OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

May 21, 2001

ADVANCE SHEET NO. 18

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

25108 - Sam McQueen v. S.C. Dept. of Health and Environmental Control	Pending
25212 - State v. Bayan Aleksey	Denied 05/14/01
25226 - State v. William Arthur Kelly	Pending

PETITIONS FOR REHEARING

25273 - Dorothy Yoho v. Marguerite Thompson	Granted 04/26/01
25282 - State v. Calvin Alphonso Shuler	Pending
25284 - State v. Michael Rochelle Wilson	Pending
2000-MO-024 - Duke Power Co. v. United Telephone	Pending

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

3323 - State v. Firetag Bonding	Pending
3324 - Schurlknight v. City of North Charleston	Pending
3325 - The Father v. SCDSS	Denied
3327 - State v. John Peake	Pending
3328 - Allstate .v Estate of Thomas Hancock	Denied
3329 - SC Dept. of Consumer Affairs v. Rent-A-Center	Pending
3330 - Bowen v. Bowen	Pending
3331 - Jenkins v. Jenkins	Denied
3332 - SC Farm Bureau v. Kelly	Pending
3333 - State v. Dennis Zulfer	Pending
3335 - Joye v. Yon	Pending
3336 - SCDSS v. Cummings	Pending
3337 - Brunson v. Stewart	Pending
3338 - Simons v. Longbranch Farms	Pending
2000-UP-677 - Chamberlain v. TIC	Denied
2001-UP-123 - SC Farm Bureau v. Rabon	(2) Pending
2001-UP-131 - Ivester v. Ivester	Pending
2001-UP-134 - Salters v. Bell	Pending
2001-UP-144 - State v. Frank A. Crowder	Denied
2001-UP-156 - Employers Ins. v. Whitakers Inc.	Pending
2001-UP-158 - State v. Lavares M. McMullen	Pending
2001-UP-160 - State v. Elijah Price, Jr.	Pending

2001-UP-161 - Meetze v. Forsthoefel	Pending
2001-UP-167 - Keels v. Richland County	Denied
2001-UP-176 - Ledbetter v. Ledbetter	Pending
2001-UP-181 - State v. Eliza Mae Gaines	Denied
2001-UP-186 - State v. Coy L. Thompson	Pending
2001-UP-189 - Green v. City of Columbia	Denied
2001-UP-192 - Mark Turner Snipes	Pending
2001-UP-193 - Cabaniss v. Redding	Denied
2001-UP-199 - Summerford v. Collins Properties	Pending
2001-UP-200 - Cooper v. Parsons	Denied
2001-UP-201 - Pittman v. Hammond	Pending
2001-UP-207 - Patterson v. Perry	Pending
2001-UP-212 - Singletary v. La-Z-Boy	Pending
2001-UP-220 - State v. Jimmy Lee Brown	Pending
2001-UP-232 - State v. Robert Darrell Watson	Pending
2001-UP-235 - State v. Robert McCrorey, III and Robert Dimitry McCrorey	Pending
2001-UP-237 - Roe v. James	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3069 - State v. Edward M. Clarkson	Pending
3102 - Gibson v. Spartanburg Sch. Dist.	Pending

3215 - Brown v. BiLo, Inc.	Pending
3216 - State v. Jose Gustavo Castineira	Pending
3217 - State v. Juan Carlos Vasquez	Pending
3218 - State v. Johnny Harold Harris	Pending
3220 - State v. Timothy James Hammitt	Pending
3231 - Hawkins v. Bruno Yacht Sales	Pending
3242 - Kuznik v. Bees Ferry	Pending
3248 - Rogers v. Norfolk Southern Corp.	Pending
3250 - Collins v. Doe	Pending
3252 - Barnacle Broadcast v. Baker Broadcast	Pending
3254 - Carolina First v. Whittle	Pending
3255 - State v. Larry Covington	Pending
3256 - Lydia v. Horton	Pending
3257 - State v. Scott Harrison	Pending
3264 - R&G Construction v. Lowcountry Regional	Pending
3267 - Jeffords v. Lesesne	Pending
3270 - Boddie-Noell v. 42 Magnolia Partnership	Pending
3271 - Gaskins v. Souther Farm Bureau	Pending
3272 - Watson v. Chapman	Pending
3273 - Duke Power v. Laurens Elec. Coop	Pending
3274 - Pressley v. Lancaster County	Pending
3276 - State v. Florence Evans	Pending
3280 - Pee v. AVM, Inc.	Pending

3284 - Bale v. SCDOT	Pending
3289 - Olson v. Faculty House	(2) Pending
3290 - State v. Salley Parker & Tim Kirby	Pending
3292 - Davis v. O-C Law Enforcement Comm.	Pending
3293 - Wiedemann v. Town of Hilton Head	Pending
3294 - State v. Nathaniel Williams	Pending
3297 - Silvester .v Spring Valley Country Club	Pending
3398 - Lockridge v. Santens of America, Inc.	Pending
3307 - Curcio v. Catepillar	Pending
3311 - SC Farm Bureau v. Wilson	Pending
3315 - State v. Ronald L. Woodruff	Pending
2000-UP-484 - State v. Therl Avery Taylor	Pending
2000-UP-491 - State v. Michael Antonio Addison	Denied
2000-UP-503 - Joseph Gibbs v. State	Pending
2000-UP-560 - Smith v. King	Granted
2000-UP-593 - SCDOT v. Moffitt	Denied
2000-UP-595 - Frank Brewster v. State	Pending
2000-UP-596 - Liberty Savings v. Lin	Denied
2000-UP-601 - Johnson v. Williams	Denied
2000-UP-602 - Reaves v. Marion County	Denied
2000-UP-607 - State v. Lawrence Barron	Pending
2000-UP-613 - Norris v. Soraghan	Pending
2000-UP-627 - Smith v. SC Farm Bureau	Pending

2000-UP-648 - State v. Walter Alan Davidson	Denied
2000-UP-653 - Patel v. Patel	(2) Pending
2000-UP-655 - State v. Quentin L. Smith	Pending
2000-UP-656 - Martin v. SCDC	Pending
2000-UP-662 - Cantelou v. Berry	Pending
2000-UP-664 - Osteraas v. City of Beaufort	Pending
2000-UP-678 - State v. Chauncey Smith	Denied
2000-UP-697 - Clark v. Piemonte Foods	Pending
2000-UP-705 - State v. Ronald L. Edge	Denied
2000-UP-706 - State v. Spencer Utsey	Pending
2000-UP-708 - Federal National v. Abrams	Pending
2000-UP-717 - City of Myrtle Beach v. Eller Media Co.	Pending
2000-UP-719 - Adams v. Eckerd Drugs	Pending
2000-UP-724 - SCDSS v. Poston	Pending
2000-UP-729 - State v. Dan Temple, Jr.	Pending
2000-UP-738 - State v. Mikell Pinckney	Pending
2000-UP-766 - Baldwin v. Peoples	Pending
2000-UP-771 - State v. William Michaux Jacobs	Pending
2000-UP-775 - State v. Leroy Bookman, Jr.	Pending
2001-UP-015 - Milton v. A-1 Financial Services	Pending
2001-UP-019 - Baker v. Baker	Pending
2001-UP-022 - Thomas v. Peacock	Pending
2001-UP-049 - Johnson v. Palmetto Eye	Pending

2001-UP-050 - Robinson v. Venture Capital	Pending
2001-UP-066 - SCDSS v. Duncan	Pending
2001-UP-069 - SCDSS v. Taylor	Pending
2001-UP-078 - State v. James Mercer	Pending
2001-UP-091 - Boulevard Dev. V. City of Myrtle Beach	Pending
2001-UP-114 - McAbee v. McAbee	Pending
2001-UP-124 - State v. Darren S. Simmons	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Quality Towing, Inc., Appellant,

v.

City of Myrtle Beach and
William D. Stephens, Respondents.

Appeal From Horry County
Jack M. Scoville, Jr., Special Referee

Opinion No. 25293
Heard February 7, 2001 - Filed May 21, 2001

REVERSED AND REMANDED

Robert C. Childs, III and Laura W. H. Teer, both of Mitchell, Bouton, Yokel & Childs, of Greenville, for appellant.

James B. Van Osdell and Charles B. Jordan, Jr., both of Van Osdell, Lester, Howe & Jordan, P.A., of Myrtle Beach, for respondents.

CHIEF JUSTICE TOAL: Quality Towing, Inc. ("Quality") appeals the Special Referee's Order finding in favor of the City of Myrtle Beach ("City").

FACTUAL/ PROCEDURAL BACKGROUND

Quality is a South Carolina corporation engaged in the business of towing vehicles in the Myrtle Beach area. On June 13, 1995, the City Council of Myrtle Beach enacted Ordinance 950613-36 ("1995 Ordinance") which instructed the City Manager to contract with one or more wrecker services to provide towing services for the City. Prior to the issuance of the Ordinance, the City operated a Rotation List whereby the City rotated among qualified wrecker services when the City needed vehicles towed. Vehicles towed by the City included City owned vehicles, vehicles illegally parked or abandoned, and privately owned vehicles whose owners had requested the City to tow their vehicle. Under the Rotation List, participants executed yearly contracts which terminated on July 31 of each year. Quality had been one of the wrecker services on the City's Rotation List, which was repealed by the 1995 Ordinance.

Under the 1995 Ordinance, the City was required to bid the contract using requests for proposals ("RFP"). According to the RFP, the City would use six weighted criteria to evaluate each proposal: price, equipment, facilities, reputation, ability to perform, and insurance. The City Manager formed a review committee ("Committee") to evaluate the proposals submitted in response to the RFP. The Committee consisted of City employees, but not City Council members, with prior experience with the local towing companies and/or experience in the procurement process. The Committee was instructed to evaluate each of the proposals and to advise and aid the City Manager in his determination of which proposal best met the City's requirements.

Quality submitted a proposal on September 11, 1995. Three other towing companies also submitted a proposal. The Committee held a meeting on September 26, 1995, where the proposals were discussed. The RFP stated the Committee would inspect the premises of the proposers on October 2, 1995.

Quality was advised on that day its premises would not be inspected because the Committee had determined its proposal was non-responsive. The only facility inspected on October 2, 1995, was Auto Body Works.

The City Manager, once aware Quality's proposal was deemed non-responsive, overruled the Committee on this issue, and instructed the Committee to consider the merits of Quality's proposal. Quality's facilities were inspected on December 13, 1995. However, the Committee, pursuant to the time frame established in the RFPs, met on October 12, 1995, and decided to recommend Auto Body Works for the contract. Therefore, the Committee's recommendation was made two months prior to the inspection of Quality's facilities.

The City Manager testified that, after reviewing the Committee's recommendation, he decided to award the contract to Auto Body Works. The contract with Auto Body Works was approved by the City Council at its January 9, 1996, meeting.

On February 16, 1996, Quality filed a complaint against the City and its risk manager William D. Stephens (collectively referred to as the "City") concerning the award of the exclusive contract to another wrecker service. In its complaint, Quality sought an injunction and claimed: (1) the Ordinance was in violation of its civil rights under 42 U.S.C. § 1983 and S.C. Code Ann. § 16-5-60 (Supp. 2000); (2) the Ordinance constituted an unlawful trust, monopoly, and restraint of trade; (3) the Ordinance amounted to an inverse condemnation of Quality's property rights; (4) the City acted negligently in its actions; and (5) the City violated South Carolina's Freedom of Information Act[1] ("FOIA").

On June 19, 1997, the lower court granted the City summary judgment on Quality's causes of action for illegal restraint of trade and negligence. On August 27, 1997, the court granted the City summary judgment on Quality's inverse condemnation claim. An order granting a separate trial on the non-jury issues was filed April 7, 1998, and an Order of Reference was filed on May 20,

[1]S.C. Code Ann. §§ 30-4-10 - 30-4-110 (Supp. 2000)

1998 appointing a special referee.

