilty, he may **only** attack the voluntary and intelligent character of the guilty plea by showing the advice he received from counsel was not competent). Here, although the PCR court did find respondent was entitled to a belated appeal, respondent did not request review of that finding from this Court. See Rule 227(i)(1), SCACR. Therefore, respondent has abandoned any direct appeal issues.

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the sentence for first degree burglary "carries **anywhere** from 15 years to life." (Emphasis added).

We hold there is no probative evidence in the record that counsel deficiently advised respondent to plead guilty; accordingly, we reverse the PCR court's grant of a new trial. See Holland v. State, supra (this Court will not uphold the findings of the PCR court when there is no evidence of probative value to support them).

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Russell James and Teresa James, Respondents,

v.

Horace Mann Insurance Company, James D. Geiger, and Ronald Wilson, Defendants,

of whom Horace Mann Insurance Company is Appellant.

Appeal From Florence County
John L. Breeden, Jr., Circuit Court Judge

Opinion No. 26231
Heard November 1, 2006 – Filed November 27, 2006

AFFIRMED

Lawrence B. Orr, of Orr, Elmore & Ervin, LLC, of Florence, for Appellant.

Kevin M. Barth, of Ballenger, Barth & Hoefer, of Florence, for Respondents.

JUSTICE BURNETT: In this action, a jury found Horace Mann Insurance Company (Appellant) liable for bad faith related to the handling of

an insurance claim and awarded actual and punitive damages to Russell and Teresa James (Respondents). Appellant appeals the trial court's denial of its motion for judgment notwithstanding the verdict (JNOV), new trial, or new trial nisi remittitur as to punitive damages. Appellant also appeals the trial court's admission of evidence regarding Respondents' lost wages and attorneys' fees. We certified the case for review from the Court of Appeals pursuant to Rule 204(b), SCACR, and we affirm.

FACTUAL/PROCEDURAL BACKGROUND

In the early 1980s, Respondents purchased a homeowner's insurance policy from Appellant through its agent, Ronald Wilson. In 2000, Appellant sent a renewal notice to Respondents which included a new endorsement for liability coverage for animal bites. The endorsement provided coverage for liability arising out of animal bites, with several exclusions, and limited the coverage to $25,000 per occurrence. Respondents renewed their homeowner's insurance policy, including the animal bite liability coverage, in 2000, 2001, and 2002.

On August 2, 2002, James D. Geiger was bitten by Respondents' dog and was hospitalized due to injuries arising out of the bite. Respondents subsequently submitted a claim to Appellant under their homeowner's insurance policy to cover Geiger's damages. Appellant assigned the matter to a claims adjuster, Bruce Garner (Adjuster). On August 16, 2002, Adjuster contacted Geiger and told Geiger that there was a medical payments coverage, which was immediately payable. Adjuster also told Geiger that Respondents had liability coverage for animal bites up to $25,000, but denied Geiger could collect under that coverage without further proof.

Geiger hired an attorney and sued Respondents for damages arising out of the dog bite. Settlement negotiations failed and the case went to trial. South Carolina Code Ann. § 47-3-110 (1987) imposes strict liability on a dog owner for damages arising out of a dog bite when the victim is lawfully on the owner's property, except when the victim provokes the dog. A jury returned a verdict against Respondents and awarded Geiger $50,500 in

damages. Appellant paid $25,000 of the judgment and Respondents paid the remaining $25,500.

Respondents filed this action against Appellant and Wilson[1] alleging seven causes of action including, *inter alia*, a declaratory judgment to determine the liability coverage under their homeowner's insurance policy for injuries arising out of a dog bite, breach of contract, negligence, and bad faith. At trial, Respondents testified when they submitted Geiger's claim to Appellant, they believed the applicable coverage under their homeowner's insurance policy was the general personal liability coverage. Respondents testified that prior to submitting Geiger's claim they were unaware their homeowner's insurance policy included a specific coverage for liability arising out of animal bites. Respondents also testified Wilson never advised them of this liability coverage for animal bites.

Geiger testified Adjuster told him that under Respondents' homeowner insurance policy, Geiger must prove negligence to recover any amount beyond the medical payments coverage. Geiger also testified he would have accepted a settlement offer prior to hiring an attorney and he would not have hired an attorney if Adjuster had told him the correct law and agreed to cover his medical bills and lost wages. Geiger's attorney and Respondent Russell James also testified Adjuster took the position that Geiger must prove negligence before he could recover from Respondents. Adjuster testified Geiger had to prove he did not provoke the dog to recover damages from Respondents.

Respondent Russell James testified he believed Adjuster, and thus Appellant, had mishandled the insurance claim by refusing to pay Geiger's medical bills and lost wages without proof of Respondents' negligence. He further testified he felt Appellant had mishandled the claim by encouraging Geiger to sue Respondents.

[1] Although Geiger was originally named a party to this action, he was dismissed after his judgment against Respondents was satisfied.

This action was submitted to a jury on the following causes of action: negligence on the part of Wilson for failing to advise Respondents of the animal bite liability coverage and bad faith on the part of Appellant in handling the claim. The jury found Wilson was not liable to Respondents. The jury also found Appellant was liable for bad faith and awarded $146,600 actual damages and $1,000,000 punitive damages to Respondents.

ISSUE

Did the trial court err in finding the punitive damages award did not violate the Due Process Clause of the Fourteenth Amendment?

STANDARD OF REVIEW

A motion for new trial nisi remittitur asks the trial court to reduce the verdict because the verdict is merely excessive. See O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993). The denial of a motion for a new trial nisi is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion. *Id.* If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial court must grant a new trial absolute. *Id.*

LAW/ANALYSIS

Appellant argues the trial court erred in denying its motion for a new trial nisi remittitur as to punitive damages. Appellant contends the trial court did not conduct a proper post-verdict review of the punitive damages award as required by Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991), and BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). We disagree.

The practice of awarding punitive damages originated in principles of criminal law "to deter the wrongdoer and others from committing like offenses in the future." Laird v. Nationwide Ins. Co., 243 S.C. 388, 393, 134 S.E.2d 206, 210 (1964) (internal citation omitted). Because punitive

damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Atkinson v. Orkin Exterminating Co., 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004); see also Gore, 517 U.S. at 568, 116 S.Ct. at 1595, 134 L.Ed.2d at 822 ("The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a grossly excessive punishment on a tortfeasor.") (internal quotations omitted).

In Gamble, this Court developed an eight factor post-verdict review that trial courts are required to conduct to determine if a punitive damages award comports with due process. The United States Supreme Court has also set forth three guideposts that trial courts must apply to an award of punitive damages to determine whether the award violates due process. Gore, 517 U.S. at 575, 116 S.Ct. at 1598-99, 134 L.Ed.2d at 826.

The trial court conducted a post-verdict review of the punitive damages award to determine whether the award violated due process. The trial court found Appellant's degree of culpability was significant based on evidence of Adjuster's false statement to Geiger regarding the applicable law for dog bite cases. The trial court also found Adjuster's conduct began the time the claim was assigned to him and continued throughout trial, and the court determined Appellant attempted to conceal Adjuster's wrongful behavior through the last day of trial. The trial court further found the punitive damages award was 6.82 times the amount of actual damages and determined this ratio was reasonable. Appellant stipulated it had the financial resources to satisfy a substantial judgment against it; therefore, the trial court found Appellant's ability to pay was not at issue. Based on this review, the trial court determined the punitive damages award of $1,000,000 was reasonable and was not the result of passion, prejudice, or improper influence. The trial court concluded there was no violation of due process.

A. Gamble Factors

The Gamble factors are: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the

existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. Gamble, 305 S.C. at 111-12, 406 S.E.2d at 354. The trial court is not required to make a finding of fact for each Gamble factor to uphold a punitive damages award. McGee v. Bruce Hosp. Sys., 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996). Further, the amount of damages, actual or punitive, remains largely within the discretion of the jury, as reviewed by the trial court. Gamble, 305 S.C. at 112, 406 S.E.2d at 355.

The trial court properly conducted a post-verdict Gamble review. The evidence supports the trial court's finding that Appellant's misconduct was extremely culpable. Geiger, Geiger's attorney, and Respondent Russell James testified Adjuster misrepresented the applicable law to Geiger. There is also evidence to support the trial court's findings that Appellant continuously misrepresented the law and denied coverage under Respondent's insurance policy based on this misrepresentation from the time the claim was submitted until the end of trial. The punitive damages award comports with due process under Gamble.

B. Gore Guideposts

Although we find the punitive damages award was reasonable under the Gamble factors, we must also review the trial court's ruling on punitive damages under Gore. A trial court shall review the constitutionality of a punitive damages award by determining whether the award was reasonable under the following guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Gore, 517 U.S. at 575, 116 S.Ct. 1598-99, 134 L.Ed.2d at 826; see, *e.g.*, Atkinson, 361 S.C. at 166-71, 604 S.E.2d at 390-93 (applying guideposts). An appellate court reviews de novo the trial court's application of the guideposts. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418, 123 S.Ct. 1513, 1520, 155 L.Ed.2d

585, 601 (2003) (citing Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 431, 121 S.Ct. 1678, 1683, 149 L.Ed.2d 674, 683-84 (2001)).

(1) Degree of Reprehensibility of Appellant's Misconduct

Appellant's conduct was extremely reprehensible. Adjuster, acting on behalf of Appellant, repeatedly falsely represented the applicable law from the time he was assigned the claim, through Geiger's action against Respondents, and through Respondents' action against Appellant. There is evidence in the record that Appellant denied the claim based on this false misrepresentation and that Geiger sued Respondents based on this misrepresentation.

(2) Disparity Between Actual and Punitive Damages Award

In Campbell, the United States Supreme Court explained:

> [W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.

538 U.S. at 424-25, 123 S.Ct. at 1524, 155 L.Ed.2d at 605-06 (internal citations omitted). The Campbell Court also determined: "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution. . . ." *Id.* at 425, 123 S.Ct. at 1524, 155 L.Ed.2d. 606. The punitive damages award in this case, which was 6.82 times the actual damages award, was reasonably related to the actual harm suffered. See also Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996) (upholding punitive damages award that was approximately 28 times the actual damages award amount); Collins v. Entertainment Corp. v. Coats & Coats Rental Amusement, 355 S.C. 125, 584

S.E.2d 120 (Ct. App. 2003) (affirming punitive damages award that was 10 times the amount of the actual damages award).

Furthermore, although a substantial portion of the actual damages award was nonpecuniary, these damages compensated Respondents for their injuries and were awarded to make Respondents whole. See Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) ("The purpose of actual or compensatory damages is to compensate a party for injuries suffered or losses sustained. The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred."). In comparison, the punitive damages award was a form of punishment and a deterrent to Appellant. See *id.* at 378, 529 S.E.2d at 533 ("The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future."). Under these facts and circumstances, we find no portion of the actual damages award was duplicated in the punitive damages award. Compare Campbell, 538 U.S. at 426, 123 S.Ct. at 1525, 155 L.Ed.2d at 606 (finding compensatory damages, which included a large amount for emotional distress that was caused by outrage and humiliation, were likely based on a component which was duplicated in the punitive damages award).

(3) Difference Between Civil Penalties and Punitive Damages Award

Pursuant to S.C. Code Ann. § 38-2-10 (2002), the director of the Department of Insurance may impose the following administrative penalties on an insurer for each violation of the insurance laws: (1) a fine not to exceed $15,000 if the conduct was not willful or a fine not to exceed $30,000 if the conduct was willful; (2) suspend or revoke the violator's authority to do business in the state; or (3) both. We find the statutory penalties are set at "such a low level, there is little basis for comparing it with any meaningful punitive damage award." Collins, 355 S.C. at 142, 584 S.E.2d at 129 (citing BMW of N. Am., Inc. v. Gore, 701 So.2d 507, 514 (Ala. 1997)). The punitive damages award was reasonable; was not the result of passion, caprice, or prejudice; and does not violate due process under Gore.