On April 13, 1999, a hearing was held before the special referee on Quality's cause of action challenging the validity of the ordinance and contract, and on the cause of action concerning alleged violations of the FOIA. By Order dated May 17, 1999, the special referee found in favor of the City. Quality appealed and the issues before this Court are:

> I. Did the special referee err in holding the Committee/ Municipal staff meetings are not subject to FOIA?
>
> II. Did the special referee err in finding the City Council's executive session of January 9, 1996, did not violate FOIA?
>
> III. Did the special referee err in determining the contract award was not a franchise?
>
> IV. Did the special referee err in denying Quality's inverse condemnation claim?
>
> V. Did the special referee err in finding the Ordinance is valid and does not deprive Quality of its due process rights?
>
> VI. Did the special referee err in finding there was no impropriety in the bidding or award process?
>
> VII. Did the special referee err in finding the three-year term of the contract was not impermissibly long?
>
> VIII. Did the special referee err in finding the Committee did not violate the City and State Procurement Code?

LAW/ ANALYSIS

I. The Freedom of Information Act (FOIA) and the Review Committee

Quality argues the special referee erred in finding the Committee set up by the City Manager to review the proposals was not subject to FOIA. We agree.

The special referee held the Committee meetings in which the members reviewed the proposals were not subject to FOIA. The special referee ruled the Committee was not a "public body" as defined in FOIA since it was formed for the sole purpose of aiding the City Manager in his determination of which wrecker service should receive the contract. The referee specifically held, "This committee, composed entirely of the City's employees and reporting only to the City Manager, was not a committee, subcommittee, or advisory committee of City Council." We find the referee erred in his holding. The plain language of the statute, as well as the purpose behind FOIA as set forth by the legislature, leads to the conclusion that the Committee is a "public body" subject to FOIA.

FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature. *South Carolina Dep't of Mental Health v. Hanna*, 270 S.C. 210, 241 S.E.2d 563 (1978). When adopting FOIA, the legislature stated "it is vital in a democratic society that public business be performed in an open and public manner." S.C. Code Ann. § 30-4-15 (Supp. 2000).

FOIA defines "public body" as:

> any state board, commission, agency, and authority, and public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts . . . including committees, subcommittees, advisory committees, and the like of any such body by whatever name known.

S.C. Code Ann. § 30-4-20(a). This Court does not need to look any further than the language of the statute to find the Committee was subject to FOIA. *Miller v. Doe*, 312 S.C. 444, 441 S.E.2d 319 (1994) ("If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing the rules of statutory interpretation. The court has no right to look for or impose another meaning.").

The fact that the City Manager, and not the City Council, created the Committee and no council member served on the Committee, is not enough to remove the Committee from the definition of "public body" as stated in FOIA. First, it does not matter that the members of the Committee are not members of the parent body. *See* 1984 S.C. Op Atty Gen., No. 84-281. Second, the Committee was set up to give advice to the City Manager, and ultimately the City Council. It is clear from the minutes of the City Council meeting and the testimony of Thomas Leath, City Manager, the Committee's selection process and recommendation went directly to the City Council. [2]

Furthermore, the legislature amended the definition of "public body" in 1987 by adding the phrase "including committees, subcommittees, advisory committees, and the like of any such body by whatever name known." Clearly, the legislature intended for "advisory" bodies, such as the Committee set up by the City Manager to advise him and the City Council, to be covered by the definition.

Finally, the Committee was formed to help determine the award of a City contract. This contract entailed the expenditure of public funds. Because the Committee was not open to the public, Quality was unable to learn its bid had been termed non-responsive and to respond to the Committee's concerns. The Committee made its decision to recommend Auto Body Works to the City in secret. FOIA was enacted to prevent the government from acting in secret.

---

[2] *See Wood v. Marston*, 442 So. 2d 934 (Fla. 1983) (where committees are found to be one step, however remote, in the decision-making process, courts tend to require committees to open their meetings).

South Carolina Tax Comm'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 447 S.E.2d 843 (1994). In addition, the City has advanced no valid reason to hold the meetings and discussions of the Committee concerning a public contract in private. This kind of secret determination is exactly what FOIA was designed to prevent.

The City also argues the Committee was not performing a "government function", but rather a "proprietary or business function", and therefore is not subject to FOIA. *See* 1984 S.C. Op. Atty. Gen., No. 84-64 (only a committee performing a governmental function are subject to FOIA). The special referee agreed with the City, finding the function performed by the Committee was proprietary in nature. We find a committee formed to give advice to a public body or official is performing a governmental function. *See MFY Legal Servs., Inc. v. Toia*, 402 N.Y.S.2d 510 (N.Y. Sup. Ct. 1977) (the giving of advice to a public body or official is a government function).

We hold the plain language of section 30-4-20(a) clearly includes an "advisory committee" such as the one set up in the instant case. We therefore remand for a determination of what relief, if any, Quality is entitled to as a result of this violation.

II. Executive Session

Quality argues the City Council's executive session of January 9, 1996, violated FOIA. We agree.

Quality argues two aspects of the executive session violated FOIA. First, they argue City Council went into the session without stating its purpose. Secondly, they allege City Council took formal action in the session.

A. Announcement

Section 30-4-70(a)(6) (Supp. 2000) states:

> Prior to going into executive session the public agency shall

> vote in public on the question and when such vote is favorable the presiding officer shall announce the *specific* purpose of the executive session. (emphasis added).

According to the minutes of the City Council meeting, the following took place:

> C. Towing - Contractual Recommendation
>
> Mayor Grissom advised this matter would be discussed in Executive Session
>
> Upon motion by Councilman Cain, seconded by Councilman Woods, Council voted unanimously to go into executive session.

The special referee held, even if FOIA was applicable, there was no violation because: (1) a public vote was taken to go into executive session; and (2) although the minutes of the meeting did not reflect the specific purpose of the executive session, the owner and president of Quality testified he, and everyone else at the meeting, knew the City Council was going to discuss the contract.[3] FOIA is clear in its mandate that the "*specific* purpose" of the session "*shall* be announced." (emphasis added). Therefore, FOIA is not satisfied merely because citizens have some idea of what a public body might discuss in private. As evidenced by the minutes, the presiding officer did not announce the specific purpose of the executive session. This was a violation of FOIA.

---

[3]The exact testimony of Mr. Rahner, president of Quality, is as follows:

> THE COURT: But you knew that was what they were going to be discussing was the contract for the towing service?
>
> THE WITNESS: I assumed that. I assumed that's what they were going to be discussing.

The City argues, even if there was no "specific purpose" announced, reversal is not warranted because substantial compliance with FOIA should be found when only a technical violation has occurred, and there has been no demonstrated effect on a complaining party. *See Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995). However, given the history and the purpose of FOIA, this was more than a "technical violation." The statute clearly mandates the specific purpose of the session must be announced.

Therefore, we hold the clear language and the express purpose of FOIA was violated by the presiding officer's failure to announce the specific purpose for the executive session. We remand for a determination of what relief, if any, Quality is entitled to as a result of this violation.

B. Formal Action

Quality also argues the City Council violated FOIA by taking formal action during an executive session. We disagree.

FOIA prohibits any formal action to be taken in an executive session. S.C. Code Ann. § 30-4-70(a)(6) (Supp. 2000). This section defines "formal action" as, "a recorded vote committing the body concerned to a specific course of action." *Id.*

Quality alleges the discussions in the executive session concerned whether or not the contract could be awarded to just one wrecker service. This type of "discussion" does not amount to a "formal action." The City Manager testified that during the executive session, City Council only received *legal* advice concerning the term of the contract: whether the City could legally contract with only one wrecker service, and whether it was legal to set the towing rates in the contract. FOIA does allow executive sessions for discussion of negotiations incident to proposed contractual arrangements and for the receipt of legal advice. S.C. Code Ann. § 30-4-70(a) (2). Furthermore, the actual City Council vote on the contract was conducted in public.

III. Franchise

Quality argues the contract awarded by the City to Auto Body Works is a franchise. Therefore, the City was required to pass an ordinance to approve the franchise. We agree.

A franchise has been defined as a special privilege granted by the government to particular individuals or companies to be exploited for private profits. *City of Cayce v. AT&T Comms.*, 326 S.C. 237, 486 S.E.2d 92 (1997). Government franchisees are traditionally service-type businesses that are willing to pay the municipality for the privilege of doing business with its citizens. *Id.* A "franchise" is a privilege of doing that which does not belong to citizens generally by common right. *State ex. rel Daniel v. Broad River Power Co.*, 157 S.C. 1, 153 S.E. 537 (1930).

City Council's contract with Auto Body Works is a classic example of a franchise. It granted one company the exclusive right to charge the public for a vendor's services. The 1995 Ordinance took away any common right of citizens to be engaged in certain aspects of the towing business, and made it a privilege granted only to a designated business.

The City granted Auto Body Works the sole and exclusive right to tow vehicles at the request of the City Police and when the owner is either unable or unwilling to request the wrecker service of his choice. The contract grants Auto Body Works the right to tow at the request of the City and private persons who have not "otherwise selected a towing company." In a City which is known for its strong tourist population, many private persons will defer to the City's choice of towing service, since they will not have "otherwise selected a towing company."[4]

---

[4]We have found a franchise to be "*special privileges* granted by the government to particular individuals or companies . . . ." *City of Cayce, supra* at n.2 (citing 12 McQuillin *Municipal Corporations* § 34.01 (1949)) (emphasis added). In this case, Auto Body Works was granted the "special privilege" of

Furthermore, the contract covers more than simply towing disabled or abandoned vehicles from public rights-of-way. It also includes the right to tow vehicles on private property which are illegally parked and vehicles involved in accidents. If a private business wants to select a towing company other than Auto Body Works, it would have to post a prescribed number of signs on its premises indicating its choice of wrecker service. The fact that individuals can request other towing services in limited circumstances does not prevent the exclusive contract awarded by the City from being, at a minimum, a partial franchise.

Under S.C. law, a municipality can grant, renew, or extend a franchise only by ordinance. S.C. Code Ann. § 5-7-260(4) (Supp. 2000). A franchise is unenforceable and illegal unless made in conformity with the statute. *Berkley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 308 S.C. 205, 417 S.E.2d 579 (1992); 10 E. McQuillan, *The Law of Municipal Corporations* § 29.02 (3d ed. 1990). Since the City has not produced an ordinance promulgated in accordance with section 5-7-260(4), the franchise contract is invalid.

---

becoming the City's default towing service, a privilege that now does not belong to the citizens of the City generally by common right. *See State ex. rel Daniel, supra*. The dissent argues the contract awarded to Auto Body Works provides for services rendered only to the City, not its citizens. As stated above, this is simply not the case. The force of law grants the City the power to tow cars. For example, the cars may be illegally parked or abandoned. The contract at issue in this case determines which towing company will get all the business when these cars are involuntarily towed - - Auto Body Works. However, it is not the City who then pays Auto Body Works their towing fee, it is the "citizen" owner of the towed car. It is also the "citizen" owner who has not "otherwise selected a towing company" who then pays Auto Body Works their fee when their car is towed. Therefore, it is the City's residents and businesses who are the primary clientele. Therefore, this is a traditional franchise situation, as it allows Auto Body Works to make money from private citizens. *See City of Cayce*, *supra* (in the traditional franchise situation, the municipality's residents and businesses are the franchisee's primary clientele).

IV. Inverse Condemnation, Due Process, Impropriety, Three-Year Term, and Procurement Code

Because we find the contract between the City and Auto Body Works was an invalid franchise agreement, we do not address the remaining issues on appeal.