CONCLUSION

We affirm the denial of Appellant's motion for a new trial nisi remittitur. We also affirm Appellant's remaining issues pursuant to Rule 220(b)(1), SCACR, and the following authorities: Issue 1: Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004) (an appellate court will reverse the trial court's denial of a motion for JNOV only where there is no evidence to support the ruling below); and Issues 2 and 3: Washington v. Whitaker, 317 S.C. 108, 114, 451 S.E.2d 894, 898 (1994) (to preserve an issue regarding the admissibility of evidence for appellate review, a contemporaneous objection must be made); McCreight v. MacDougall, 248 S.C. 222, 226, 149 S.E.2d 621, 622 (1966) (failure to object when evidence is offered constitutes a waiver of the right to have the issue considered on appeal).

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Donna L. Holcombe-Burdette,
as Personal Representative of the
Estate of Charles A. Burdette, **Appellant,**

v.

Bank of America, successor
by merger to Farmer's
Bank of Simpsonville, and
Bertha B. Bozeman, as Co-Trustees
of Trust, Bernie W. Burdette,
Helen B. Peters, Bertha B. Bozeman,
Individually, Robert McPherson
Burdette, Alice Diane Kervin, and
George Benjamin Peters, **Respondents.**

In Re: Last Will and Testament of Bennie W. Burdette

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

Opinion No. 4180
Heard November 9, 2006 – Filed November 27, 2006

AFFIRMED

James B. Drennan, III, of Spartanburg, for Appellant.

Bertha Bozeman, of Lexington and Laurel R. S. Blair and R. O'Neil Rabon, Jr., both of Greenville, for Respondents.

ANDERSON, J.: Donna L. Holcome-Burdette, as the personal representative of the estate of Charles A. Burdette (Personal Representative), appeals the circuit court's order affirming the order of the probate court finding the testamentary trust (Trust) contained in the last will and testament (Will) of Bennie W. Burdette (Testator) requires a devisee to be living at the time the trust terminates in order to inherit trust assets. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Testator died in 1965 leaving his Will dated February 8, 1955. Testator was predeceased by his wife, Ella, and survived by his five children: Bennie E. Burdette; Helen B. Peters; Bertha B. Bozeman; Claude M. Burdette; and Zelene B. Adams.

Under Item VIII of his Will, Testator bequeathed the residue of his estate in trust, naming The Farmer's Bank of Simpsonville (now Bank of America) and Bertha B. Bozeman as co-trustees. Item VIII(2)(c) directs the trustees, in the event of the death of Testator's wife, to apply the entire balance of Testator's residuary estate to the benefit of his daughter, Helen B. Peters, for her lifetime. Item VIII(2)(d) provides that upon the death of Peters and when her youngest natural child reaches the age of twenty-one, the trust shall cease and be divided as follows:

> One share to the natural child or children per stirpes of my daughter, Helen B. Peters; one share to each of my children,

> Claude M. Burdette, Zelene B. Adams and Bertha B. Bozeman, living at the time of the termination of said trust. If either of my said three children shall have died before the termination of this trust, leaving a child or children surviving, the child or children of said deceased child of mine shall take per stirpes the share of the corpus and accumulated net income of which his, her or their parent would have taken if living. If any of my four children Helen B. Peters, Claude M. Burdette, Zelene B. Adams and Bertha B. Bozeman, should die without leaving a surviving child or children, the share of the corpus and accumulated net income which the child or children of Helen B. Peters, and the share which my other child or children would have taken if living, shall be divided among my surviving children, Claude M. Burdette, Zelene B. Adams, and Bertha B. Bozeman, and the child or children per stirpes of any of my said three deceased children who shall have died leaving a surviving child or children, as the case may be.

Peters died on July 3, 2003 and was survived by one son who was over the age of twenty-one. Claude M. Burdette died in 1970, predeceasing Peters, but was survived by two sons, one of whom was Charles A. Burdette. Charles A. Burdette also predeceased Peters and was not living at the time the trust terminated.

In December 2003, Personal Representative filed this action requesting the probate court to find, pursuant to Item VIII (2)(d), Charles A. Burdette had a vested remainder interest in the Trust based on having survived his father, Claude M. Burdette. The probate court held the plain language of Testator's Will "clearly articulates the Settlor's intention that the assets pass lineally, per stirpes, to heirs surviving Helen B. Peters and living at the time of Trust termination, or to their surviving children." On appeal, the circuit court affirmed the ruling of the probate court.

STANDARD OF REVIEW

An appellate court's determination of the standard of review for matters originating in the probate court is controlled by whether the cause of action is at law or in equity. Golini v. Bolton, 326 S.C. 333, 338, 482 S.E.2d 784, 787 (Ct. App. 1997); Univ. of S. Cal. v. Moran, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005).

The construction of a will is an action at law. Epworth Children's Home v. Beasley, 365 S.C. 157, 165, 616 S.E.2d 710, 714 (2005); Estate of Stevens v. Lutch, 365 S.C. 427, 430, 617 S.E.2d 736, 737 (Ct. App. 2005); Nationsbank of S.C. v. Greenwood, 321 S.C. 386, 392, 468 S.E.2d 658, 662 (Ct. App. 1996). "On appeal from an action at law that was tried without a jury, the appellate court can correct errors of law, but the findings of fact will not be disturbed unless found to be without evidence which reasonably supports the judge's findings." Blackmon v. Weaver, 366 S.C. 245, 249, 621 S.E.2d 42, 44 (Ct. App. 2005). Because Personal Representative has admitted that no facts are in dispute in this case, this court can review conclusions of law based on those facts. See Coakley v. Horace Mann Ins. Co., 363 S.C. 147, 152, 609 S.E.2d 537, 540 (Ct. App. 2005).

In the case sub judice, a trust is encapsulated within the four corners of a will. An action to construe or interpret a testamentary trust is equitable in nature. Waddell v. Kahdy, 309 S.C. 1, 4-5, 419 S.E.2d 783, 785-86 (1992). A declaration of rights arising in the administration of a trust generally lies in equity. See First Citizens Bank and Trust Co. of S.C. v. Hucks, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991).

It is not necessary for this Court to resolve the obvious conundrum as to whether the standard of review in this case is at law or in equity. Applying either standard, the result will be the same.

LAW/ANALYSIS

Personal Representative argues the trial court erred in finding any interest Charles A. Burdette had in the residuary of Testator's estate (to be distributed at the dissolution of the trust) was conditioned upon Charles A. Burdette surviving Helen B. Peters. Specifically, Personal Representative avers Charles A. Burdette's interest in the Trust assets vested at the time Claude M. Burdette died in 1970 because no condition precedent remained—the only condition precedent was that Charles survive his father, Claude. It is Personal Representative's contention that, while Testator intended to require that his three named children survive their sister Helen in order to take a share of the Trust principal at her death, he did not desire this same requirement be placed on their children, i.e. his grandchildren. We disagree.

1. Construction of Wills

The paramount rule of will construction is to determine and give effect to the testator's intent. S.C. Code Ann. § 62-1-102(b)(2) ("The underlying purposes and policies of this Code are . . . (2) to discover and make effective the intent of a decedent in the distribution of his property."); Epworth Children's Home v. Beasley, 365 S.C. 157, 165, 616 S.E.2d 710, 714 (2005); Bob Jones Univ. v. Strandell, 344 S.C. 224, 230, 543 S.E.2d 251, 254 (Ct. App. 2001); Matter of Clark, 308 S.C. 328, 330, 417 S.E.2d 856, 857 (1992) (stating the cardinal rule of will construction, as well as the primary inquiry of the appellate court, is the determination of the testator's intent). "[A] testator's intention, as expressed in his will, governs the construction of it if not in conflict with law or public policy . . . ." In re Estate of Prioleau, 361 S.C. 627, 631, 606 S.E.2d 769, 772 (2004); White v. White, 241 S.C. 181, 185, 127 S.E.2d 627, 629 (1962). In construing the provisions of a will, every effort must be made to determine and carry out the intentions of the testator. Prioleau, 361 S.C. at 631, 606 S.E.2d at 772; Citizens & S. Nat'l Bank v. Cleveland, 200 S.C. 373, 377, 20 S.E.2d 811, 812 (1942). Indeed, "[t]he rules of construction are subservient to the primary consideration of ascertaining what the testator meant by the terms used in the written instrument itself . . . ." Kemp v. Rawlings, 358 S.C. 28, 34, 594 S.E.2d 845,

849 (2004); Allison v. Wilson, 306 S.C. 274, 278, 411 S.E.2d 433, 435 (1991); see also Black v. Gettys, 238 S.C. 167, 173, 119 S.E.2d 660, 662-63 (1961) (stating while there are certain rules of construction to be followed in seeking the intention of the testator, they are all subservient to the paramount consideration of determining what the testator meant by the terms used).

In determining the intent of the deceased, a court must always look first to the language of the will itself. Pate v. Ford, 297 S.C. 294, 299, 376 S.E.2d 775, 778 (1989); Bob Jones Univ., 344 S.C. at 230, 543 S.E.2d at 254 ("In construing a will, a court's first reference is always to the will's language itself."). The primary rule of ascertaining intent is that "[r]esort is first to be had to the instrument's language, and if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument." Chiles v. Chiles, 270 S.C. 379, 383-84, 242 S.E.2d 426, 429 (1978) (quoting Superior Auto Ins. Co. v. Maners, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973)). The court must be guided by the words which the testator has used, reading them in the light of established principles of law. White, 241 S.C. at 186, 127 S.E.2d at 629.

"In construing the language of a will, the appellate court must give words their ordinary, plain meaning unless it is clear the testator intended a different sense, or unless such a meaning would lead to an inconsistency with the testator's declared intention." Epworth Children's Home, 365 S.C. at 165, 616 S.E.2d at 714-15; accord Bob Jones Univ., 344 S.C. at 230, 543 S.E.2d at 254. "A will must be read in the ordinary and grammatical sense of the words employed, unless some obvious absurdity, repugnancy or inconsistency with the declared intention of the testator, as abstracted from the whole will, should follow from such construction." Matter of Clark, 308 S.C. at 330, 417 S.E.2d at 857; accord Epworth Children's Home, 365 S.C. at 165, 616 S.E.2d at 715; Love v. Love, 208 S.C. 363, 369, 38 S.E.2d 231, 233 (1946). Only when a will's terms or provisions are equivocal, may the court resort to extrinsic evidence to resolve the ambiguity. In re Estate of Hyman, 362 S.C. 20, 26, 606 S.E.2d 205, 207 (Ct. App. 2004).

In assigning meaning to the words used in the will and ascertaining the intent of the testator, the court must view the will as a whole. See Pate, 297

S.C. at 299, 376 S.E.2d at 778. Intent is to be ascertained upon consideration of the entire will. Epworth Children's Home, 365 S.C. at 165, 616 S.E.2d at 714; Prioleau, 361 S.C. at 631, 606 S.E.2d at 772. "[E]ach item of a will must be considered in relation to the other portion." Epworth Children's Home, 365 S.C. at 166, 616 S.E.2d at 715; Allison, 306 S.C. at 278, 411 S.E.2d at 435. "A court may not consider the will piecemeal, but must give due weight to all its language and provisions, giving effect to every part when, under a reasonable interpretation, all the provisions may be harmonized with each other and with the will as a whole." Epworth Children's Home, 365 S.C. at 166, 616 S.E.2d at 715 (citations omitted). Arriving at the intent of the testator requires that every item be considered in relation to the other portions of the will. Gettys, 238 S.C. at 174, 119 S.E.2d at 663. "An interpretation that fits into the whole scheme or plan of the will is most likely to be the correct interpretation of the intent of the testator." Epworth Children's Home, 365 S.C. at 166, 616 S.E.2d at 715; accord Lemmon v. Wilson, 204 S.C. 50, 69, 28 S.E.2d 792, 800 (1944).