CONCLUSION

For the foregoing reasons, we **REVERSE** the decision of the special referee and **REMAND** for a determination of what relief Quality is entitled to as a result of the FOIA violations.

MOORE and WALLER, JJ., concur. BURNETT and PLEICONES, JJ., concurring in part and dissenting in part in a separate opinion.

JUSTICE PLEICONES: I concur in part and respectfully dissent in part. I agree with the majority that Quality has shown a violation of the Freedom of Information Act. I disagree, however, with the majority's conclusion that the towing contract awarded to Auto Body Works was a franchise.

"[A] franchise is the privilege of doing that which does not belong to citizens of the country generally by common right. . . . ." State ex rel. Daniel v. Broad River Power Co., 157 S.C. 1, 35, 153 S.E.537, 548 (1930). "Traditionally, governmental franchises are obtained by service-type businesses which seek the municipality's permission **to do business with the municipality's citizens**, and are willing to pay the municipality for this privilege." City of Cayce v. AT&T Communications of Southern States, Inc., 326 S.C. 237, 241, 486 S.E.2d 92, 94 (1997) (emphasis added). In the traditional franchise situation, the municipality's residents and businesses are the franchisee's primary clientele. Id.

The Service Contract between City and Auto Body Works provide "towing and storage services shall be provided when requested by the City. . . ." It contains a provision specifically recognizing a vehicle owner may obtain towing and storage services from any wrecker service.

The Service Contract provides the City with specific services, and requires the City to pay for these services. Under the terms of the Service Contract, Auto Body Works provides services to City, not to City's citizens or businesses. Accordingly, the agreement between City and Auto Body Works is a contract, not a franchise. While the agreement also provides that Auto Body Works is the "default" towing service for certain individuals and businesses, in my view, this provision does not transform a routine procurement contract into a franchise. Similarly, as recognized by the majority, the 1995 Ordinance "instructed the City Manager to contract with one or more wrecker services to provide towing services **for the City**." (emphasis added). While the 1995 Ordinance limited the businesses with which City contracted, it did not prevent other businesses from engaging in wrecker services for City's citizens. The 1995 Ordinance did not contemplate the granting of a franchise.

Since I would not decide the appeal on the franchise issue, I find it necessary to briefly address Quality's remaining claims. Quality's due process and inverse condemnation claims are predicated on its assertion of a "property interest" in remaining eligible to tow cars. The fact that Quality at one time had a definite term contract for towing services does not create a cognizable "property interest" in continuing to tow cars for the City. Further, I find no impropriety or violations of any procurement code in the award of this contract. Although the committee may not have conducted its activities in the most exemplary manner, the fact remains that its role was merely advisory. The contract was awarded by the City Manager and approved by the City Council. I can find no allegations or evidence of improprieties under those codes on their part. Finally, this three year contract is not impermissibly long. Piedmont Pub. Serv. Dist. v. Cowart, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995), *aff'd* 324 S.C. 239, 478 S.E.2d 836 (1996). I would affirm the referee's rulings on these issues.

As noted above, I concur in the majority's conclusion that there were two violations of the FOIA, and therefore concur in the majority's decision to remand this matter to determine whether Quality is entitled to any relief under S.C. Code Ann. §30-4-100 (1991).

BURNETT, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Morris A. Sullivan, Appellant.

Appeal From Greenville County
Lee S. Alford, Circuit Court Judge

Opinion No. 25294
Heard April 5, 2001 - Filed May 21, 2001

REVERSED AND REMANDED

Deputy Chief Attorney Joseph L. Savitz, III, and Assistant Appellate Defender Eleanor Duffy Cleary, both of the South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon; Chief Deputy Attorney General John W. McIntosh; Assistant Deputy Attorney General Donald J. Zelenka; Assistant Attorney General Tracey Colton Green, all of Columbia; and Solicitor Robert M. Ariail, of

Greenville, for respondent.

JUSTICE PLEICONES: Appellant was convicted of murder, possession of a weapon during the commission of a violent crime, possession of marijuana with intent to distribute, and unlawful possession of a pistol by a person under the age of twenty-one. He was sentenced to one thirty year term of imprisonment, a consecutive five year term, and two concurrent one year terms, respectively. On appeal, he challenges only the trial court's refusal to charge certain defenses in connection with the unlawful pistol charge. We reverse.

Facts

The evidence was undisputed that the teenage victim and several of his friends went to appellant's home, and that appellant invited them inside. It soon became apparent, however, that the victim was angry because he believed appellant had been involved in a recent drive-by shooting at the victim's house. There was testimony that the victim removed his jacket and acted as if he intended to fight appellant, who retreated to a back room. The victim followed, and they struggled over a handgun, with appellant gaining control. Appellant then walked backwards into the living room holding the gun, while the victim advanced towards him, daring appellant to shoot him. Appellant fired a warning shot towards the floor, but the victim continued to advance. Appellant then shot him in the leg and chest, killing him.

Law/Analysis

Where there is evidence in the record to support a defense, it is reversible error to refuse a request to charge the jury that defense. E.g., State v. Burris, 334 S.C. 256, 513 S.E.2d 104 (1999). The State concedes that a minor charged with the unlawful possession of a pistol under S.C. Code Ann.

§16-23-30(c) and (e) (1985)[1] may be entitled to a charge on the defense of self-defense, defense of habitation, and/or the defense of necessity when the facts adduced at trial support such a charge. It argues, however, that the evidence here did not require these charges. We disagree.

A defendant is entitled to a self-defense charge where the evidence shows that:

> (1) he was without fault in bringing on the difficulty;
>
> (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; and
>
> (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief.[2]

State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997).

The evidence here showed that appellant was threatened by the victim after inviting him into his home. There is no evidence that appellant was responsible for the victim's aggressive conduct, and in fact appellant retreated even though he was under no duty to do so. Id. Further, the jury could have found a reasonable person in appellant's position would have believed that he

---

[1]Section 16-23-30(e) makes it unlawful for a person under age twenty-one to possess a pistol except under certain circumstances not applicable here. §16-23-30(c).

[2]Since appellant was threatened in his own home, he had no duty to retreat. State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997).

was in imminent danger of suffering serious bodily injury at the hands of the victim, and therefore appellant was entitled to arm himself in self-defense. Cf. State v. Burris, supra (a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting). The trial judge erred in denying appellant's request that the jury be instructed on self-defense.

The defense of habitation is analogous to self-defense and should be charged when the defendant presents evidence that he was "defending himself from imminent attack on his own premises." State v. Lee, 293 S.C. 536, 362 S.E.2d 24 (1987). As explained above, there was evidence to support this requested charge, and the refusal to give it constitutes reversible error. State v. Burris, supra.

The defense of necessity should be charged where the evidence shows:

> (1) there is a present and imminent emergency arising without fault on the defendant's part;
>
> (2) the emergency gives rise to well-grounded apprehension of death or serious bodily injury if the criminal act is not done; and
>
> (3) there is no other reasonable alternative to avoid the threat of harm except to commit the criminal act.

State v. Cole, 304 S.C. 47, 403 S.E.2d 117 (1991).

We find appellant was entitled to a jury charge on this defense as it

relates to the pistol charge. As noted above, appellant was threatened in his own home by a guest, there was evidence that appellant was not at fault in bringing about the confrontation, and there was evidence of a struggle over control of the gun. From this, the jury could have found that appellant was justified in taking possession of the pistol. The denial of appellant's request that the jury be charged on the defense of necessity on the pistol charge requires reversal. State v. Burris, supra.

Conclusion

The evidence entitled appellant to the three defense charges requested in connection with the pistol offense. The failure to honor these requests left the jury no choice other than to convict him of that offense. Whether the refusal to charge these defenses prejudiced the jury's consideration of self-defense and/or defense of habitation with regard to the murder charge is not an issue before us at this juncture.[3] Appellant's conviction for violating §16-23-30 is

REVERSED AND REMANDED.

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

---

[3]We disagree with the State's position that the murder conviction renders harmless the failure to charge self-defense and defense of habitation in connection with the pistol charge. The jury may well have concluded it was reasonable for appellant to arm himself in response to the threat posed by the victim, but unreasonable to shoot him to death. The jury's rejection of these defenses as applied to the homicide charge does not vitiate them in connection with the pistol possession charge. Further, since the jury was not allowed to consider whether appellant was entitled to arm himself, it may have concluded that his action in wresting control of the pistol precluded a finding that he was "without fault" in shooting the victim.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shonya Renee Parks,

Respondent,

v.

Characters Night Club and Thomas Schweitzer, d/b/a Characters,

Defendants,

Of whom Thomas Schweitzer, d/b/a Characters is

Appellant.

AND

Thomas Schweitzer, d/b/a Characters,

Third Party Plaintiff,

Appellant,

v.

Kenneth Antoine Smith,

Third Party Defendant,

Respondent.

Appeal From Greenville County
Alison R. Lee, Circuit Court Judge

Opinion No. 3342
Heard May 7, 2001 - Filed May 21, 2001

REVERSED

O.W. Bannister, Jr., of Greenville, for Appellant.

David B. Greene, of Greenville, for Respondent.

ANDERSON, J.: In this negligence action, Characters and Thomas Schweitzer, who is President of the corporation that owns Characters, appeal the magistrate's denial of their motion for an involuntary nonsuit as well as the nonjury verdict in favor of Shonya Parks. They argue there was no evidence Characters was negligent or that Parks' injury was reasonably foreseeable. We reverse.

FACTS/PROCEDURAL BACKGROUND

On June 12, 1996, seventeen-year-old Shonya Parks attended "Teen Night" at Characters nightclub in Greenville, South Carolina. Parks was accompanied by her cousin, Tomika Miles, and two of Tomika's friends. At the

nightclub, Parks ran into Kenneth "Tweek" Smith, her "ex-boyfriend" and the father of her child.[1]

While in the club, Parks and Smith had a disagreement. Smith pulled Parks' arm in an attempt to force her to walk off with him. Parks told security, who kept Smith away from her. Sometime later in the evening, Parks and Smith "made up." When the club closed around midnight, Smith walked Parks to her car.

Smith stood nearby while Parks and her companions entered Parks' 1989 Suzuki. As Parks waited to pull out of the parking lot, a thrown object broke the car window and struck her in the head, knocking her sideways into her cousin's lap. The object was later discovered to be a billiard ball. Smith pulled Parks out of the car and held her until Characters' security arrived.

On hearing the ball strike Parks' vehicle, Jimmy Chambers, the owner and operator of Eagle Security, immediately went to help Parks. Chambers observed Smith holding Parks. Additionally, Chambers overheard Smith telling Parks that he was "sorry, he [didn't] know why he did it." Chambers testified Smith confessed to a police officer who later arrived at the scene. Several passengers in Parks' jeep yelled for Chambers to arrest Smith. One of the girls told Chambers "he did it, he did it." Parks, however, did not want police to arrest Smith.

According to Chambers, Smith said "he was sorry for doing it and all that. He didn't know why he meant to hit – I just meant to hit your car, I didn't mean to hit you." When asked by Chambers where he got the ball, Smith replied: "I took it from inside." An ambulance transported Parks to the hospital where she was apparently treated and released. Parks' actual damages totaled $969.65.

Parks filed this action against Thomas Schweitzer, doing business as Characters, alleging Characters was negligent in failing to break up a fight in the

[1]After the incident, Parks and Smith had another child together.

club's doorway and this negligence proximately caused the billiard ball to strike her in the head.

Schweitzer and Characters answered denying negligence on their part and the existence of a fight. Schweitzer impleaded Smith as a third-party defendant pursuant to Rule 14(a), SCRCP, asserting Smith threw the ball and was liable for all or part of the damages.[2]

At the nonjury trial in Magistrate's Court, Parks testified: "I was sitting still waiting for the traffic and a cue ball came from behind–like on the side–not the side but like behind me and hit me in the head." Parks did not see the ball coming. She admitted she did not see who threw the ball or from where it was thrown. Parks nonetheless insisted the ball was thrown from behind her vehicle.