2. Construction of Trusts

"The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property." S.C. Code Ann § 62-7-112 (2005 Act No. 66, § 1, effective January 1, 2006).

The primary consideration in interpreting and construing a testamentary trust is to discern the testator's intent. Epworth Children's Home, 365 S.C. at 166, 616 S.E.2d at 715; Bowles v. Bradley, 319 S.C. 377, 380, 461 S.E.2d 811, 813 (1995) ("The primary consideration in construing a trust is to discern the settlor's intent."). Indeed, "the law relating to discerning the drafter's intent is identical for wills and trusts." Epworth Children's Home, 365 S.C. at 166, 616 S.E.2d at 715 (citing All Saints Parish, Waccamaw v. Protestant Episcopal Church, 358 S.C. 209, 224 n. 10, 595 S.E.2d 253, 262 n. 10 (Ct. App. 2004)). In ascertaining a settlor's intent, if the language of the trust instrument is perfectly plain and capable of legal construction, such language determines the force and the effect of the instrument. Chiles v. Chiles, 270 S.C. 379, 384, 242 S.E.2d 426, 429 (1978);

see also Floyd v. Floyd, 365 S.C. 56, 615 S.E.2d 465 (Ct. App. 2005) (affirming trial court's construction of testamentary trust language relating to trustee's discretionary powers); Moran, 365 S.C. 270, 617 S.E.2d 135 (construing the plain language of trust specifically to authorize trustee to enter into settlements); Estate of Stevens v. Lutch, 365 S.C. 427, 617 S.E.2d 736 (Ct. App. 2005) (relying on the trust language as most persuasive of settlor's intent regarding discretionary power of trustee).

"[C]onstruction depends upon the trustor's intent at the time of execution as shown by the face of the document and not on any secret wishes, desires or thoughts after the event." Chiles, 270 S.C. at 384, 242 S.E.2d at 429 (quoting Brock v. Hall, 33 Cal.2d 885, 206 P.2d 360 (1949)). Extrinsic evidence is not admissible to alter the plain language of a trust instrument. Bowles, 319 S.C. at 380, 461 S.E.2d at 813.

3. Vesting

The word "vest" can be employed to refer to either "a vesting in interest" or "a vesting in possession." Loadholt v. Harter, 260 S.C. 176, 181, 194 S.E.2d 880, 883 (1973). As the latter meaning would have no further effect than if the grantor had declared the property was "to and be possessed by" the remaindermen upon the death of Helen (and when her youngest child reaches twenty-one years of age), the former use of the term, in the sense of "to vest in interest," is unequivocally the meaning of term in the case sub judice. See id.

Our supreme court has stated:

> A vested remainder is one the owner of which has the present capacity of taking the seisin in case the particular estate were to determine. But no degree of uncertainty as to the remainderman's ever enjoying his remainder will render it contingent, provided he has by the limitation a present absolute

> right to enjoy the estate the instant the prior estate should determine.
>
> While a contingent remainder is one limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event, it does not follow that every remainder which is subject to a contingency or a condition is therefore a contingent remainder. The condition may be precedent or it may be subsequent if the former, the remainder is contingent; if the latter, it is vested, though it may be divested by the happening of the condition.

Peoples Nat. Bank of Greenville v. Hable, 243 S.C. 502, 510, 134 S.E.2d 763, 766 (1964) (internal quotations omitted).

It is not the uncertainty of enjoyment in the future, but the uncertainty of the right to that enjoyment which marks the difference between a vested and a contingent interest. Loadholt, 260 S.C. at 182, 194 S.E.2d at 883 (quoting Walker v. Alverson, 87 S.C. 55, 59, 68 S.E.2d 966, 969 (1910)).

4. Application

The plain language of the Trust articulates Testator's clear intention to pass the Trust assets to heirs living at the time the Trust terminates. It is true, as Personal Representative contends, that the law favors the vesting of estates at the earliest time possible. Gettys, 238 S.C. at 177, 119 S.E.2d at 664-65; Walker, 87 S.C. at 57-58, 68 S.E. at 967. The Trust provides that in the event any of Testator's "three children shall have died before the termination of this trust, **leaving a child or children surviving**, the child or children of said deceased child of mine shall take per stirpes the share of the corpus and accumulated net income of which his, her or their parent would have taken if living." (emphasis added). This language indicates Testator only desired a grandchild to take if he or she were "surviving" at the time of the termination of the trust. Therefore, the trial court did not err in holding Charles A. Burdette's interest in the Trust assets was conditioned upon his surviving Peters.

While a remainder may vest in title before the life estate ends (i.e. "determines") at the death of the life tenant, any interest the grandchildren had in the trust property did not vest until the time of Helen's death. The Trust specifically stated: "Upon the death of my daughter, Helen B. Peters [or if later, upon her youngest child reaching the age of twenty-one], the trust herein created in . . . **shall cease and determine** . . ." (emphasis added). It was at this point in time, when the trust terminated, that Testator intended vesting to occur.

Our interpretation is further substantiated by consideration of the entire Will and Trust. Throughout these documents, Testator evidences a common scheme of devising assets only to persons surviving him or surviving prior devisees. Testator bequeathed his home to his wife, "[i]f she shall survive me," gave his daughter, Zelene B. Adams, $3,500 for running his business "if she shall survive me," and left a vacant lot to his son, Bennie E. Burdette, for life "if he shall survive me . . . ." Upon Bennie E. Burdette's death, the vacant lot was directed to pass to Bennie E. Burdette's wife, for life, "if she be then living." Similarly, Testator left Peters a house, for her natural life, "if she shall survive me" and instructed that the house shall pass to Peters' son if he survives until the age of twenty-five and is living at the time of Peters' death. These other devises indicate Testator's general intent to leave assets to heirs living at the time a bequest passes. Thus, in viewing the passage at issue in light of the Will and Trust as a whole, the clear intent of the Testator under Item VIII(2)(d) is to require a devisee be alive at the time of the termination of the Trust in order to take an interest in the Trust assets.

We acknowledge the Testator's direct requirement of survivorship in other portions of the Will and Trust could arguably provide support for finding that Testator knew how to specifically require survivorship, and the failure to do so under Item VIII, indicates survivorship is not obligatory. See Thomson v. Russell, 131 S.C. 529, 538-39, 128 S.E. 421, 422 (1924) (holding creation of life estate in one part of will demonstrates knowledge of requirements and that intention in other part is to not create life estate). We read the Trust as clearly requiring survivorship. Further, the circumstances in this case do not lead to interpreting the Trust as the court did in Thompson.

We note that "while precedent is helpful at times, 'no will has a brother,'" and "[a] court may find little guidance in prior decisions interpreting wills . . . due to the different intent and circumstances of each testator . . . ." Epworth Children's Home, 365 S.C. at 166, 616 S.E.2d at 715 (citation omitted).

CONCLUSION

We rule the language of the Will and Trust clearly indicates Testator's intent that the Trust assets pass only to devisees surviving at the time the Trust terminates. Accordingly, the decision of the trial court is

AFFIRMED.

HUFF and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Danny K. Wright, **Respondent,**

v.

Ralph C. Craft d/b/a Craft Auto Mart, Inc., **Appellant,**

Appeal From Richland County
Allison Renee Lee, Circuit Court Judge

Opinion No. 4181
Heard November 9, 2006 – Filed November 27, 2006

AFFIRMED

Timothy G. Quinn, of Columbia, for Appellant.

C. Steven Moskos of Charleston, for Respondent.

ANDERSON, J.: Danny K. Wright initiated an action against Ralph C. Craft, d/b/a/ Craft Auto Mart, Inc., for revocation of acceptance, breach of contract, negligence, constructive fraud, fraud, violation of the Unfair Trade Practices Act, §§ 39-5-10 to -560 (UTPA), violation of the Regulation of

Manufacturers, Distributors, and Dealers Act, §§ 56-15-10 to -600 (Dealers Act), and violation of the Federal Odometer Statute. The trial court granted Craft summary judgment on Wright's causes of action for fraud and violation of the Federal Odometer Statute. Wright withdrew his causes of action for revocation of acceptance, breach of contract and constructive fraud. The jury rendered verdicts as follows:

> (1) Negligence—The jury awarded Wright actual damages of $25,578 and punitive damages of $12,789.
> (2) UTPA—The jury awarded Wright actual damages of $25,578.
> (3) Dealers Act—The jury awarded Wright actual damages of $51,156 and punitive damages of $12,789.

On Wright's motion to treble damages under the UTPA, the trial court required Wright to elect his remedy. Wright chose to proceed under the UTPA. The trial court trebled the UTPA damages and awarded Wright attorney's fees in the amount of $70,650 and costs in the amount of $4656.59. Craft filed a motion for a judgment non obstante veredicto (JNOV) and a motion to strike damages, which were denied by the trial court.

FACTUAL/PROCEDURAL BACKGROUND

Wright purchased a used 2001 Ford F-150 (Truck) from Craft Auto Mart, Inc. (Craft Auto) in July of 2002. When purchased by its first owner the Truck came with a 36,000 mile bumper-to-bumper warranty, which was transferable to subsequent owners. In November of 2001, the Truck was involved in an accident in which it rolled and flipped over. The incident damaged the right quarter panel and the hood of the Truck, broke windows, and caused both air bags to deploy. State Farm Insurance Company bought the Truck from the first owner.

Craft purchased the Truck at a vehicle auction to repair and sell at Craft Auto. The purchase was arranged by an acquaintance, Jim Spoon, whom Craft instructed to buy the Truck if "just the sheet metal was damaged."[1]

[1] Craft testified at trial that "sheet metal damage" meant that the frame was not damaged.

Craft had the Truck repaired at Bestway Body Shop. Replacements for some of the damaged parts were obtained from the Ford Dealership and others came from Keystone Automotive Industries. Lindsay Brothers supplied a used airbag.[2] Craft saw the Truck about a week after the repair work had begun. He observed some of the wrecked parts and noted that the original airbags had deployed during the wreck. Craft claimed his observations supported his belief that the Truck only had sheet metal damage.

Craft advertised the Truck for sale as a "one-owner vehicle" and did not reveal that the Truck had been wrecked and repaired. Wright saw the advertisement, contacted Craft Auto, and questioned Zack Rickard, an employee, about the Truck's mileage, warranty, and condition. Rickard informed Wright the Truck had ten thousand miles, came with a warranty, and had nothing wrong with it. Wright specifically asked Rickard if the Truck had any damage and Rickard responded that it did not.

Wright, accompanied by Rickard, test drove the Truck and noticed the check engine and seat belt lights came on. Rickard assured Wright "there would be no problem" because it was covered and would be checked. In addition, Wright observed some exterior damage near the driver's side door of the Truck and was advised "it was done in the parking lot like somebody opened the door and hit it, or it got hit with a grocery cart." Wright said he would buy the Truck if "everything that I see wrong with it when I'm looking at it, he'd have it fixed before I bought it."

In attending to the warning lights, Craft took the Truck to Bob Bennett Ford, where he learned that any Truck parts damaged in the wreck or painted because of the wreck would not be covered by the warranty. Moreover, Craft was warned the warranty did not cover parts and components not replaced by genuine Ford parts. Components not covered by warranty included the used airbags from Lindsay and the generic parts from Keystone.

Craft never told Wright the Truck had been wrecked, purchased from State Farm at auction, and repaired. He maintained he did not know what

[2] The record contains conflicting reports as to whether one or two airbags were replaced.

was covered by the factory warranty, nor did he inform Wright about parts he specifically knew were not under factory warranty.

The Buyer's Guide Wright received at the time of purchase stated the Truck was sold "as is-no warranty." Wright inquired about the extent of the warranty and Craft wrote on the back of the Buyer's Guide "factory warranty, if applicable." When Wright asked why the factory warranty was qualified with "if applicable," Craft claimed he did not know how much time was remaining on the factory warranty. Craft made an additional notation on the back of the Buyer's Guide indicating the Truck had "previous paintwork."

While driving the Truck in September of 2002, Wright observed an illuminated check engine light, which was repaired under warranty at a Ford dealership. A month or so later, Wright experienced the Truck shaking and shutting off. He returned the Truck to the Ford dealership in October of 2002. David McCauley, a mechanic from the Ford dealership who owned the same model F-150, lifted the hood on his own truck to show Wright what the interior under the hood should look like. McCauley explained that if wreck damage was causing the Truck's trouble, the repair would not be covered under warranty. After learning the Truck had been wrecked, Wright called to complain to Craft, who told Wright there was nothing he could do. Wright grew concerned that the Truck was not safe to drive.

At trial, Ford Motors field service engineer, Stuart Sonnen, testified that repairs are not covered under a factory warranty if the parts used in the repairs are not manufactured by Ford or if the parts are not installed by an authorized Ford agent. Ray Morris, a former car salesman, averred that the Truck had serious safety concerns. Moreover, he claimed that in the retail market, the Truck was valueless in its current condition. John Disher, a Ford-certified body shop owner who qualified as an expert in the field of automotive repair, maintained the welds formed to repair the Truck were not satisfactory and did not meet factory specifications. Disher expressed concern about what might happen to the Truck in another accident. "The structural integrity [of the Truck] ha[d] not been restored and it would probably collapse."

Wright claimed his losses as a result of purchasing the Truck from Craft included: (1) $33.18 to have the hood fixed; (2) sixteen Truck payments totaling $6395.04; (3) twelve Truck payments after refinancing totaling $3739.80; (4) $12,766.21 remaining on his Truck loan obligation; and (5) negative equity on the vehicle he traded in for the Truck in the amount of $2643.92. Wright's total damages amounted to $25,578.15.

In Craft's statement of issues on appeal he contends the trial court erred in failing to: (1) grant the motion for directed verdict; (2) grant the motion for JNOV; (3) strike damages from the UTPA cause of action; (4) allow the entry of the Truck into evidence; (5) admit Wright's loan application into evidence; and (6) grant the motion for summary judgment. Additionally, Craft appeals the jury's verdict on the ground it was the result of undue passion and prejudice. Apart from his statement of issues on appeal, in his brief Craft asserts that Wright should have been estopped from alleging he suffered damages under the UTPA.

STANDARD OF REVIEW

When legal and equitable actions are maintained in one suit, the court is presented with a divided scope of review, and each action retains its own identity as legal or equitable for purposes of review on appeal. Blackmon v. Weaver, 366 S.C. 245, 248-49, 621 S.E.2d 42, 44 (Ct. App. 2005); Kiriakides v. Atlas Food Sys. & Servs., Inc., 338 S.C. 572, 580, 527 S.E.2d 371, 375 (Ct. App. 2000) (citations omitted). The proper analysis is to view the actions separately for the purpose of determining the appropriate standard of review. Jordan v. Holt, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005).

Actions at Law

In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings. Erickson v. Jones Street Publishers, L.L.C., 368 S.C. 444, 464, 629 S.E.2d 663-64 (2006); R & G. Const. Inc., v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 431, 540 S.E.2d 113, 117 (Ct. App. 2000) cert. dismissed (July 22,

2002) rehearing denied (Aug 21, 2002). Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

When reviewing a motion for directed verdict or JNOV, an appellate court must employ the same standard as the trial court. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); Proctor v. Dep't of Health and Envtl. Control, 368 S.C. 279, 292, 628 S.E.2d 496, 503 (Ct. App. 2006) (citing Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004)); The Huffines Co., L.L.C. v. Lockhart, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2005). On appeal from an order denying a directed verdict, an appellate court views the evidence and all reasonable inferences in a light most favorable to the non-moving party. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 476, 514 S.E.2d 126, 130 (1999); Mullinax v. Brown Amusement, 326 S.C. 453, 456, 485 S.E.2d 103, 105 (Ct. App. 1997) aff'd 333 S.C. 89, 508 S.E.2d 848 (1998). "The appellate court must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his favor." Jones v. General Electric Co., 331 S.C. 351, 356, 503 S.E.2d 173, 176 (Ct. App. 1998).

This court will reverse the trial court's ruling on a directed verdict motion only if no evidence exists to support the ruling, or if the decision was controlled by an error of law. Pye v. Estate of Fox, 369 S.C. 555, ___, 633 S.E.2d 505, 509 (2006); McMillan, 367 S.C. at 564, 626 S.E.2d at 886; Clark v. S.C. Dep't of Pub. Safety, 362 S.C. 377, 382-83, 608 S.E.2d 573, 576 (2005); Swinton Creek Nursery, 334 S.C. at 477, 514 S.E.2d at 130; Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 418 (Ct. App. 2000). 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. Erickson, 368 S.C. at 463, 629 S.E.2d at 663.

Actions at Equity

In an action at equity, a reviewing court can find facts in accordance with its own view of the preponderance of the evidence. Key Corporate Capital, Inc. v. County of Beaufort, 360 S.C. 513, 516, 602 S.E.2d 104, 106 (Ct. App. 2004). Estoppel is an equitable concept. Cothran v. Brown, 357

S.C. 210, 215, 592 S.E.2d 629, 631 (2004); West v. Newberry Elec. Co-op., 357 S.C. 537, 541, 593 S.E.2d 500, 542 (Ct. App. 2004); Quinn v. Sharon Corp., 343 S.C. 411, 416, 540 S.E.2d 474, 476 (Ct. App. 2000) (Anderson, J., concurring in result only). However, a distinction should be made between cases in which the defendant's answer asserts merely an equitable defense, and cases in which the answer seeks affirmative equitable relief. Rogers v. Nation, 284 S.C. 330, 332-33, 326 S.C.2d 182, 183 (Ct. App 1985). In the case of an equitable defense, the nature of the action remains the same. Id.; but see Brown v. Chandler, 50 S.C. 385, 27 S.E. 868 (1897) (holding an equitable defense in a legal action receives equity review).

LAW/ANALYSIS

Initially, we address several procedural matters, noting that a number of Craft's issues on appeal are not preserved for our review. When a defendant moves for a directed verdict under Rule 50, SCRCP at the close of the plaintiff's case, he must renew that motion at the close of all evidence. Hendrix v. E. Distribution, Inc., 316 S.C. 34, 37 446 S.E.2d 440, 442 (Ct. App. 1994) aff'd in result, 320 S.C. 218, 464 S.E.2d 112 (1995). See State v. Bailey, 368 S.C. 39, 43, 626 S.E.2d 898, 900 (Ct. App. 2006) ("If a defendant presents evidence after the denial of his motion for a directed verdict at the close of the [plaintiff's] case, he must make another motion for a directed verdict at the close of all evidence in order to appeal the sufficiency of the evidence."); State v. Rosemond, 348 S.C. 621, 560 S.E.2d 636 (Ct. App. 2002), aff'd as modified 356 S.C. 426, 589 S.E.2d 757 (2003). Otherwise, this court is precluded from reviewing the denial of the motion on appeal. Hendrix, 316 S.C. at 37, 446 S.E.2d at 442. Craft moved for a directed verdict at the close of Wright's case, but failed to renew the motion after concluding his presentation of evidence. Consequently, the denial of Craft's motion is not preserved for our review.

Concomitantly, a motion for JNOV under Rule 50(b), SCRCP is a renewal of a directed verdict motion. Glover v. N.C. Mut. Life Ins. Co., 295 S.C. 251, 256, 368 S.E.2d 68, 72 (Ct. App. 1988). When a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV. Henderson v. St. Francis Cmty. Hosp., 295 S.C. 441, 446, 369 S.E.2d 652, 656 (Ct. App. 1988). Because Craft did not renew

his motion for a directed verdict at the close of all evidence, there is no JNOV motion to review. In addition, Craft identified the denial of the JNOV motion in his statement of issues on appeal but failed to address it in his brief. "An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court." Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 284 (Ct. App. 1993); Bell v. Bennett, 307 S.C. 286, 294, 414 S.E.2d 786, 791 (Ct. App. 1992).

The record indicates Craft did not comply with the time requirements under Rule 59, SCRCP in filing his motion to strike damages. Moreover, the denial of the motion to strike damages is listed in his statement of issues on appeal, but Craft did not address the denial in his brief. The issue is, therefore, deemed abandoned. Id. Likewise, Craft's argument that the jury's verdict was the result of undue passion and prejudice was included in his statement of issues on appeal. Craft failed to pursue the issue in his brief and it is not properly before this court. Id.

In his brief Craft advanced an argument grounded on a general estoppel theory. However, Craft failed to plead estoppel as a defense in his answer to Wright's complaint. "Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto . . . ." Rule 12, SCRCP. "[E]stoppel must be affirmatively [pleaded] as a defense and cannot be bootstrapped onto another claim." Collins Entm't, Inc. v. White, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005) (citing Rule 8, SCRCP); Provident Life & Accident Ins. Co. v. Driver, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994)). The failure to plead an affirmative defense is deemed a waiver of the right to assert it. See, e. g., Adams v. B & D, Inc., 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989) (ruling that an affirmative defense not pleaded in the answer or raised before the trial court will not be addressed on appeal). Additionally, Craft failed to raise the estoppel issue to the trial court for a ruling. Accordingly, that issue is not preserved for this court's review. Ulmer v. Ulmer, 369 S.C. 486, ___, 632 S.E.2d 858, 861 (2006) (citing In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court.")); Pye v. Estate of Fox, 369 S.C. 555, ___, 633 S.E.2d 505, 510

(2006); Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004); Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779 (2004). Furthermore, Craft did not set forth the estoppel argument in his statement of issues on appeal. Rule 208(b)(1)(B), SCACR requires an appellant's initial brief to contain "[a] statement of each of the issues presented for review." See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("No point will be considered which is not set forth in the statement of issues on appeal.") (citing State v. Bray, 342 S.C. 23, 28, 535 S.E.2d 636, 639, n. 2 (2000)); State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001); Barnes v. Cohen Dry Wall, Inc., 357 S.C. 280, 287, 592 S.E.2d 311, 314, n. 11 (Ct. App. 2003) (declining to address issues that were not set forth in appellant's statement of issues on appeal). Luculently, the issue of estoppel is not properly before this court.

I. UTPA

Craft challenges the trial court's ruling in denying his motion for a directed verdict on Wright's UTPA cause of action. He contends he was entitled to a directed verdict on the following grounds:

> (A) Damages—The damages awarded by the jury were improper under the UTPA; Wright suffered no damages;
> (B) Deceptive Act—Wright failed to demonstrate Craft's conduct was deceptive because Craft did not have a duty to disclose; and
> (C) Craft's act or practices did not impact the public interest.

In ruling on a motion for directed verdict, the trial court must view the evidence and all its reasonable inferences in the light most favorable to the nonmoving party. Long v. Norris & Assocs. Ltd., 342 S.C. 561, 568, 538 S.E.2d 5, 9 (Ct. App. 2000). When the evidence yields only one inference, a directed verdict in favor of the moving party is proper. Id. On the other hand, the trial court must deny a motion for a directed verdict when the evidence yields more than one inference or its inference is in doubt. McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006); Bailey v. Segars, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001); Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). If more than one inference can

be drawn from the evidence, a jury issue is created and the motion should be denied and the case must be submitted to the jury. Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003); Long, 342 S.C. at 568, 538 S.E.2d at 9; Adams v. G.J. Creel Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). However, this rule does not authorize the submission of speculative, theoretical, and hypothetical views to the jury. Proctor v. Dep't of Health and Envtl. Control, 368 S.C. 279, 292-93, 628 S.E.2d 496, 503 (Ct. App. 2006). The issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror. The Huffines Co., LLC v. Lockhart, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005). In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct. App. 2002); Long, 342 S.C. at 568, 538 S.E.2d at 9.