Parks attested two boys from Easley were fighting behind her car and one of them threw the ball that hit her. Parks, however, conceded she did not see anyone fighting with a billiard ball. Further, Parks admitted she did not see whether the "boys from Easley" had a billiard ball in their possession. During cross examination of Parks, the following exchange occurred:

> Q. You can't tell us that either one of these boys from Easley threw that pool ball, can you?
>
> A. No.

Parks stated she did not "notice" if anyone from Characters attempted to "break up" the fight. She was not sure the fight was on Characters' property. The fight was in a parking lot next door to Characters.

Miles testified Smith was standing in front by the roadway when the ball struck Parks' car from the left. She looked at him approximately thirty seconds

---

[2]Smith's relationship with Parks had been violent in the past resulting in two arrests for criminal domestic violence.

before the accident. Like Parks, Miles did not see who threw the ball. Miles stated she saw the boys from Easley fighting and recognized both of them. She denied asking anyone at the scene to arrest Smith. Miles agreed Smith was a "pretty violent person." After brief testimony from Parks' mother, who was not present at the time of the accident, Parks rested her case.

Schweitzer and Characters moved for an involuntary nonsuit and dismissal pursuant to Rule 41(b), SCRCP, arguing Parks failed to demonstrate (1) her injury was foreseeable; (2) who threw the ball; and (3) security was inadequate.

The magistrate denied the motion. Characters then presented evidence from Schweitzer and Chambers. Schweitzer testified Characters had more than twenty security people on the premises for "Teen Night" to control a crowd of approximately eight hundred patrons. Of these twenty security people, six were uniformed, armed, security personnel from Eagle Security. The remainder of the security people were Characters' employees. Two security guards patrolled the parking lot. As the club closed around midnight, security personnel moved with the crowd to the parking lot outside.

All of the security personnel were outside when Parks was struck by the ball. They were equipped with radios and maintained constant communication with each other. At least four security people were in the parking lot. Chambers contended if there had been a fight in the parking lot, he would have known about it. No one reported a fight that night.

Chambers averred he was no more than sixty to seventy feet from Parks' car when he heard what he thought was a gunshot. According to Chambers, the driver's side window of Parks' Suzuki was broken. Chambers found a cue ball lying in the passenger seat of Parks' vehicle.

Based on the physical evidence, Chambers opined the billiard ball was thrown from the sidewalk at the front of the vehicle. Chambers explained: "The window on the Suzuki was a perfect circle–I mean a perfect circle. And it wasn't from an angle from behind, it was an angle from the front. It was exactly as if you just pointed straight at the vehicle from the curb, where this young

black guy [Smith] had run from to the Suzuki. From the position he was there then run to it, just like it came straight there."

At the close of all the evidence, the magistrate held there was no evidence Smith was negligent and Characters was "somewhat negligent in failing to patrol the grounds so as to avoid plaintiff's injury." The magistrate ordered Characters to pay one-half of Parks' damages plus court costs.

Characters appealed the verdict to the Circuit Court. The Circuit Court judge affirmed the magistrate's order finding it was supported by evidence of a fight occurring at approximately the same time as the incident. Schweitzer and Characters appeal.

STANDARD OF REVIEW

In deciding whether to grant or deny a motion for nonsuit, the trial court must view the evidence and all reasonable inferences in the light most favorable to the plaintiff. Bullard v. Ehrhardt, 283 S.C. 557, 324 S.E.2d 61 (1984). If there is no relevant competent evidence reasonably tending to establish the material elements of the plaintiff's case, a motion for nonsuit must be granted. Id.

Because this case originated in Magistrate's Court, South Carolina Code Ann. section 18-7-170 (1985) is applicable. Section 18-7-170 provides that on appeal from Magistrate's Court, the Circuit Court may make its own findings of fact. See Dingle v. Northwestern R.R., 112 S.C. 390, 99 S.E. 828 (1919); Truluck v. Atlantic Coast Line R.R., 110 S.C. 92, 96 S.E. 254 (1918); A. & E. Leather Goods Co. v. Sentz, 87 S.C. 267, 69 S.E. 390 (1910); Redfearn v. Douglass, 35 S.C. 569, 15 S.E. 244 (1892); Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp., 280 S.C. 232, 312 S.E.2d 20 (Ct. App. 1984).

However, on appeal from a Circuit Court's affirmance of a magistrate's order, our scope of review is more limited. The Court of Appeals will presume that an affirmance by a Circuit Court of a magistrate's judgment was made upon

the merits where the testimony is sufficient to sustain the magistrate's judgment and there are no facts that show the affirmance was influenced by an error of law. Hadfield v. Gilchrist, 343 S.C. 88, 538 S.E.2d 268 (Ct. App. 2000). We therefore look to whether the Circuit Court order is controlled by an error of law or is unsupported by the facts.

The Circuit Court order provided:

> Magistrate's ruling is affirmed. Under Miletic v. Wal-Mart Stores, Inc., . . . there is no duty unless the merchant or owner has knowledge or reason to know of criminal acts about to occur. Evidence was presented to magistrate that there was a fight and this incident occurred in approximately the same time frame. There is evidence to support the judge's conclusion that Characters had knowledge of activity that could lead to this incident. (i.e. foreseeable).

LAW/ANALYSIS

On appeal, Schweitzer and Characters (referred to in this section collectively as "Characters") argue the magistrate erred in denying their motion for nonsuit and in awarding damages to Parks. They contend there was no evidence in the record to support the finding of negligence. In particular, they assert Parks failed to show her injury was foreseeable and proximately caused by the alleged fight. Characters further maintains it did not have either actual or constructive notice of a fight.

Because this was an action sounding in negligence, Parks was required to allege and prove: (1) the defendant owed her a duty of care; (2) the defendant breached that duty of care; and (3) the defendant's breach proximately caused her damage. See Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998); Jeffords v. Lesesne, 343 S.C. 656, 541 S.E.2d 847 (Ct. App. 2000); Hubbard v. Taylor, 339 S.C. 582, 529 S.E.2d 549 (Ct. App. 2000).

This case hinges on whether Characters breached a duty owed to Parks and whether this breach was the proximate cause of Parks' injuries. It is apodictic that a plaintiff may only recover for injuries proximately caused by the defendant's negligence. Olson v. Faculty House, 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001).

To prove causation, a plaintiff must demonstrate both causation in fact and legal cause. Id. Causation in fact is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's negligence. Id. Legal cause turns on the issue of foreseeability. Id. An injury is foreseeable if it is the natural and probable consequence of a breach of duty. Id. Foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the alleged breach. Id. It is not necessary for a plaintiff to demonstrate the defendant should have foreseen the particular event which occurred but merely that the defendant should have foreseen his or her negligence would probably cause injury to someone. Greenville Mem'l Auditorium v. Martin, 301 S.C. 242, 391 S.E.2d 546 (1990).

Parks' complaint averred Characters had a duty to break up the alleged fight and its negligent failure to do so caused her injury. Specifically, the complaint alleged:

> That at said time and place the plaintiff was in her car on defendant's property and was preparing to leave the premises; that she was waiting for traffic to clear; that suddenly and without warning a projectile, later determined to be a billiard ball, crashed through her car window and hit her in the head, knocking her unconscious and causing her grievous bodily injury; that the billiard ball was thrown by one of several men who were in a fight at the doorway of defendant's night club; and that defendant's agents were making no effort to control the situation or to stop said fight.

Our Supreme Court first addressed the extent of a business's duty to protect invitees[3] from the criminal activity of third parties in the landmark case of Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977).

In Shipes, a shopper was attacked as he walked to his car in a grocery store parking lot. The shopper alleged the store failed to adequately light and supervise the parking area either because (1) existing lamps were not shining brightly enough or (2) they were not turned on. In this case of first impression, the Court recognized that while the owner of a business is not generally charged with a duty to protect customers from criminal acts by third parties, an intervening criminal act by a third party may not always release an owner from liability for negligence. Shipes, 269 S.C. at 483, 238 S.E.2d at 168.

The Court discussed the Restatement (Second) of Torts section 344, which provides:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of

---

[3]An invitee is "one who enters upon the premises of another at the express or implied invitation of the occupant, especially where he is on a matter of mutual interest or advantage." Crocker v. Barr, 305 S.C. 406, 411-12, 409 S.E.2d 368, 371 (1991)(citing Parker v. Stevenson Oil Co., 245 S.C. 275, 280, 140 S.E.2d 177, 179 (1965)). See also Sims v. Giles, 343 S.C. 708, 716, 541 S.E.2d 857, 862 (Ct. App. 2001)("'Invitees are limited to those persons who enter or remain on land upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make them safe for their reception.' The visitor is considered an invitee especially when he is upon a matter of mutual interest or advantage to the property owner.")(quoting Restatement (Second) of Torts § 332 cmt. a (1965)(additional citations omitted)).

> third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done . . . . (emphasis added).

Restatement (Second) of Torts § 344 (1965). Comment f to section 344 explains further the duty of the storeowner:

> Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur . . . . If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Restatement (Second) of Torts § 344 cmt. f (1965).

The Shipes Court held the storeowner was not liable. The Court concluded the storeowner did not know or have reason to know of criminal attacks on shoppers. Thus, the storeowner was not under a duty to protect against such attacks. Furthermore, even assuming the storeowner had a duty to provide adequate lighting to prevent assaults, Shipes failed to show a breach of this duty. Shipes presented no proof the storeowner had actual or constructive knowledge the lights were out.

Approximately three years after Shipes, the Supreme Court revisited the question of a business owner's duty to protect customers in Munn v. Hardee's Food Systems, Inc., 274 S.C. 529, 266 S.E.2d 414 (1980). In Munn, a racially motivated fight began on the premises of a Hardee's restaurant as it was closing. The fight occurred outside the restaurant. Munn was fatally stabbed in the fight. His beneficiaries filed a wrongful death action against Hardee's. Several hours prior to the fatal fight, there had been another racially motivated incident at the location involving different persons.

The Munn Court reaffirmed the Shipes holding that a business owner is not charged with a duty to protect customers from the criminal acts of third parties unless the owner knew or had reason to know that such acts were occurring or about to occur. Id. at 531, 266 S.E.2d at 414-15. The Court found there was no evidence in the record that Hardee's knew or should have known the spontaneous fight was about to occur. Counsel for the Administrator of Munn's Estate attempted to overcome the momentary and impulsive nature of the incident by arguing Hardee's was liable because it "knowingly allowed an atmosphere of unrest to exist at its establishment which precipitated violence." Id. at 531, 266 S.E.2d at 415. The Court held there was no evidence to support this allegation. The prior racial incident was unrelated and Hardee's did not know or have reason to know the fight would occur. The evidence was therefore insufficient to sustain the judgment against Hardee's. Id. at 531-32, 266 S.E.2d at 415.

The Court next addressed this question in Bullard v. Ehrhardt, 283 S.C. 557, 324 S.E.2d 61 (1984). Minnie Bullard filed a negligence action against the owner of Two Notch Billiards for injuries she received when an inebriated customer, Billy Ford, threw a beer bottle which struck Bullard in the eye while she was an invitee in the pool hall. Although the owner of the tavern had asked Ford to leave prior to the incident, Ford returned shortly thereafter and within seconds threw the bottle that injured Bullard. The trial court granted a nonsuit in favor of the tavern owner.