The evidence in this case must be evaluated in light of the legislative mandate set forth in sections 39-5-10 to -560 of the South Carolina Code (1976 & Supp. 2005). The UTPA declares "unfair or deceptive acts or practices in the conduct of any trade or commerce . . . unlawful." S.C. Code Ann. § 39-5-20(a) (1976). The terms "trade" and "commerce" "include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and include any trade or commerce directly or indirectly affecting the people of this State." S.C. Code Ann. § 39-5-10(b) (1976). "An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." Wogan v. Kunze, 366 S.C. 583, 606, 623 S.E.2d 107, 120 (Ct. App. 2005) (citing deBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct. App. 2000)). To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s). S.C. Code Ann. §§ 39-5-10 to -560.

A. Damages

Craft's contentions that the damages the jury awarded Wright were not proper under the UTPA and that Wright did not sustain any damages fail on the merits.

"An action for damages may be brought under [UTPA] for 'unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce." Camp v. Springs Mortg. Corp., 310 S.C. 514, 517, 426 S.E.2d 304, 306 (1993). Section 39-5-140(a) creates a private right of action in favor of "[a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 . . . ." Under section 39-5-140, a plaintiff can recover treble damages where "the use or employment of the unfair or deceptive . . . act or practice was a willful or knowing violation of § 39-5-20." Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 477, 351 S.E.2d 347, 348-49 (Ct. App. 1986).

Craft relies on Barton v. Superior Motors, Inc. in support of his position that Wright's damages were not proper under the UTPA. 309 S.C. 491, 494, 424 S.E.2d 524, 526 (Ct. App. 1992) ("The measure of damages for the sale of a defective vehicle is the difference in fair market value between the car, having been wrecked, and the value of the car had it not been wrecked at time of sale.") (citations omitted). In Barton, the plaintiff sought to recover damages under the Dealers Act, section 56-15-40(1) of the South Carolina Code (Rev. 1991). Barton, 309 S.C. at 494, 424 S.E.2d at 526. In the case sub judice, although the jury found for Wright under the Dealers Act and the UTPA, the trial court required Wright to elect his remedy and he elected the UTPA. That ruling has not been appealed and Wright can only recover on the UTPA claim. Accordingly, Barton is not applicable and we address whether damages were proper under the UTPA.

The UTPA allows for the recovery of actual damages. See Global Prot. Corp. v. Halbersberg, 332 S.C. 149, 159, 503 S.E.2d 483, 488 (Ct. App. 1998) (citing S.C. Code Ann. § 39-5-140(a) (1976)). "Actual damages under the UTPA include special or consequential damages that are a natural and

proximate result of deceptive conduct." Id. (citing Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (1996)). The jury awarded actual damages that equaled the actual damages Wright claimed. Wright provided evidence the Truck was valueless in its wrecked and repaired condition. Additionally, he had paid nearly one half of the outstanding balance on his car loan, and he lost the equity on the vehicle he traded in for the Truck. The damages Wright sustained arose out of Craft's selling the Truck without disclosing it had been wrecked and repaired. Material evidence existed that could reasonably establish a finding of damages in the minds of the jurors.

B. Deceptive Act

Craft maintains Wright failed to demonstrate an unfair or deceptive act because Craft did not have a duty to disclose the Truck had been wrecked. We disagree.

1. Duty to Disclose

Whether Craft had a duty to inform Wright that the truck had been wrecked and repaired was a question of law for the trial court to address. "The Court must determine, as a matter of law, whether the law recognizes a particular duty." Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co., 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2003); Steinke v. S.C. Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999); Cowburn v. Leventis, 366 S.C. 20, 46, 619 S.E.2d 437, 451 (Ct. App. 2005).

> The duty to disclose may be reduced to three distinct classes: (1) where it arises from a preexisting definite fiduciary relation between the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and

> necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

Ellie, Inc. v. Miccichi, 358 S.C. 78, 101, 594 S.E.2d 485, 497 (Ct. App. 2004) (citing Regions Bank v. Schmauch, 354 S.C. 648, 673-74, 582 S.E.2d 432, 445-46 (Ct. App. 2003)).

Understanding that nothing in the UTPA suggests a deceptive act must be predicated on a violation of the duty to disclose, as Craft seems to suggest, we review the evidence to discern whether a duty to disclose was implicated in the transaction between Craft and Wright. On examination by Wright's attorney Craft admitted:

> Q. Now, do you intend for your customers to rely on what you tell them about the vehicle they are purchasing?
> A. Yes.
> Q. Do you expect customers to rely on the statements you make about a vehicle?
> A. Yeah. The year and make of the car is very vital. I have to give them the correct year so they know how to make their own investigation of the car.
> Q. You expect your customers to fully believe what you tell them about the vehicles you sell them, is that right?
> A. Yes.
> . . .
> Q. And it is reasonable for customers to rely on what you tell them, isn't it?
> A. Yes.

Craft acknowledged in his testimony that he intended for his customers to repose trust and confidence in his representations concerning the vehicles he sold them. Furthermore, before purchasing the Truck Wright repeatedly questioned Craft and his employees about the Truck's condition, the warranty, and the Truck's observable defects, indicating he relied on the trustworthiness of Craft's representations concerning the Truck. With reference to the particular transaction in question, we conclude from the circumstances of the case and the nature of their dealings a duty to disclose

existed because of the trust and confidence Wright reposed in Craft's representations. See Ellie, Inc., 358 S.C. at 101, 594 S.E.2d at 497.

2. Tendency to Deceive

Our case law instructs that a deceptive act is any act which has a tendency to deceive. deBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct. App. 2000). "Even a truthful statement may be deceptive if it has a capacity or tendency to deceive." Wogan v. Kunze, 366 S.C. 583, 606, 623 S.E.2d 107, 120 (Ct. App. 2005) (citations omitted). Whether an act or practice is unfair or deceptive within the meaning of the UTPA depends on the surrounding facts and the impact of the transaction on the marketplace. deBondt, 342 S.C. 269, 536 S.E.2d at 407. "An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive." Bessinger v. BI-LO, Inc., 366 S.C. 426, 432, 622 S.E.2d 564, 567 (Ct. App. 2005) (cert. pending) (citing Gentry v. Yonce, 337 S.C. 1, 12, 522 S.E.2d 137, 143 (1999)).

South Carolina precedent establishes that failure to accurately represent the history of a car constitutes a deceptive trade practice under section 39-5-20. Our Supreme Court ruled the purchaser of a car had a cause of action under the UTPA because the dealer represented that the car was a "new demonstrator" and had "all the bugs worked out," when it had, in fact, been sold and returned by the previous owner. Inman v. Ken Hyatt Chrysler Plymouth, Inc., 294 S.C. 240, 242, 363 S.E.2d 691, 692 (1988). Accordingly, in Dowd v. Imperial Chrysler-Plymouth, Inc., this court held a salesman's representation that a car had been leased as part of a fleet, when the car, in fact, had been maintained by the dealer for daily rentals, constituted a "deceptive trade practice" under the UTPA. 298 S.C. 439, 442-43, 381 S.E.2d 212, 214 (Ct. App. 1989). Applying this reasoning to facts similar to those in the instant case, the Supreme Court upheld a UTPA claim for failure to disclose that a vehicle had been previously wrecked. In Ward v. Dick Dyer and Assocs., Inc., plaintiffs initiated an action against a dealer whose employee failed to inform them the vehicle they purchased had been wrecked and repaired. 304 S.C. 152, 158, 403 S.E.2d 310, 313 (1991). Subsequently, the dealer offered to replace or purchase the vehicle, and the dealer raised that offer as a defense against the plaintiffs' cause of action. Id.

The Supreme Court declared the offer to replace or purchase an automobile was no defense to a claim under the UTPA that the dealer failed to disclose the vehicle had been involved previously in an accident. Id.

At trial in this case, Craft responded to questions from Wright's attorney concerning the information he provided to his customers. The following colloquy illustrates that Craft's business practices involve statements that have the capacity or tendency to deceive:

> Q. Now, you know that when you're dealing with—you know you have to be fair with your customers?
> A. That's right.
> Q. And you have to be honest with your customers?
> A. That's correct.
> Q. And you have to thorough—you have to explain things thoroughly to your customers?
> A. I will explain what is asked. If the customer asks a question, I will explain something about the car or the equipment on it.
> . . .
>
> Q. Did you provide the information that was on the title that came from State Farm to Mr. Wright?
> A. I conveyed information that I received off of the car and the title such as serial number, make, model, year, a description of the vehicle.
> Q. Did you tell him that State Farm had owned this vehicle?
> A. He didn't ask. You know, that was not asked.
> Q. So the answer is no?
> A. I would have if he had asked. I would have showed him the title if he had asked.
> Q. So the answer is no, you didn't tell him?
> A. No, I did not.
>
> . . .

Q. Do you understand that if you tell somebody a vehicle was wrecked, they know it was wrecked? You made that clear to them?
A. Yes.
Q. Do you understand that by not telling them it was wrecked that you are representing to them that it hasn't been wrecked?

(Objection by Craft's attorney on record)

Q. Do you understand that by not telling somebody that a vehicle had been wrecked, you are letting them believe that it had not been wrecked?

. . .

Q. Do you understand that?
A. Yes.

Craft had a duty to disclose that the Truck had been previously wrecked, damaged, and extensively repaired. The failure to disclose supported the jury's finding that Craft's conduct was unfair or deceptive. Moreover, the information Craft did share with Wright was misleading. Instead of informing Wright about the extent of the Truck's damage and repairs, Craft claimed the damage Wright had observed was the result of a shopping cart or car door hitting the Truck in a parking lot. Furthermore, Craft withheld information he had about the extent of the factory warranty on the Truck. Craft averred he told Wright the Truck would be under whatever factory warranty was applicable. In actuality, Craft knew some of the parts that had been replaced, including the re-painted parts of the Truck, were not covered by factory warranty. Wright claimed Craft told him the Truck would be covered by the full factory warranty. Finally, when Wright asked why the previous owner no longer wanted the Truck, Craft responded that the former owner "just wanted a different truck." Craft never showed Wright the title to the Truck, from which Wright could have learned that State Farm Insurance Company formerly owned the vehicle. The evidentiary record reveals ample

support for the jury's conclusion that Craft's conduct, having the tendency and capacity to deceive, was unfair and deceptive under the UTPA.

C. Public Interest

Craft's assertion that his conduct in this matter does not impact public interest and, therefore, does not support a claim under the UTPA is without merit.

To be actionable under the UTPA, an unfair or deceptive act or practice must have an impact upon the public interest. S.C. Code Ann. § 39-1-10(b) (Trade as used in this article "shall include any trade or commerce directly or indirectly affecting the people of this State.") (emphasis added); see Haley Nursery Co. v. Forrest, 298 S.C. 520, 524, 381 S.E.2d 906, 908 (1989). "Since 1986, South Carolina courts have required that a plaintiff bringing a private cause of action under UTPA allege and prove the defendant's actions adversely affected the public interest." Daisy Outdoor Adver. Co. v. Abbott, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996). "An impact on the public interest may be shown if the acts or practices have the potential for repetition." Singleton v. Stokes Motors, Inc., 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004) (citing Crary v. Djebelli, 329 S.C. 385, 387, 496 S.E.2d 21, 23 (1998)); Wogan v. Kunze, 366 S.C. 583, 606, 623 S.E.2d 107, 120 (Ct. App. 2005); Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 480, 351 S.E.2d 347, 350-51 (Ct. App. 1986).

The potential for repetition may be demonstrated in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts. Singleton, 358 S.C. at 379, 595 S.E.2d at 466; Daisy, 322 S.C. at 496, 473 S.E.2d at 51 (citing Haley, 298 S.C. at 524, 381 S.E.2d at 908; Dowd v. Imperial Chrysler-Plymouth, Inc., 298 S.C. 439, 442, 381 S.E.2d 212, 214 (Ct. App. 1989); Barnes v. Jones Chevrolet Co., 292 S.C. 607, 613, 358 S.E.2d 156, 159-60 (Ct. App. 1987)). These two ways are not the only means for showing the potential for repetition or public impact, and each case must be evaluated on its own merits to determine what a plaintiff must show to satisfy the potential for repetition/public impact prong of the

UTPA. Daisy, 322 S.C. at 497, 473 S.E.2d at 51. Nevertheless, a plaintiff proves an adverse effect on public interests if he proves facts that demonstrate the potential for repetition. Id. at 493, 473 S.E.2d at 49; see also Crary, 329 S.C. at 388, 496 S.E.2d at 23 ("The plaintiff need not allege or prove anything further in relation to the public interest requirement.").

Craft's testimony on direct examination by Wright's attorney reveals the potential for repetition of the same deceptive act Wright encountered in his dealings with Craft:

Q. Now, Mr. Spoon was your employee, wasn't he?
A. No.
Q. But you knew him through the car business?
A. Yes.
Q. For eight or nine years?
A. I would say I have known him pretty close to that.
Q. And in the past, Mr. Spoon has told you that he has found vehicles that were damaged but that you might want to buy and have repaired so you can sell them on your lot?
A. That wasn't a frequent thing. I didn't buy a lot of vehicles like that.
Q. But that has happened in the past, hasn't it?
A. He has called me, yes.
Q. And he has told you about previously wrecked cars that he could fix and you could sell on your lot?
A. Yes.
Q. And Mr. Spoon would buy these vehicles and fix them and then you would sell them?
A. Right.
Q. And when you sold them, you knew he had previously fixed these vehicles after they had been previously wrecked?
A. Yes.
Q. You didn't tell your customers, did you, when these cars were bought by them?

A. I usually if it was brought up would tell them—I usually would tell them if the car had previous paint work or body work.
Q. But if they didn't bring it up, you didn't mention it. Right?
A. Well, for one thing, I don't buy cars . . .

(Objection on record from Craft's attorney)

Q. If other customers would buy a previously owned vehicle and didn't ask if the vehicle had been wrecked, you didn't disclose that, did you?
A. A lot of times I did.
Q. But there were other times you didn't?
A. I don't know which time you're asking me about. Normally I would tell them if it had previous paint work and I knew about it.

Craft confirmed he often buys cars with damage from insurance auctions and repairs them to sell on his car lot. He generally knows when those vehicles have been wrecked or damaged but does not always disclose that fact to his customers. Craft denied that he did anything wrong in his sale to Wright and admitted that he has not changed the way he does business as a result of this litigation. The record is replete with evidence indicating Craft has previously engaged in and would continue to engage in the same business practices and procedures that affected his transactions with Wright.

Accordingly, evidence existed that would lead reasonable jurors to conclude: (1) Wright sustained the damages he alleged, and those damages were proper under the UTPA; (2) Craft engaged in a deceptive and unfair trade practice; and (3) Craft's deceptive and unfair practice affected the public interest. Consequently, the trial court did not err in denying Craft's motion for a directed verdict on Wright's UTPA cause of action.

II. Denial of JNOV

Craft complains the trial court erred in denying his motion for a JNOV. We disagree.

When ruling on a JNOV motion, the trial court is required to view the evidence and the inferences that reasonably can be drawn from it in the light most favorable to the nonmoving party. Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). This court must follow the same standard. Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 418 (Ct. App. 2000). This court will only reverse the trial court when no evidence supports its ruling. Steinke v. S.C. Dep't of Labor, Licensing, & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999) (citing Creech v. S.C. Wildlife & Marine Res. Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997)); S.C. Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 521, 548 S.E.2d 880, 885 (Ct. App. 2001) ("The appellate court will reverse the trial court only when there is no evidence to support the ruling below.").

For the same reasons we affirmed the trial court's denial of Craft's motion for directed verdict, we conclude evidence existed to support the court's ruling on the JNOV motion.

III. Denial of Motion to Strike Damages

Craft contends the trial court erred in denying his motion to strike damages from the UTPA cause of action. We disagree.

A motion to strike is within the trial court's discretion, and an appellate court will not reverse absent an abuse of that discretion. Mayes v. Paxton, 313 S.C. 109, 115, 437, S.E.2d 66, 70 (1993). Craft's argument basically reiterated the same grounds asserted in his motion for a directed verdict. Apodictically, Craft's motion to strike damages was essentially a motion for a directed verdict. See Allison v. Charter Rivers Hosp., Inc., 334 S.C. 611, 615, 514 S.E.2d 601, 604 (Ct. App. 1999). This court may only reverse the denial of a motion for directed verdict when there is no evidence to support the ruling below. Id. at 616, 514 S.E.2d at 604.

Craft moved to strike damages maintaining that the $33.18 hood repair constituted the only damages Wright sustained, and those damages were de minimis. The trial court issued a form order denying Craft's motion to strike. Wright presented evidence of damages totaling $25,578.15. Evidence existed to support the trial court's ruling on Craft's motion.

IV. Admission of Evidence

Craft argues the trial court erred in refusing to admit the Truck and Wright's loan application into evidence. We disagree.

The admissibility of evidence is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion or the commission of legal error prejudicing the defendant. State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000) (citing State v. Patterson, 337 S.C. 215, 228, 522 S.E.2d 845, 851 (Ct. App. 1999)). The trial court has wide discretion in determining the relevancy of evidence, and its decision to admit or reject evidence will not be reversed on appeal absent an abuse of that discretion. Moore v. Moore, 360 S.C. 241, 257-58, 599 S.E.2d 467, 476 (Ct. App. 2004) (citing Hoeffner v. The Citadel, 311 S.C. 361, 365, 429 S.E.2d 190, 192 (1993); Davis v. Traylor, 340 S.C. 150, 155, 530 S.E.2d 385, 387 (Ct. App. 2000); Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 108, 498 S.E.2d 395, 404 (Ct. App. 1998)). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE; see Haselden v. Davis, 341 S.C. 486, 497 n.12, 534 S.E.2d 295, 301 n.12 (Ct. App. 2000); Hunter v. Staples, 335 S.C. 93, 101-02, 515 S.E.2d 261, 266 (Ct. App. 1999). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 568, 629 S.E.2d 690, 696 (Ct. App. 2006) (cert. pending). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005); see Am. Fed. Bank, FSB v. No. One Main Joint Venture, 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996); Timmons v. S.C. Tricentennial Comm'n., 254 S.C. 378, 405, 175 S.E.2d 805, 819 (1970); Powers v. Temple, 250 S.C. 149, 162, 156 S.E.2d 759, 765 (1967).

The trial court admitted a number of photographs of the Truck into evidence, and the jurors were allowed to review the photographs as they deliberated. In addition, the jurors heard testimony regarding the condition of the Truck, both after the accident and at the time of trial. Admitting the actual Truck itself into evidence would have been cumulative, causing needless waste of time. The trial court did not abuse its discretion in denying admission of the Truck.

Craft's attorney attempted to enter Wright's loan application into evidence to establish that Wright represented the Truck's value between $15,000 and $16,000. The trial court ruled that the information Craft sought could be elicited by testimony without entering the loan document, thereby avoiding a potential hearsay problem. We discern no error in the trial court's ruling.

V. Denial of Summary Judgment

Craft maintains the trial court erred in denying his motion for summary judgment. We disagree.

"The denial of summary judgment does not finally determine anything about the merits of the case . . . . Therefore, an order denying a motion for summary judgment is not appealable." Ballenger v. Bowen, 313 S.C. 476, 477-78, 443 S.E.2d 379, 380 (1994); see also Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 580 S.E.2d 440 (2003) ("We adhere to recent precedent and hold that the denial of a motion for summary judgment is not appealable, even after final judgment."); Silverman v. Campbell, 326 S.C. 208, 208, 486 S.E.2d 1, 2 (1997); Raino v. Goodyear Tire & Rubber Co., 309 S.C. 255, 259, 422 S.E.2d 98, 100 (1992); Holloman v. McAllister, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986); Willis v. Bishop, 276 S.C. 156, 157, 276 S.E.2d 310, 310 (1981); Mitchell v. Mitchell, 276 S.C. 44, 45, 275 S.E.2d 1, 1 (1981); Neal v. Carolina Power & Light, 274 S.C. 552, 265 S.E.2d 681 (1980); U.S. Fid. & Guar. Co. v. City of Spartanburg, 267 S.C. 210, 211, 227 S.E.2d 188, 189 (1976); Medlin v. W.T. Grant, Inc., 262 S.C. 185, 185-86, 203 S.E.2d 426, 426 (1974); Greenwich Sav. Bank v. Jones, 261 S.C. 515, 516-17, 201 S.E.2d 244, 245 (1973); Geiger v. Carolina Pool Equip. Distribs., Inc., 257 S.C. 112, 114, 184 S.E.2d 446, 447 (1971);

Gilmore v. Ivey, 290 S.C. 53, 59, 348 S.E.2d 180, 184 (Ct. App. 1986); Assocs. Fin. Servs. Co. of S.C., Inc. v. Gordon Auto Sales, 283 S.C. 53, 56, 320 S.E.2d 501, 503 (Ct. App. 1984). Accordingly, we refrain from addressing the denial of Craft's summary judgment motion.

VI. Verdict Result of Undue Passion and Prejudice by the Jury

Craft alleges the jury's verdict was the result of undue passion and prejudice. We disagree.

A trial court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. Stevens v. Allen, 336 S.C. 439, 446, 520 S.E.2d 625, 628-629 (Ct. App. 1999). The jury's determination of damages, however, is entitled to substantial deference. Id.; Brabham v. S. Asphalt Haulers, Inc., 223 S.C. 421, 430, 76 S.E.2d 301, 306 (1953). Compelling reasons must be given to justify invading the jury's province by granting a new trial to adjust damages. See Proctor v. Dep't of Health and Envntl. Control, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006) "When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 26, 602 S.E.2d 772, 781 (2004); Allstate Ins. Co. v. Durham, 314 S.C. 529, 530, 431 S.E.2d 557, 558 (1993) (footnote omitted). "A new trial absolute should be granted only if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the 'result of caprice, passion, prejudice, partiality, corruption, or other improper motives.' " Smalls v. S.C. Dep't of Educ., 339 S.C. 208, 215, 528 S.E.2d 682, 686 (Ct. App. 2000) (citations omitted); Vinson v. Hartley, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996) (citing Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 9, 466 S.E.2d 727, 731 (1996)). To warrant a new trial, the verdict must be so grossly excessive as to clearly indicate the influence of an improper motive on the jury. Welch v. Epstein, 342 S.C. 279, 302, 536 S.E.2d 408, 420 (Ct. App. 2000). The failure of the trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion, and on appeal this court will grant a new trial absolute. Stevens, 336 S.C. at 447, 520 S.E.2d at 629 (citing Vinson, 324 S.C. at 404-

05, 477 S.E.2d at 723); Allstate Ins. Co., 314 S.C. at 531, 431 S.E.2d at 558. However, "[w]hen a verdict falls within the range of the evidence, the courts will not disturb it on the ground of excessiveness." Satcher v. Berry, 299 S.C. 381, 385, 385 S.E.2d 41, 43 (Ct. App. 1989). "The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision." Smalls, 339 S.C. at 215, 528 S.E.2d at 686.