The Supreme Court affirmed finding the owner had no forewarning Ford would throw the bottle and, therefore, no duty arose which the owner could breach. The Court reiterated the rule that a business owner has a general duty to exercise reasonable care in protecting its invitees but is not liable for criminal attacks by third parties in the absence of evidence the owner knew or had reason to know of the attack. Bullard, 283 S.C. at 559, 324 S.E.2d at 62. Accord Wintersteen v. Food Lion, Inc., 344 S.C. 32, 542 S.E.2d 728 (2001).

Despite these early cases, some South Carolina courts have found evidence a business owner's negligent behavior may have proximately caused a criminal attack on an invitee. In Daniel v. Days Inn of America, Inc., 292 S.C.

291, 356 S.E.2d 129 (Ct. App. 1987), three men sexually assaulted Daniel for five or six hours in a Days Inn hotel room before she escaped. This Court reversed a grant of summary judgment to the hotel finding evidence (1) the hotel was in a high crime area; (2) Daniel repeatedly uttered "bloody screams" during the five or six hour attack and torture; and (3) the hotel failed to follow its own security guidelines or to regularly patrol the premises. One inference from the testimony of a guest who overheard Daniel's screams was that security, if it had patrolled, would have heard the screams and intervened to free Daniel from the room in which she was held.

In Greenville Memorial Auditorium v. Martin, 301 S.C. 242, 391 S.E.2d 546 (1990), a bottle-throwing case, the Supreme Court found evidence existed from which a jury could have found plaintiff's injuries from a criminal act were foreseeable and that Greenville Memorial Auditorium was liable. In reaching this conclusion, the Court appears to have relied on the rule from comment f to section 344 of the Restatement (Second) of Torts providing "[i]f the place or character of [an owner's] business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection." Restatement (Second) of Torts § 344 cmt. f (1965).

Martin attended a rock concert at the auditorium. During the concert, an unknown person threw a bottle from the auditorium's balcony. The bottle struck and injured Martin, who filed suit claiming the city's negligence in securing the premises during the concert created an unreasonable risk of harm and proximately caused Martin's injury.

The record demonstrated the city only employed fourteen security guards to manage a crowd of six thousand people. There was no reserved seating on the main floor. Many patrons of the concert were unruly and openly drinking liquor. The floor was littered with liquor bottles and pieces of glass. Some patrons smoked marijuana during the concert.

At trial, the auditorium's director of security acknowledged reserved seating would have assisted security personnel in seeing into the crowd. The director further testified the group, Loverboy, performed songs which encouraged the use of drugs and alcohol, and increased the potential for security problems. Based on this evidence that the auditorium's negligent security created a dangerous situation, the Court held a jury could find Martin's injuries were foreseeable. Id. at 245-46, 391 S.E.2d at 548.

A case finding no evidence supporting negligence and foreseeability is Callen v. Cale Yarborough Enterprises, 314 S.C. 204, 442 S.E.2d 216 (Ct. App. 1994). Callen was injured in a fight in the drive-through lane of a Sumter Hardee's after he got into an argument with a man in the car in front of his car. When Callen got out of the car, the man picked up a board and struck Callen in the face. Id. at 205, 442 S.E.2d at 217. Callen stated he "had no warning whatsoever" of the attack. Id.

Relying on Munn and Shipes, this Court affirmed the grant of summary judgment to Hardee's. The Court determined: "Hardee's is a fast-food restaurant which serves no alcohol. It certainly does not fit the description of an operation which attracts or provides a climate for crime. There was no evidence Hardee's knew or had reason to know the violent act in question was occurring or about to occur." Id. at 206, 442 S.E.2d at 218.

In Dalon v. Golden Lanes, Inc., 320 S.C. 534, 466 S.E.2d 368 (Ct. App. 1996), this Court affirmed the denial of Golden Lanes' motions for directed verdict and judgment notwithstanding the verdict. While he was in the Golden Lanes entertainment center, Dalon was stabbed by another customer named Carroll, who had caused trouble at the center on other occasions and had been intoxicated several times. On the night of the stabbing, a Golden Lanes security guard broke up a fight between Carroll and Dalon in the parking lot of the center. The security officer heard Carroll threaten to cut Dalon's throat. Despite this fact, the officer sent Carroll back inside the center. Carroll returned to the parking lot and began yelling for Dalon. The security guard instructed Carroll to return to the center. Carroll pulled out a knife and moved toward

Dalon. At that point, Dalon ran into the center. Carroll followed and stabbed Dalon.

This Court ruled:

> Viewing the evidence in the light most favorable to Dalon, Golden Lanes was aware of Carroll's apparent propensity to cause trouble and had permitted him to return to its premises despite the trespass notices issued by its security personnel. The officer on duty broke up the initial fight between Dalon and Carroll and heard Carroll threaten to cut Dalon's throat. Rather than escort Carroll from the scene, the officer sent him back inside the bowling alley and began to question Dalon. Carroll returned with his knife and events led to the stabbing of Dalon. There is more than one reasonable inference to be drawn from the evidence in this case as to whether Golden Lanes exercised reasonable care in providing security under the circumstances given its specific knowledge about Carroll's past conduct.

Dalon, 320 S.C. at 539-40, 466 S.E.2d at 371.

The pendulum swung back in Miletic v. Wal-Mart Stores, Inc., 339 S.C. 327, 529 S.E.2d 68 (Ct. App. 2000), in which this Court found no evidence of foreseeability despite other criminal activity in or near the shopping center's parking lot from which a shopper was abducted and robbed at gunpoint. Because the other crimes were unrelated and did not involve abductions, Wal-Mart had no duty to protect Miletic from an attack like the one she suffered. As Miletic left Wal-Mart and got into her car, two men ran toward her, put a gun to her head, forced her into the back seat of her car, and drove away in her car with her. The men later released Miletic after taking her money and credit cards. Id. at 329, 529 S.E.2d at 68.

The Court noted Wal-Mart is not the type of operation that attracts or provides a climate for crime. In the two years prior to Miletic's abduction, the only crime involving Wal-Mart was a larceny, not an assault, car jacking, or

kidnapping. Further, the Court emphasized the attack occurred so quickly even the victim had no prior notice of it.

More recently, in Jeffords v. Lesesne, 343 S.C. 656, 541 S.E.2d 847 (Ct. App. 2000), this Court examined whether a bar should have foreseen the criminal act of a customer who injured Jeffords. Jeffords attended an "End of Summer Bash" at a bar known as "The Watering Hole." As Jeffords waited to play pool, another customer, Chris Driggers, claimed ownership of several quarters which Jeffords had placed on the edge of the pool table. When Jeffords disputed Driggers' ownership of the quarters, Driggers abruptly hit Jeffords in the mouth with his pool cue, causing Jeffords severe injuries.

Jeffords brought a negligence action against Bonneau Lesesne, individually and doing business as the "Watering Hole," asserting three allegations of negligence creating a reasonably foreseeable risk of third party conduct such as the assault by Driggers. Jeffords specifically argued: "(1) the defendant failed to secure and maintain the premises in a reasonably safe condition; (2) the defendant failed to employ adequate security guards; and (3) the defendant failed to adequately warn Jeffords." Id. at 660, 541 S.E.2d at 849. The trial court found no evidence to support a conclusion that the allegations of negligence were a proximate cause of Jeffords' injuries. The court directed a verdict in favor of the defendant.

As in Greenville Memorial Auditorium v. Martin, 301 S.C. 242, 391 S.E.2d 546 (1990), the Jeffords Court focused on the place and character of the business and whether it created a dangerous climate for criminal activity rather than on the spontaneous nature of the criminal act involved. The Court noted the "End of Summer Bash" was promoted by a local radio station that broadcast from the parking lot. The establishment offered prizes to customers and played music on large speakers in the parking lot. Despite these efforts to draw a large crowd to a "high crime area," the owner did not provide a doorman or other security measures such as bouncers or wait staff. The Court found: "[T]he evidence as to the special promotion and the crowd lends itself to the inference that a more frenzied atmosphere was cultivated by Lesesne." Id. at 665, 541 S.E.2d at 851. The Court concluded the place and character of the "End of

Summer Bash" "was such as to raise a factual issue concerning the reasonable foreseeability of [criminal] conduct and the necessity of taking reasonable precautions, such as providing security or a reasonably sufficient number of servants, to afford protection." Id. at 664, 541 S.E.2d at 851.

As further evidence of foreseeability, the Court found it "compelling" that prior to the attack, Driggers had been "loud, obnoxious, aggressive, disheveled in appearance, glassy eyed, and 'even a little intimidating.'" Id. at 663, 541 S.E.2d at 850. It was obvious Driggers "'had been drinking probably quite a while.'" Id. Less compelling was the spontaneity of the attack. "Even though the actual assault by Driggers may have been so swift that it could not have been stopped once it began, a factual issue is presented as to whether that type of criminal conduct was a foreseeable risk created by the place and character of Lesesne's business activities on that evening." Id. This Court concluded the trial judge erred in directing a verdict as to the negligence of Lesesne in creating a reasonably foreseeable risk of third party criminal conduct such as the assault by Driggers.

Despite the divergence in the above cases, we find Daniel, Greenville Memorial Auditorium, Dalon, and Jeffords are distinguishable from the present case. Those cases contain the common thread of a business that failed to take reasonable security precautions despite actual or constructive notice of danger to customers. See Daniel, 292 S.C. at 297, 356 S.E.2d at 132 (stating hotel was in a high crime area and evidence existed hotel personnel failed to implement any of hotel's security policies or procedures); Greenville Mem'l Auditorium, 301 S.C. at 245-46, 391 S.E.2d at 548 (finding director of security was on notice patrons had consumed alcohol); Dalon, 320 S.C. at 539-40, 466 S.E.2d at 371 ("Viewing the evidence in the light most favorable to Dalon, Golden Lanes was aware of Carroll's apparent propensity to cause trouble and had permitted him to return to its premises despite the trespass notices issued by its security personnel."); Jeffords, 343 S.C. at 665, 541 S.E.2d at 851 ("Perhaps most compelling is the evidence as to the condition of Driggers in the minutes prior to the assault. In a light most favorable to Jeffords, Driggers showed signs of intoxication, was obnoxious, and was aggressive for at least several minutes prior to the assault. Consequently, even though the actual manifestation of

physical aggression may not have been foreseeable, the fact of the aggression was arguably a natural result of Lesesne's failure to provide sufficient personnel or security to control the premises and warn patrons.").

In contrast, the evidence is undisputed that Characters took precautions and provided numerous security personnel equipped with headsets and radios. These personnel were in constant communication with each other and moved with the patrons outside into the parking lot as the club closed. Parks did not present any evidence the amount of security personnel was inadequate or that Characters failed to follow its own security guidelines. There was no evidence Characters was in a high crime area or that the alleged fight was of such duration as to put Characters on notice of a problem. No one reported a fight that night. Chambers contended if there had been a fight in the parking lot, he would have known about it.

Even assuming, arguendo, that there was a fight and Characters was negligent in failing to break it up, Parks failed to present any evidence this breach of duty proximately caused her injury. Neither Parks nor Miles could testify a participant in the alleged fight threw the billiard ball or that the fighters had a billiard ball in their possession.

The evidence further indicates the attack on Parks was unexpected and occurred abruptly. Parks was not involved in an altercation at the time of the attack. The record does not indicate that alcohol was involved in any way.

Neither Parks nor Miles saw who threw the ball or from where it was thrown. The evidence was undisputed that the driver's side window of Parks' car was broken. Additionally, when struck, Parks fell sideways into her cousin's lap. This indicates the ball could not have come from behind Parks' car as Parks alleged. We conclude there is absolutely no evidence in the record indicating Characters' alleged negligence in breaking up the fight proximately caused Parks' injury.

CONCLUSION

Because of the complete dearth of evidence to support crucial elements of Parks' case, the magistrate erred in denying the motion of Characters and Schweitzer for an involuntary dismissal of the action. Further, the Circuit Court erred as a matter of law in affirming the magistrate. Accordingly, the judgment of the Circuit Court is hereby

REVERSED.