The trial court, which heard the evidence and is more familiar with the evidentiary atmosphere at trial, possesses a better-informed view of the damages than this court. Krepps v. Ausen, 324 S.C. 597, 608, 479 S.E.2d 290, 295-96 (Ct. App. 1996). Accordingly, the decision to grant a new trial is left to the sound discretion of the trial court and generally will not be disturbed on appeal. Id. An abuse of discretion occurs when the trial court's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. Id. "In deciding whether to assess error when a new trial motion is denied, this [c]ourt must consider the testimony and reasonable inferences therefrom in the light most favorable to the nonmoving party." Welch, 342 S.C. at 302-03, 536 S.E.2d at 420.

The jury awarded damages equal to the actual damages Wright claimed. The verdict is within the range of evidence presented and that evidence sustains the factual findings implicit in the jury's decision. Accordingly, we give the proper deference to the jury in awarding damages and to the trial court in reviewing that award.

VII. Estoppel

Craft claims Wright should be estopped from alleging damages because Wright stated in a loan application that the Truck's value was $15,000 to $16,000, while complaining in this action that the Truck has no value. We disagree.

The "[e]ssential elements of estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001). The "[e]lements of equitable

estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts." Id. Evidence indicates Craft had at least as much, if not more knowledge about the true value of the Truck than Wright did. In addition, no evidence suggests the loan application executed by Wright was intended to induce Craft's reliance on the information contained in the application. Moreover, Craft did not change his position in reliance on the loan application.

Under the theory of judicial estoppel Craft claims Wright maintained two inconsistent positions—i. e. in the loan application Wright stated the Truck was worth $15,000 to $16,000 and in the current action he alleges that the Truck is worthless. "Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." Cothran v. Brown, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) (emphasis added). The purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary. Id. (citing Hawkins v. Bruno Yacht Sales, 353 S.C. 31, 42, 577 S.E.2d 202, 208 (2003)). Five elements are required for the application of judicial estoppel:

> (1) two inconsistent positions must be taken by the same party or parties in privity with each other;
> (2) the two inconsistent positions were both made pursuant to sworn statements;
> (3) the positions must be taken in the same or related proceedings involving the same parties in privity with each other;
> (4) the inconsistency must be part of an intentional effort to mislead the court; and
> (5) the two positions must be totally inconsistent-that is, the truth of one position must necessarily preclude the veracity of the other position.

Quinn v. Sharon Corp., 343 S.C. 411, 422, 540 S.E.2d 474, 480 (Ct. App. 2000) (Anderson, J., concurring in result only) (emphasis added).

Craft urges us to take a broad view of the phrase "same or related" but does not explain how the loan application qualifies as a proceeding related to the current action. He cites Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997), and Quinn, 343 S.C. at 414-15, 540 S.E.2d at 476, in support of this broad view. However, neither of these cases supports applying judicial estoppel in the present case. In Hayne, the appellant in a divorce action claimed he had no legal interest in certain property owned by his son. 327 S.C. at 252, 489 S.E.2d at 477. He later contended he owned certain property by virtue of a resulting trust. Id. The court applied the doctrine of judicial estoppel to bar the appellant from claiming the property. Id. at 252, 489 S.E.2d at 477 ("When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him."). In Quinn, the appellant had previously filed an answer and counterclaim admitting his daughter owned and operated a corporation and stating that he had no authority to bind the corporation. 343 S.C. at 414-15, 540 S.E.2d at 476. In another case, the same appellant testified his daughter owned the corporation and denied that he owned any real estate, stocks, bonds, notes, or other valuable property. Id. at 415, 540 S.E.2d at 476. Appellant then claimed, in a later action, that he was the sole owner of the corporation. Id. The court held appellant's later claim was barred by judicial estoppel because it directly contravened his assertions in the prior related litigations. Id. The Quinn court announced, "[w]ere we to allow [appellant] to change his position as to the facts and now claim ownership of the Corporation, 'the truth-seeking function of the judicial process [would be] undermined.' " Quinn, 343 S.C. at 415, 540 S.E.2d at 476.

Unlike the circumstances in Hayne and Quinn, the loan application in which Wright asserted the Truck had value was not produced in any type of formal proceeding or litigation and was not a sworn statement. Moreover, Craft, though a party to this litigation, was not a party to the loan application. Even broadly interpreting "same or related," the loan application cannot be considered the same or related to the current litigation and judicial estoppel does not apply to bar Wright's claim.

CONCLUSION

Accordingly, for the foregoing reasons, the trial court's rulings are **AFFIRMED.**

HUFF and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Linda James and David James, individually and as parents and natural guardians of Meredith James, a minor under the age of 14, Respondents,

v.

State of South Carolina Employee Insurance Program,[1] Appellant.

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

Opinion No. 4182
Submitted November 1, 2006 – Filed November 27, 2006

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[1] We note the defendant in this action was previously misnamed in the pleadings as Blue Cross Blue Shield of South Carolina; however, the circuit court, with the parties' consent, "ORDERED, ADJUDGED and DECREED, that the pleadings be amended to reflect that the State of South Carolina Employee Insurance Program [is] the [Defendant] in this action . . . ." Accordingly, we have made this amendment in the caption for this appeal.

AFFIRMED

Theodore DuBose Willard, Jr., of Columbia, for Appellant.

John Magruder Read, IV, of Greenville, for Respondents.

GOOLSBY, J.: This appeal arises from a dispute about health insurance coverage under a group plan for state employees and their dependents. David James, acting on behalf of himself and his wife, Linda (collectively, "the Jameses"), sought pre-authorization for a medical device for their infant daughter, Meredith. Blue Cross Blue Shield of South Carolina ("Blue Cross"), denied coverage on the basis the device, which is designed to treat a misshaped skull, was not medically necessary as it served only a cosmetic purpose. The Appeals Committee of the State of South Carolina Employee Insurance Program ("EIP"), upheld the denial of coverage. The circuit court reversed, finding the device was medically necessary and within the scope of the policy's coverage. We affirm the circuit court's ruling.[2]

FACTS

David James was employed by the State of South Carolina, which, through EIP, has established a group health insurance plan ("State Health Plan") for state employees and their dependents. Blue Cross is responsible for processing the claims. At the time this action arose, James had coverage for himself and his dependents.

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[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

The Jameses' daughter, Meredith, was born on March 4, 2003. She was diagnosed with plagiocephaly when she was approximately ten and a half months old. According to exhibits included in the record, this term has been generally defined as follows:

> Plagiocephaly, which literally translates to "oblique head," is a term used to describe asymmetry of the head shape [] when viewed from the top. Late during fetal life, the head may become compressed unevenly in utero . . . . Such inequality of forces may result in asymmetric molding of the head and face.[3]

In addition to restrictive intrauterine positioning, plagiocephaly can develop from such causes as birth trauma, torticollis, and sleeping position.

Meredith was also diagnosed with a condition known as torticollis, or twisted neck syndrome, which refers to the posture that results from the head being tilted or twisted for a variety of reasons.[4] It has been further defined as follows:

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[3] This definition appears in materials included in the record on "Torticollis and Related Issues" distributed by Dr. John M. Graham, Jr., of the Cedars-Sinai Medical Center, excerpted from Smith's Recognizable Pattern of Human Deformation, 3rd Edition, W.B. Saunders Publishing Company, Philadelphia PA, 2002. See also Taber's Cyclopedic Medical Dictionary 1519 (17th ed. 1993) (defining plagiocephaly as "[m]alformation of the skull producing the appearance of a twisted and lopsided head").

[4] This definition appears in the article on "Torticollis and Related Issues" excerpted from Smith's Recognizable Pattern of Human Deformation and distributed by Dr. John M. Graham, Jr. of Cedars-Sinai Medical Center. See also Taber's Cyclopedic Medical Dictionary 2012 (17th ed. 1993) (discussing torticollis and its causes).

> Torticollis, or twisted neck, is a condition in which the sternocleidomastoid muscle is shortened or tightened on one side of the neck, causing the head to tilt toward the affected muscle and the head to turn away. This is the most frequent cause of deformational posterior plagiocephaly, which results from progressive occipital flattening when a baby with torticollis is preferentially placed in [a] supine position.[5]

To treat this condition, the Jameses sought pre-authorization from Blue Cross for a Dynamic Orthotic Cranioplasty Band, or DOC Band, for Meredith. A DOC Band is similar to a helmet and is used to correct the shape of an infant's head. Cranial Technologies, Inc., the supplier, described the device as follows in its documentation requesting pre-authorization approval for Meredith:

> The DOC® Band is an FDA approved medical device for the treatment of deformational plagiocephaly. It is a non-invasive outpatient procedure used for correcting abnormal head shape in infants up to 18 months. The procedure involves making a plaster cast of the infant's head and custom creating a band which is worn 23 hours a day. The infant is monitored and the band is modified on a weekly or biweekly basis. Average treatment time is 2-4 months.

The DOC Band is a six-ounce device consisting of an outer plastic shell with a foam lining, and mild pressure is applied to inhibit growth in prominent areas and encourage growth in flat areas. The DOC Band is viable for about two to four months, and some children may require more than one band, depending on the age of the child and the severity of the deformity. A

[5] This information is from the article on "Torticollis and Related Issues."

DOC Band costs approximately $3,000.00. The price is an all-inclusive fee that includes fabrication, adjustments to the DOC Band, and all patient visits.

Blue Cross denied coverage on the basis the treatment was purely for cosmetic purposes and was not medically necessary. The Jameses sought review by the Appeals Committee of EIP, which upheld the denial of coverage by letter of February 25, 2005 based on several provisions and exclusions in the State Health Plan. The first provision is found in Article 2 of the State Health Plan, entitled "DEFINITIONS," which defines medically necessary as follows:

> **2.57 Medical Necessity; Medically Necessary or Necessary Service and Supply**
>
> A service or supply that:
>
> A. Is required to identify or treat an illness or injury; and
>
> B. Is prescribed or ordered by a Physician, and
>
> C. Is consistent with the Covered Person's illness, injury, or condition, and in accordance with proper medical and surgical practices prevailing in the medical specialty or field of medicine at the time rendered; and
>
> D. Is required for reasons other than the convenience of the patient. The fact that a service is prescribed by a Physician does not necessarily mean that such service is Medically Necessary.

Additionally, the Appeals Committee of EIP relied on Article 9, entitled "EXCLUSIONS AND LIMITATIONS," which provides in relevant part as follows:

9.1 No benefits will be provided under any Article of this Plan for any service, supply or charges for the following:

A. Any service or charge for service which is not Medically Necessary as defined in paragraph 2.57; any service or charge for service which is performed in a more costly setting than that required by a Covered Person's condition, in which case benefits will be limited to the benefits due had the services been performed in the least costly setting required by the Covered Person's condition;

. . . .

J. Hospital and Physicians services and prescription drugs related to procedures or goods that have primarily cosmetic effects including but not limited to cosmetic surgery, or the complications resulting there from. Cosmetic goods, procedures or surgery shall mean all goods, procedures, and surgical procedures performed to improve appearance or to correct a deformity without restoring a bodily function. In the instances of the following and other procedures which might be considered "cosmetic"—e.g., rhinoplasty (nose), mentoplasty (chin), rhytidoplasty (face lift), glabellar rhytidoplasty, surgical planing (dermabrasion), blepharoplasty (eyelid), mammoplasty (suspension or augmentation), superficial chemosurgery (acid peel of the face) and rhytidectomy (abdomen, legs, hips, or buttocks including lipectomy or adipectomy)—benefits may only be provided when the malappearance or deformity was caused by physical trauma, surgery, or congenital anomaly (as opposed to familial characteristics or aging phenomenon)

> occurring after the Covered Person's Effective Date of coverage under this Plan or a Predecessor Plan; provided, however, that surgery to correct a cleft palette, or for restoration required because of burn injuries, or other similar procedures performed in stages or after certain growth has been attained, are not excluded because the physical trauma, surgery or congenital anomaly (as opposed to familial characteristics or aging phenomenon), occurred after the Covered Person's Effective Date of Coverage under this Plan or a Predecessor Plan . . . . [Emphasis added.]