HUFF and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

_____

Elizabeth M. Langehans and Faye Smith Brown,

Appellants,

v.

Flint P. Smith, Klaus D. W. Langehans, Michael L. Brown, Carol Schwarting Smith, South Carolina Employment Security Commission, Nationsbank, N.A., formerly known as Nationsbank, National Association (CAROLINAS), formerly known as NationsBank of South Carolina, N.A., as successor to the Citizens and Southern National Bank of South Carolina, Colleen H. Jolly and Willis L. Jolly, Ralph Morrell, Jr., Eva Gwaltney, Linda R. Myers, Darvin Lee, Leigh Ann Walker, Bennie H. Collins, The Anderson National Bank, The United States of America acting by and through The Internal Revenue Service, and The South Carolina Department of Revenue,

Defendants,

of Whom
Ralph Morrell, Jr., Eva Gwaltney, Linda R. Myers, and Leigh Ann Walker are,

Respondents.

Appeal From Bamberg County
E. T. Moore, Jr., Special Referee

Opinion No. 3343
Heard March 5, 2001 - Filed May 21, 2001

AFFIRMED

W. D. Rhoad, of Rhoad Law Firm, of Bamberg, for appellants.

Robert F. McCurry, Jr., of Horger, Barnwell & Reid, of Orangeburg; and Richard B. Ness, of Early & Ness, of Bamberg, for respondents.

HEARN, C.J.: In this action to foreclose on a real estate mortgage, Elizabeth Langehans and Faye Brown appeal the special referee's ruling in favor of the intervening judgment creditors. We affirm.

FACTS

On November 9, 1988, Klaus Langehans, Michael Brown, and Flint Smith (Husbands) executed a promissory note in the amount of $50,000 to Citizens and Southern National Bank of South Carolina (NationsBank).[1] To

[1] Husbands originally executed this note and mortgage to Citizens and Southern National Bank of South Carolina. Through a series of mergers and name changes, the note and mortgage came to be owned by NationsBank.

secure payment for this note, Husbands executed a mortgage encumbering real estate they owned. The mortgage contained a future advance clause, but limited the indebtedness secured by the mortgage to $50,000. Under the terms of the mortgage, Husbands were jointly and severally liable on the note and were obligated to make monthly mortgage payments to NationsBank. During the ensuing years, Husbands paid the monthly mortgage as various parcels were sold and released from the mortgage. At some point however, Husbands stopped paying the monthly mortgage and defaulted under the terms of the note and mortgage. Upon learning that NationsBank planned to bring a collection action, Flint Smith and Michael Brown agreed to pay NationsBank $10,000 to forestall legal action against them. Pursuant to this agreement, Michael Brown paid NationsBank $5,000; however, Flint Smith never paid anything.

In October 1996, NationsBank filed suit on the note against Husbands. NationsBank did not seek foreclosure on the note, but expressly "reserve[d] and preserve[d] its right to later pursue any and all rights it ha[d] against the real estate collateral, including, but not limited to, the appointment of a receiver or foreclosure of the mortgage." Klaus Langehans demanded foreclosure and was subsequently dismissed from the lawsuit. NationsBank obtained a judgment against Michael Brown and Flint Smith in the amount of $23,764.25 plus interest. In his order, then circuit judge Costa Pleicones held that NationsBank "shall hereafter have the right to pursue any and all rights and remedies it has against the real estate collateral securing the note upon which this judgment is rendered . . . ." The rest of this sentence, which was crossed out and initialed by Judge Pleicones, states that NationsBank's rights and remedies "includ[e], but [are] not limited to, the right to appointment of a receiver and/or the right to foreclose upon the mortgage securing the note."

Shortly after the lawsuit, NationsBank purported to assign the note, mortgage, and judgment lien to Elizabeth Langehans and Faye Brown (Wives). In exchange for this assignment, Elizabeth Langehans paid NationsBank $10,694.35, and Michael Brown and Faye Brown paid NationsBank $10,694.35 from a joint account held in both their names. The sum of these payments, $21,388.70, was the negotiated amount of the total debt due to NationsBank.

All parties considered this transaction a sale, as opposed to a payment, of the note.

After the assignment, Wives filed a foreclosure action against Husbands. In response to this foreclosure action, various judgment creditors of Flint Smith asked that their intervening judgments against him be afforded priority superior to that of Wives. A foreclosure hearing was held in May 1998, and the special referee denied Wives' foreclosure action. The special referee held that Elizabeth Langehans's payment to NationsBank was a gratuitous payment on her husband's behalf to satisfy his debt. The special referee also found that Faye Brown paid no consideration for the assignment and that Michael Brown's payment was for his own debt. Although the special referee ruled that Wives were subrogated to the rights of NationsBank and could therefore seek contribution from Flint Smith, he denied Wives' foreclosure action, finding that the assignment of the note and mortgage was without effect, because the payments from Michael Brown and Elizabeth Langehans extinguished the debt secured by the mortgage. The special referee further found that it would be extremely inequitable to Flint Smith's judgment creditors to allow Wives to achieve priority status through their collusion with Husbands.

Wives moved for reconsideration or alternatively for a new trial. The motion was denied and Wives appeal.

STANDARD OF REVIEW

An action to foreclose a real estate mortgage is one in equity. Dockside Ass'n v. Detyens, 294 S.C. 86, 88, 362 S.E.2d 874, 875 (1987). In equity cases, the appellate court may view the evidence to determine facts in accordance with its own view of the preponderance of the evidence, though it is not required to disregard the findings of the special referee. Friarsgate, Inc. v. First Fed. Sav. & Loan Ass'n, 317 S.C. 452, 456, 454 S.E.2d 901, 904 (Ct. App. 1995).

DISCUSSION

I. Equitable Subrogation

Wives argue that they were equitably subrogated to the rights of NationsBank. We disagree.

Equitable subrogation allows a subsequent creditor to assume the rights and priority of a prior creditor. Dodge City v. Jones, 317 S.C. 491, 494, 454 S.E.2d 918, 920 (Ct. App. 1995). A party may be equitably subrogated to the rights of an earlier creditor if: (1) the party paid the debt owed to the earlier creditor; (2) the party was not a volunteer but had a direct interest in the discharge of the debt or lien; (3) the party was secondarily liable for the debt; and (4) no injustice or inequity will be done to another party. United Carolina Bank v. Caroprop, Ltd., 316 S.C. 1, 3, 446 S.E.2d 415, 416 (1994); Dodge City, 317 S.C. at 494, 454 S.E.2d at 920.

Wives fail to meet several of these elements. We are not persuaded that Faye Brown meets the first factor for equitable subrogation, as there is no evidence that she owed any debt to NationsBank. The special referee concluded that Michael Brown paid his own debt and that Faye Brown gave no consideration for the assignment of the note and judgment. Moreover, because neither party has appealed this finding, it is the law of the case. Matheson v. McCormac, 187 S.C. 260, 263, 196 S.E. 883, 884 (1938) (holding that a decree from which no appeal is taken becomes the law of the case in all subsequent proceedings involving the same parties and the same subject matter).

As to the second and third factors for equitable subrogation, we do not find that Wives had a direct interest in the discharge of the debt or that they were secondarily liable for the debt. The special referee specifically found that Elizabeth Langehans made a "gratuitous payment to NationsBank on her husband's behalf satisfying a debt for which he was jointly and severally liable." Thus, Elizabeth Langehans was a volunteer with no direct interest in the discharge of the debt or lien. Because we affirm the special referee's finding that Faye Brown paid no consideration for the debt, she is neither a volunteer

nor a party with a direct interest. Wives argue that they had a direct interest in the debt for which they were secondarily liable by virtue of their spousal relationship with Husbands. This argument is unavailing. With the exception of medical necessities, one spouse is not liable for the debts of another spouse. S.C. Code Ann. § 20-5-60 (Supp. 2000); Richland Mem'l Hosp. v. Burton, 282 S.C. 159, 160-61, 318 S.E.2d 12, 13 (1984); Taylor v. Barker, 30 S.C. 238, 245, 9 S.E. 115, 118 (1889).

Further, Wives do not satisfy the fourth element for equitable subrogation because allowing them to be equitably subrogated would unjustly and inequitably affect another party. The special referee stated that he was "particularly concerned that it would be extremely inequitable to the judgment creditors of Smith to allow Plaintiffs to 'leap frog' their way to a priority status by virtue of their apparent collusive efforts with their spouses . . . ." We concur with this finding.

Moreover, we find the equitable subrogation cases Wives cite to be distinguishable from the facts of this case. In Caroprop, a co-maker was forced to satisfy the entire mortgage and past-due taxes for a note after the tenant-in-common, with whom he was jointly and severally liable for the note, defaulted. 316 S.C. at 2, 446 S.E.2d at 416. The co-maker then brought a partition action for equitable subrogation to recoup one-half of the mortgage and taxes he paid on his tenant-in-common's behalf. Id. at 2-3, 446 S.E.2d at 416. Unlike the co-maker in Caroprop, Wives were not co-makers of the note and were not jointly and severally liable for the note. In Dodge City, Dodge City was awarded a judgment which became a lien against the mortgagors' property. 317 S.C. at 492-93, 454 S.E.2d at 919. Dodge City brought suit after a subsequent mortgage was held to be equitably subrogated and given priority over its judgment. Id. The party holding the subsequent mortgage was equitably subrogated because that party was legally obligated to satisfy the mortgage and would be subject to a lawsuit if it had not paid the mortgage. Id. at 495-96, 454 S.E.2d at 921. Unlike the party that was held to be equitably subrogated in Dodge City, Wives had no legal obligation to satisfy the mortgage and no action could have been brought against Wives had they not satisfied the mortgage.

Thus, Caroprop and Dodge City do not involve third party volunteers stepping forward to pay an existing judgment for a prior note and mortgage.

For the foregoing reasons, we find that Wives were not equitably subrogated to the rights of NationsBank.

II. Foreclosure Action

Wives contend the special referee erred in denying their foreclosure action. We disagree.

A mortgage is security for a debt or obligation. Perpetual Bldg. & Loan Ass'n v. Braun, 270 S.C. 338, 340, 242 S.E.2d 407, 408 (1978); Patterson v. Rabb, 38 S.C. 138, 147, 17 S.E. 463, 465 (1893). Unlike other instruments, in order for a mortgage to be valid, there must be a debt or obligation of the mortgagor for which the mortgage is given as security. Blackwell v. Blackwell, 289 S.C. 470, 472, 346 S.E.2d 731, 732 (Ct. App. 1986). If there is no debt, then there is no valid mortgage. Duckworth v. McKinney, 58 S.C. 418, 426, 36 S.E. 730, 733 (1900); Blackwell, 289 S.C. at 472-73, 346 S.E.2d at 732.

NationsBank secured a judgment against Husbands for $23,863.77. Wives then paid NationsBank the amount NationsBank agreed to accept as full payment for the debt owed to it by Husbands. This payment fully satisfied the debt for which NationsBank held a mortgage on Husbands' property. The special referee found that "the bank's debt was paid in full . . . ." Once this occurred, the mortgage was extinguished because the underlying debt was satisfied, and NationsBank no longer had the right to foreclose. Duckworth, 58 S.C. at 426, 36 S.E. at 733; Blackwell, 289 S.C. at 472-73, 346 S.E.2d at 732. NationsBank could only convey to Wives rights it possessed. See Noland v. Law, 170 S.C. 345, 354, 170 S.E. 439, 442 (1933) (stating that an assignee of a mortgage takes the mortgage subject to the same rights the original assignee had). Wives, therefore, were also prevented from foreclosing on the extinguished debt. Moreover, because neither party appealed this finding in the special referee's order, it is the law of the case. Matheson, 187 S.C. at 263, 196 S.E. at 884 (holding that a decree from which no appeal is taken becomes the

law of the case in all subsequent proceedings involving the same parties and the same subject matter).