The Appeals Committee of EIP concluded the DOC Band claims for Meredith dated February 6, 2004 and July 2, 2004 fell within these contractual exclusions.[6] The Jameses appealed this determination to the circuit court, which reversed, finding the DOC Bands were medically necessary and within the scope of coverage. This appeal followed.

STANDARD OF REVIEW

Section 1-11-710(C) of the South Carolina Code provides that "claims for benefits under any self-insured plan of insurance offered by the State to

[6] The Appeals Committee of EIP states in its report: "In summary, the Committee determined that there is no documentation of any neurologic or functional impairment associated with Meredith's condition. Instead, the use of both DOC Bands was only to improve appearance. Thus, no benefits are provided for Meredith's DOC Bands because the Plan of Benefits does not cover this service because it is not a medical necessity, any service or supply that is used to identify or treat an illness or injury and is not necessary to correct a functional deficit. Accordingly, Meredith's February 6, 2004 and July 2, 2004 Doc [B]and claims fall[] within specific contractual exclusions." The Jameses decided it was not in Meredith's best interest to wait for a response to their appeal, so they proceeded with the treatment. They had two bands made, at a total cost of approximately $6,000.00.

state and public school district employees and other eligible individuals must be resolved by procedures established by the board [South Carolina Budget and Control Board], which shall constitute the exclusive remedy for these claims, subject only to appellate judicial review consistent with the standards provided in Section 1-23-380." S.C. Code Ann. § 1-11-710(C) (2005).

After the exhaustion of administrative remedies, an appeal for review may be made to the circuit court, which sits in an appellate capacity. Under section 1-23-380(A)(6) of the Administrative Procedures Act ("APA"), a reviewing court may reverse the decision of an agency upon the grounds, among others, that the decision is "affected by [an] error of law" or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(6)(d) & (e) (2005). In addition, the decision may be reversed where it is "arbitrary or capricious or characterized by [an] abuse of discretion or [a] clearly unwarranted exercise of discretion." Id. § 1-23-380(A)(6)(f).

LAW/ANALYSIS

On appeal, EIP contends the circuit court erred in finding the administrative agency's decision was clearly erroneous and not supported by substantial evidence. We disagree.

In finding the DOC Bands were medically necessary and within the scope of the State Health Plan's terms of coverage, the circuit court noted that Meredith's "treating neurosurgeon, Dr. John Johnson[,] stated unequivocally that the application of the DOC Bands were 'medically necessary' to correct her plagiocephaly."[7] The court additionally noted:

[7] The court stated Dr. Johnson was "the only physician who personally examined and treated the infant child" and observed that, in contrast, the evidence submitted by EIP to deny coverage consisted of the opinions of non-treating physicians from other states who never examined the child. The peer review physicians engaged by Blue Cross reviewed portions of Meredith's medical records, but they did not personally examine her prior to making their recommendations to deny coverage.

> The record further reflects that the child's condition was characterized by deformity of the skull, face and jaw. The records from Dr. Johnson and notes from the Respondent's own internal Nurse Review both set forth that the treatment prescribed was purposed to remedy in part, "musculoskeletal deformities of skull, face and jaw" of the infant. As set forth in the medical research contained within the record, malocclusion of the mandible or jaw is a functional abnormality often associated with this defect and the DOC [B]and is a remedy prescribed to prevent development of this condition where the jaw, face and skull are malformed.

In Bynum v. Cigna Healthcare of North Carolina, Inc., 287 F.3d 305 (4th Cir. 2002), the United States Court of Appeals, Fourth Circuit, upheld an order of the United States District Court for the District of South Carolina requiring coverage for a DOC Band to correct an infant's skull deformity. Id. at 315. The Fourth Circuit rejected the insurer's assertion that the DOC Band served only a cosmetic function and was not medically necessary and was, therefore, outside the scope of coverage in a claim governed by the Employee Retirement Income Security Act ("ERISA"). Id. at 314.

The child in question, Katrina Bynum, was diagnosed with plagiocephaly directly related to congenital torticollis, which her treating pediatrician stated "is a medical condition[,] not a cosmetic condition." Id. at 310. Katrina had flattening on the right side of her head, her right ear was closer to the face than her left ear, and the right side of her head protruded outward greater than the left side. Id. at 309-10 & 310 n.8. The Fourth Circuit found Katrina's DOC Band was not cosmetic as it "was not utilized for the sole purpose of providing her with an aesthetically pleasing, symmetrical head shape . . . ." Id. at 314. "Instead, her DOC Procedure constituted treatment for a congenital birth defect and its related symptoms, with the added hope that it might prevent the onset of serious abnormalities associated with her birth defect, such as malocclusion of the mandible." Id.

The court concluded the insurer's determination that the DOC Band was purely cosmetic "was objectively unreasonable and not supported by substantial evidence." Id.

The court also rejected the argument that the DOC Band was not covered because it was not medically necessary since it was not necessary "for the . . . treatment, cure or relief of a Medical Condition, illness, injury or disease" as defined by the health plan. Id. at 315. The court noted that "both of Katrina's treating physicians, a pediatrician and a pediatric neurosurgeon, opined that Katrina's asymmetrical head shape was a medical condition requiring treatment. And the uncontradicted medical evidence indicates that the appropriate treatment for Katrina's medical condition was the DOC Procedure." Id. at 315.

The court further concluded that the insurer's rejection of coverage, whether being based on the lack of medical necessity or on its being excluded as a cosmetic procedure, was not objectively reasonable and constituted an abuse of discretion. Id. The court stated that it was "left with the definite and firm conviction that [the insurer] committed a clear error of judgment, and it thereby abused its discretion" in this case.[8] Id.

[8] The Fourth Circuit observed in Bynum that the insurer "possessed a financial self-interest in defining 'cosmetic' in a broad manner," as counsel for the insurer had acknowledged the company was "presently facing an increasing number of benefit claims for DOC Procedures, because the number of infants with asymmetrical skulls is increasing due to current trends in post-natal positioning." Id. at 312. The court noted that parents were being advised to place infants on their backs to avoid Sudden Infant Death Syndrome ("SIDS"). Id. at 312 n.15. It has also been noted in the medical literature submitted for the current appeal that there has been an increased rate of plagiocephaly with the 1992 recommendation of the American Academy of Pediatrics to use back positioning as a way to reduce the incidence of SIDS. Although the SIDS rate has declined approximately forty percent since that recommendation, the incidence of positional plagiocephaly has increased. See, e.g., Persing, James, Swanson & Kattwinkel, "Prevention

We find this reasoning persuasive in the instant appeal and conclude its application is warranted here. Article 9, paragraph J of the State Health Plan policy excludes coverage for procedures or goods that have primarily cosmetic effects, which it defines as follows: "Cosmetic goods, procedures or surgery shall mean all goods, procedures, and surgical procedures performed to improve appearance or to correct a deformity without restoring a bodily function." Even where items are arguably cosmetic, however, benefits "may . . . be provided when the malappearance or deformity was caused by physical trauma, surgery, or congenital anomaly . . . ."

Before Meredith was two months old, the Jameses noticed her eyes and ears did not look symmetrical. One of her ears was a little smaller than the other and her eyes appeared to be of dissimilar size. Her pediatrician at the time, Dr. Raymond Flanders, told them it could be the orbital bones that made the eyes appear different.

Meredith was ultimately diagnosed at ten and one-half months with plagiocephaly and torticollis. At that point Meredith was seen by Dr. John Johnson, a neurosurgeon with the Southeastern Neurological and Spine Institute, who found Meredith had positional plagiocephaly. Dr. Johnson wrote a prescription for a cranial molding device, the DOC Band, on February 2, 2004.

Dr. Johnson, as Meredith's treating neurosurgeon, stated in a letter dated February 2, 2004, that Meredith was "found to have a form of positional cranial deformity known as plagiocephaly. This particular deformity may be corrected by the use of a cranial helm[e]t. This device is used to [reshape] the distorted head shape of an infant so that hopefully

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and Management of Positional Skull Deformities in Infants," American Academy of Pediatrics Clinical Report, p. 199, Vol. 112, No. 1, July 2003.

surgery is avoided. I strongly feel that this device is medically necessary for the treatment of this child."[9]

As noted by the circuit court, "the only physician who personally examined and treated the infant child stated unequivocally that the treatment was medically necessary." Even the peer review analysis conducted at the request of Blue Cross noted that the DOC Band had improved not only "the shape of the patient's head" but also "the degree of torticollis" (twisted neck syndrome). Cranial Technologies, the company producing the DOC Band, opined that use of the DOC Band "results in normal to near normal head shape. If left untreated, the infant can have persistent facial asymmetry, which can affect mandibular mechanics, jaw function, airway and orbital alignment. For this reason, the DOC Band is deemed a medical necessity."

The Jameses point out that the American Medical Association ("AMA") has issued Resolution 119 (I-97), which states the AMA is aware that "[i]nsurance companies . . . are increasingly denying insurance coverage for treatment of children's deformities, disfigurement and congenital defects, claiming that these services are non-functional and thus considered 'cosmetic' in nature and therefore declared a non-covered disorder." See "Coverage of Children's Deformities, Disfigurement and Congenital Defects," American Medical Association, Resolution 119 (I-97) <www.ama-assn.org; www.cappskids.org/res119.pdf>. Resolution 119 affirmatively declares, however, the AMA's position is that correction of these facial anomalies is not cosmetic because it is performed on abnormal structures to restore them to a more normal state; further, correction is generally to improve function, although it may also be done to approximate a normal appearance. Id. The AMA stated "[c]hildren who do not have birth defects

[9] Dr. David Matthews, of the Department of Plastic Surgery, Head-Shape Screening Clinic, Cranial Technologies, completed a letter of June 3, 2004, along with an Initial History and Initial Physical of the same date, stating Meredith's abnormal head shape was noticed when Meredith was approximately one month old and that Meredith had positional plagiocephaly and torticollis. Dr. Matthews recommended a second DOC Band to continue the treatment being administered by Dr. Johnson.

and facial anomalies repaired face long-term physical and psychological injuries." Id. The AMA noted at least twelve states had passed legislation requiring insurance coverage for children's deformities or craniofacial surgery. Id.

The AMA has also issued AMA Policy H-185.967, which declares "that treatment of a minor child's congenital or developmental deformity or disorder due to trauma or malignant disease should be covered by all insurers" and "shall include treatment which, in the opinion of the treating physician, is medically necessary to return the patient to a more normal appearance . . . ." See "Coverage of Children's Deformities, Disfigurement and Congenital Defects," American Medical Association, AMA Policy H-185.967 <www.ama-assn.org/ad-com/polfind/hlth-ethics.pdf>.

We find EIP's assertion that coverage should be denied based on its averment that Meredith did not currently have severe mandible or other problems requiring surgery to be unpersuasive. The position of the treating physician was that treatment would prevent the development of these problems and obviate the need for surgery. In our view, it would not be reasonable to require a patient to delay medically-recognized, viable treatments until a problem becomes more severe before coverage applies.

Further, we agree with the circuit court that, considering the record as a whole, reasonable minds would conclude treatment in this case is not primarily cosmetic, but rather, it does affect the functioning of the patient and it is medically necessary. Cf. Baggott v. S. Music, Inc., 330 S.C. 1, 5-6, 496 S.E.2d 852, 854-55 (1998) (finding substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the agency's conclusion; the supreme court held substantial evidence did not support the agency's determination to deny coverage because reasonable minds would conclude the claimant's injury did arise out of and in the scope of his employment).

Accordingly, we affirm the order of the circuit court finding the Jameses' claim for insurance benefits relating to the DOC Band procedures should be approved.

AFFIRMED.

STILWELL and SHORT, JJ., concur.