We therefore affirm the special referee's denial of Wives' foreclosure action as to Michael Brown and Flint Smith.

AFFIRMED.

SHULER, J., concurs.

CURETON, J., dissents in a separate opinion.

CURETON, J.: (Dissenting). The majority holds Wives are not equitably subrogated to the rights of NationsBank and are not entitled to foreclosure. I respectfully disagree.

I. Equitable Subrogation

Subrogation is defined as the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt. U.S. Fidelity & Guar. Co. v. Collins, 298 S.C. 165, 378 S.E.2d 821 (Ct. App. 1989).

"Subrogation can arise by statute, by contract, or through equity." Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 607, 538 S.E.2d 15, 30 (Ct. App. 2000). Conventional subrogation arises by contract and is specifically bargained for by the parties.[2] "In contrast, equitable (or legal) subrogation is implied subrogation that arises under the common law." Id. at 608, 538 S.E.2d at 30. Equitable subrogation permits a subsequent creditor to assume the rights and priority of a prior creditor. Dodge City of Spartanburg, Inc. v. Jones, 317 S.C. 491, 454 S.E.2d 918 (Ct. App. 1995).

The elements of equitable subrogation are: (1) the party claiming subrogation has paid the debt; (2) the party was not a volunteer, but had a direct interest in the discharge of the debt or lien; (3) the party was secondarily liable for the debt or for the discharge of the lien; and (4) no injustice will be done to the other party by the allowance of the equity. United Carolina Bank v. Caroprop, Ltd., 316 S.C. 1, 446 S.E.2d 415 (1994).

[2] I am of the view that this action could have been more appropriately pursued based on the theory of conventional subrogation or contractual assignment. In fact, Wives' complaint asserts they stand in the shoes of NationsBank by virtue of a contractual assignment. It is not clear to me how the case evolved into one premised on equitable subrogation.

A.

The majority concludes Mrs. Brown failed to appeal the special referee's ruling that Mr. Brown, rather that Mrs. Brown, paid his portion of the debt owing NationsBank. Accordingly, the majority concludes the ruling is the law of the case, thus, precluding Mrs. Brown from meeting the first element of equitable subrogation. I believe Mrs. Brown properly appealed the ruling.

In Wives' Statement of Facts, Mrs. Brown claims she paid her share of an agreed price to purchase the assignment from a joint account held with her husband. In Wives' first argument, Mrs. Brown argues the referee's finding that her payment to the bank merely satisfied Mr. Brown's underlying debt contravenes case law. I would find this argument sufficient to prevent waiver of the argument under the majority's law of the case analysis.

On the merits, I also disagree with the majority's holding that Mrs. Brown failed to meet the first element of equitable subrogation. A joint account is defined as "an account payable on request to one or more of two or more parties. . . ." S.C. Code Ann. § 62-6-101 (4) (1987). "A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." S.C. Code Ann. § 62-6-103 (a) (1987).

There is no evidence in the record regarding the contributions made by Mr. and Mrs. Brown to their joint account. However, they each testified they considered the payment to have been made by Mrs. Brown. Mrs. Brown testified she and Mrs. Langehans went "fifty-fifty" to purchase the note and mortgage. She acknowledged Mr. Brown wrote the check on her behalf from a joint checking account used solely by Mr. Brown. However, she explained the funds used were transferred from their joint savings account. Mr. Brown also testified the money paid to NationsBank was for Mrs. Brown's purchase of the mortgage.

Furthermore, all parties to the transaction treated the payment as one made by Mrs. Brown. NationsBank's attorney testified NationsBank "assigned the promissory note, mortgage, and judgment liens" to Mrs. Langehans and Mrs. Brown. Mrs. Langehans testified she and Mrs. Brown agreed to buy the mortgage from NationsBank. All parties to the transaction considered the check a payment from Mrs. Brown. I would hold Mrs. Brown met the first element of equitable subrogation: that the party claiming subrogation paid the debt.[3]

B.

The majority also concludes Wives failed to meet the second and third elements of equitable subrogation: (2) the party was not a volunteer but had a direct interest in the discharge of the debt or lien; and (3) the party was secondarily liable for the debt. I disagree.

In Sutton v. Sutton, 26 S.C. 33, 1 S.E. 19 (1886), our supreme court concluded a prospective heir to land who paid a portion of the mortgage debt was not a volunteer for purposes of equitable subrogation. The court found "he was in no proper sense a mere stranger, making a voluntary payment . . . ." Id. at 37, 1 S.E. at 22. The court acknowledged:

> [t]he payment must be made by or on behalf of a person who had some interest in the premises, or

[3] Moreover, while much is made by the special referee and the majority about the Wives' payment satisfying only their husbands' obligation, that argument is to no avail. Under the law of equitable subrogation, a joint debtor who pays the entire debt is equitably subrogated to the rights of the creditor to the extent he paid more than his proportionate share of the debt. See United Carolina Bank v. Caroprop, Ltd., 316 S.C.1, 446 S.E.2d 415 (1994); 73 Am. Jur. 2d Subrogation § 62 (1974); 83 C.J.S. Subrogation § 25 (2000). Thus, under the facts of this case, even if Mr. Brown and Mr. Langehans had personally paid NationsBank the amount paid by their wives, they would have been entitled to be subrogated to the interest of NationsBank as to Mr. Smith's one-third interest in the property.

> some claim against other parties, which he is entitled in equity to have protected. . . . In general, where any person having a subsequent interest in the premises . . . and who is not the principal debtor primarily liable for the mortgage debt, pays off the mortgage, he thereby becomes an equitable assignee thereof, and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit; he is subrogated to the rights of the mortgagee to the extent necessary for his own equitable protection.

Id. at 38, 1 S.E. at 23 (citations omitted).

Other states have likewise limited the application of the volunteer element in determining the right to equitable subrogation. See Mort v. United States, 86 F.3d 890 (9th Cir. 1996) (applying Nevada law in determining that a person who lends money to pay off an encumbrance on property and secures the loan with a deed of trust is not a volunteer); Baker v. Leigh, 385 S.W.2d 790 (Ark. 1965) (extending equitable subrogation to one with no previous interest or obligation who pays off the debt at the instance of the debtor); Bryant v. Cole, 468 S.E.2d 361 (Ga. 1996) (finding ex-wife equitably subrogated to the rights of the mortgagee where ex-wife paid a debt ordered in the parties' divorce decree to be paid by the ex-husband); Hult v. Ebinger, 352 P.2d 583 (Ore. 1960) (finding a wife's interest in her husband's financial well-being justified her payment of the debt; therefore, she was not a volunteer). Moreover, the general law is that a party will not be considered a volunteer who has "any palpable interest which will be protected, such as a future or contingent interest, or the interest of a cotenant, a life tenant, judgment creditor, a wife or widow, or an heir, devisee, or legatee." 73 Am. Jr. 2d Subrogation § 93 at 656 (1974). Generally, one paying the debt of another pursuant to an agreement express or implied for subrogation is not a volunteer and is entitled to the creditor's rights. 83 C.J.S. Subrogation § 17 (2000). I conclude Wives were not volunteers, thereby meeting the second element.

C.

I likewise conclude Wives met the third element of being secondarily liable for the debt. Secondary liability does not require contractual liability; a moral duty to make payment is sufficient. See Walker v. Queen Ins. Co., 136 S.C. 144, 154, 134 S.E. 263, 267 (1926) ("Subrogation is allowed only in favor of one who under some duty or compulsion, legal or moral, *pays the debt of another*. . . .") (citations omitted) (underline added). Wives had a moral obligation to pay any debts incurred by their husbands. Cf. McAfee v. McAfee, 28 S.C. 188, 5 S.E. 480 (1888) (finding sufficient consideration where a wife acting out of moral obligation where no legal obligation existed, assumed the debt of the husband). I would hold Wives met the third element of equitable subrogation.

D.

Finally, I believe Wives satisfy the fourth element; that equitable subrogation will not unjustly or inequitably affect another party. In Caroprop, Ltd., 316 S.C. at 4, 446 S.E.2d at 419, the court addressed the fourth factor. The court concluded there was no injustice as the creditor contesting the equitable subrogation took its mortgage with the knowledge it was a second mortgagee. Id. Likewise, in Dodge City, 317 S.C. at 495, 454 S.E.2d at 920, this Court concluded there was no injustice, and equitable subrogation was appropriate, where the other party was in essentially the same position both before and after subrogation.

In the case sub judice, Mr. Smith's creditors were secondary in priority to NationsBank, who held first priority. There is no injustice resulting from equitably subrogating Wives to NationsBank's rights as Mr. Smith's creditors would remain in the same position they were in when NationsBank held the mortgage. This principle of equitable subrogation applies to judgment liens. See Sutton, 26 S.C. 33, 1 S.E. 19 (applying equitable subrogation to a judgment). Under equitable subrogation, Wives would step into the shoes of NationsBank with all attendant rights. See Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000). I would find it

is not inequitable for Wives to be equitably subrogated to the rights of NationsBank.[4]

II. Foreclosure Action

The majority concludes Wives' payment to NationsBank extinguished the mortgage; therefore, the special referee correctly denied Wives' request for foreclosure. I would reverse the special referee's denial of Wives' request for foreclosure.

Initially, the majority asserts that the Wives' failure to appeal the special referee's ruling that the debt was paid in full precludes them from appealing the special referee's denial of foreclosure. The special referee made the factual finding that Wives paid the debt in full.[5] The special referee concluded that the payment of the debt extinguished the mortgage and accompanying right to foreclosure. Wives argued the special referee's legal conclusion was erroneous as the payment purchased an assignment of the note and judgment and NationsBank's reduction of the note to judgment did not prevent the assignment nor extinguish their right to foreclosure. I would find Wives adequately appealed the special referee's denial of foreclosure.

As noted by the majority, this action is in equity and this Court may view the evidence in accordance with its own view of the preponderance of the evidence. Friarsgate, Inc. v. First Fed. Sav. & Loan Ass'n of S.C., 317 S.C. 452, 454 S.E.2d 901 (Ct. App. 1995). In my view, Wives bargained with NationsBank to purchase the debt, and the purchase did not extinguish

---

[4] The special referee concluded Wives were equitably subrogated to the rights of NationsBank and were entitled to contribution from Mr. Smith. The real issue in the case, it seems to me, is whether Wives maintain NationsBank's priority in interest in the real property vis-á-vis Mr. Smith's creditors.

[5] In fact, Wives negotiated a purchase price for the assignment of $21,388.70. The judgment amount was for $23,764.25 plus interest. The record does not reflect the full amount owed on the judgment at the time it was purchased by Wives.

the right to foreclosure. Moreover, the right to foreclosure was assigned to Wives by NationsBank.

The majority accurately states that without an underlying debt, a mortgage is invalid. See Blackwell v. Blackwell, 289 S.C. 470, 472, 346 S.E.2d 731, 732 (Ct. App. 1986) ("A mortgage is different from other instruments in that, in order for it to be a valid instrument, there must be a debt or obligation of the mortgagor for which it is given as security. If there is no debt, then there is no valid mortgage.") (citations omitted).

However, a mortgage and accompanying debt may be assigned. See Mills v. Killian, 273 S.C. 66, 254 S.E.2d 556 (1979) (discussing statutory recording requirements of mortgage assignments); see also Sanders v. Salley, 283 S.C. 458, 322 S.E.2d 829 (Ct. App. 1984) (reviewing priority of a mortgage which was assigned in exchange for satisfaction of the underlying indebtedness).

NationsBank's reduction of the note to judgment prior to the assignment did not extinguish the mortgage or render the assignment invalid.

> Except as affected by statute . . . the cases are uniform in holding that until the mortgage debt is actually satisfied, the recovery of a judgment on the obligation secured by a mortgage, without the foreclosure of the mortgage, although merging the debt in the judgment, has no effect upon the mortgage or its lien, does not merge it, and does not preclude its foreclosure in a subsequent suit instituted for that purpose . . . .

55 Am. Jur.2d Mortgages § 524, at 198 (1996). [6]

[6] I note that in the event the underlying note had been satisfied, the mortgage, which contains a future advance clause, continues to exist to secure future advances. See Central Prod. Credit Ass'n v. Page, 268 S.C.1, 231 S.E.2d

South Carolina's statutory scheme does not appear to conflict with this general rule. South Carolina Code Annotated Section 29-3-630 *requires* a debt secured by a mortgage to be converted to judgment prior to seeking foreclosure. S.C. Code Ann. § 29-3-630 (Supp. 2000). Section 29-3-650 states the court *may* render judgment and order a sale of the mortgaged premises at the same time. S.C. Code Ann. § 29-3-650 (1991). The discretionary nature of section 29-3-650 clearly contemplates that the court is not *required* to order a sale of the security at the time judgment is rendered. This statute simply allows the court in its discretion to grant a personal judgment at the time it enters a judgment for foreclosure. See White v. Douglas, 128 S.C. 409, 123 S.E. 259 (1924) (interpreting section 29-3-650 as allowing the court the discretion to grant a personal judgment at the time it awards judgment for foreclosure; comparing this to the former practice of granting a sale of the mortgaged premises, applying the amount derived therefrom to the mortgage debt, and granting a personal judgment for the deficiency).

The assignment of a judgment passes all the assignor's rights to the assignee. Watts v. Copeland, 170 S.C. 449, 170 S.E. 780 (1933). These rights include the right to use every remedy, lien, or security available to the assignor. Id. An assignment of a judgment also transfers all the incidents of the cause of action on which it was based. Id. NationsBank had the right to foreclose after reducing the debt to judgment. NationsBank validly assigned that right to Wives.

Finally, the special referee found Wives were "subrogated to the rights of NationsBank" and that finding is not contested by Mr. Smith's judgment creditors. However, the referee also erroneously concludes that the benefits of such subrogation only permits Wives to seek "contribution" from Mr. Smith (presumably personally). This, I would conclude as a matter of law, was error. I would hold Wives are entitled to foreclosure, and would accordingly reverse the special referee's contrary finding.

---

210 (1977).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Nancy Henkel,

Appellant,

v.

Marshall Winn, Lesley R. Moore, and Wyche, Burgess, Freeman & Parham,

Respondents.

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

Opinion No. 3344
Heard April 3, 2001 - Filed May 21, 2001

AFFIRMED

Renee R. Christina, of Greenville, for appellant.

Jefferson V. Smith, Jr. and Thomas W. Traxler, both of Carter, Smith, Merriam, Rogers & Traxler, of Greenville, for respondents.

HEARN, C.J.: In this attorney malpractice action, Nancy Henkel (Wife) alleges that Marshall Winn, Lesley R. Moore, and the law

firm of Wyche, Burgess, Freeman & Parham, P.A., (collectively, Attorneys) were negligent in the preparation of her husband's will. The trial court granted summary judgment in favor of Attorneys. We affirm.

FACTS

In November 1995, Robert Head (Husband) and Wife met with Winn to discuss their estate plans and wills. At the time of this meeting, Husband had been diagnosed with terminal metastatic cancer, and Wife was expecting the couple's first child. Husband had three children from a previous marriage. Following the meeting, Winn realized that Husband's situation was indeed grave and enlisted the aid of Moore, another attorney in his firm. The couple had a second meeting with both attorneys on November 21. Robert Head, Jr. was born on November 25.

On November 28, Moore sent Husband and Wife a draft of the wills and a letter explaining their contents. Specifically, the letter stated:

> Robert leaves to Nancy that amount which, when added to the assets passing to Nancy outside his Will (but not his tangible personal property), will equal one–half of his estate . . . I do want to remind you of the fact that your Wills will operate only on the property in your probate estates. To the extent that property passes directly to each other or to someone else in the form of insurance proceeds, as jointly owned property with rights of survivorship and/or pursuant to beneficiary designations under any employer or other plans, your Wills will not operate on these assets. I believe we discussed the advisability of Robert naming his estate as the beneficiary of part or all of his life insurance.

Wife acknowledged she read the letter to the best of her ability. In the following months, Husband asked that his will be amended to include specific bequests to his sisters. He made no changes to the other substantive

provisions of the will. On January 31, 1996, as they prepared to go to Houston for medical treatment, the couple executed wills as drafted by Attorneys. In March, Husband received a bill from Attorneys and wrote Winn questioning the amount and asking for a cost breakdown. Tragically, Husband died in August 1996.

When the will was admitted for probate, Wife realized she was not going to receive what she anticipated under the will as executed, and she chose to take her elective share. She did not challenge the validity of the will for lack of testamentary capacity.

In the will, Wife received one-half of Husband's estate for federal estate tax purposes.[1] According to Wife, her husband instructed Attorneys to make specific bequests to her in addition to leaving her one-half of the probate assets. She contends she should have received all of the couple's jointly owned property and the proceeds from her husband's retirement plan and savings investment accounts plus one-half of the life insurance proceeds, stocks and bonds, and his interest in the marital home with the balance of the estate going to Husband's children from his previous marriage.[2]

Wife filed this action alleging professional negligence against Attorneys. Attorneys moved for summary judgment. The trial court determined that Husband's execution of the will indicated he was aware of its content and nature. Furthermore, the trial court concluded that Wife waived her right to present the issue at trial and is estopped from claiming that the will was contrary to her husband's instructions because she failed to raise the issue before Husband's death. The trial court also found Wife's failure to

---

[1] In effect, this was achieved by reducing her share of the probate assets for each dollar she received in taxable non-probate assets.

[2] Using the numbers in the trial judge's order, Husband's net estate totaled $812,000. Under the will as executed, Wife would have received approximately $406,000. If the will had been executed as Wife proposes, her share would have amounted to $546,500. After taking her elective share, Wife received $455,000.

inform Attorneys that the will and letter were inconsistent with Husband's intent was an intervening and superseding cause of Wife's injury. Accordingly, the trial court granted summary judgment in favor of Attorneys. Wife appeals.

ANALYSIS

I. Standard of Review

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; see Bessinger v. Bi-Lo, Inc., 329 S.C. 617, 619, 496 S.E.2d 33, 34 (Ct. App. 1998). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences from it must be viewed in the light most favorable to the party opposing summary judgment. Summer v. Carpenter, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997).

II. Husband's Testamentary Intent

Wife argues that the trial court erred in granting summary judgment to Attorneys because a genuine issue of material fact exists regarding Husband's testamentary intent. We disagree.

To prove legal malpractice, the plaintiff must establish: (1) the existence of an attorney-client relationship, (2) breach of a duty by the attorney, (3) proximate causation, and (4) damage to the client. McNair v. Rainsford, 330 S.C. 332, 342, 499 S.E.2d 488, 493 (Ct. App. 1998). Generally, a plaintiff in a legal malpractice action must establish the standard of care by expert testimony. Smith v. Haynsworth, Marion, McKay & Guerard, 322 S.C. 433, 435, 472 S.E.2d 612, 613 (1996); Mali v. Odom, 295 S.C. 78, 80, 367 S.E.2d 166, 168 (Ct. App. 1988).

Here, we find Wife's claim fails as a matter of law because there is no evidence in the record showing Attorneys breached any duty to

Husband or Wife.[3] Wife relies on extrinsic evidence to establish that Husband's testamentary intent was contrary to the language of his will. However, we presume a person signing a will knows the content and nature of the will. Estate of O'Neill v. Tobias, 259 S.C. 55, 62-63, 190 S.E.2d 754, 757 (1972); Hembree v. Estate of Hembree, 311 S.C. 192, 195, 428 S.E.2d 3, 4 (Ct. App. 1993). Because the will was duly executed and admitted for probate, we must presume Husband knew and understood its contents. Moreover, the testator's intent must be determined from the will itself.

> But how is the intention to be ascertained? Certainly not by conjecture as to what the testator ought to have done, but by considering what is the plain meaning of the language which he has used, and by giving a careful consideration to the words of the will as a whole . . . . *We are to read the will as a whole, and from its terms ascertain, if practicable, what was in the mind of the testator at the time he executed it.* We may also, where the language used is obscure or doubtful, read such language in the

---

[3] Initially, we note that Wife may not have standing to assert a claim for malpractice based on her husband's will. There is a split among other jurisdictions as to whether a frustrated beneficiary can sue the will's drafter. See Ginther v. Zimmerman, 491 N.W.2d 282, 285-86 (Mich. Ct. App. 1992) (discussing generally approaches applied with respect to attorney malpractice in drafting wills and privity); see generally Joan Teshima, Annotation, Attorney's Liability, to One Other than Immediate Client, for Negligence in Connection with Legal Duties, 61 A.L.R. 4th 615 (1988). Although never addressed directly in South Carolina, related case law indicates that a plaintiff in an attorney malpractice action may have to be in privity with the attorney. See Gaar v. North Myrtle Beach Realty Co., 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986) (finding in action for malicious prosecution that "an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client"). We decline to reach this issue because even assuming Wife has standing, her claim fails as a matter of law.

> light which may be reflected upon it by the circumstances surrounding the testator at the time he executed his will, but such circumstances cannot be resorted to, to prove the testator's intention apart from his language.

Roundtree v. Roundtree, 26 S.C. 450, 465, 2 S.E. 474, 478 (1887) (emphasis added); see Shelley v. Shelley, 244 S.C. 598, 602, 137 S.E.2d 851, 853 (1964); Black v. Gettys, 238 S.C. 167, 174, 119 S.E.2d 660, 662 (1961).

Although the above cases arose from will contests, we find no reason why the presumptions should not apply here. A will evidences the testator's intent at the moment of execution and may differ dramatically from statements he or she may have made in the past.[4] Therefore, extrinsic evidence of intent may not be considered absent a latent ambiguity in the will. Because the will was properly executed and probated, we find that Wife cannot establish that Husband's intent was anything other than as expressed in his will. Thus, Wife has set forth no facts showing any breach of duty by Attorneys. Accordingly, the trial court correctly granted summary judgment.[5]

AFFIRMED.

CURETON and SHULER, JJ., concur.

---

[4] Although the parties in this case acknowledge Wife was present at all meetings between Husband and Attorneys, it is easy to imagine a situation where a testator would repeatedly assure someone that he or she was going to inherit and then execute a will which provides otherwise.

[5] Because we agree with the trial judge that Wife presented no evidence that the testator's intent was other than that expressed in the will, we do not reach Wife's arguments that her actions were not a superseding cause of her injury and that her claims were not barred by the doctrines of waiver and estoppel.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lora Cunningham, a minor by Guardian ad Litem, Linda A. Grice,

Appellant,

v.

Helping Hands, Inc., and City of Aiken Department of Public Safety,

Respondents.

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

Opinion No. 3345
Heard March 7, 2001- Filed May 21, 2001

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART

Jefferson D. Turnipseed, Michael B. Hart and Ilene Stacey King, of Turnipseed & Associates, of Columbia, for appellant.

Andrew F. Lindemann, William H. Davidson, II, all of Davidson, Morrison & Lindemann and Thomas C. Salane, of Turner, Padget, Graham & Laney, all of Columbia, for respondents.

HEARN, C.J.: Lora Cunningham appeals an order granting summary judgment to Helping Hands, Inc. (Helping Hands) and the City of Aiken Department of Public Safety (the Department) based on the trial court's findings that Cunningham assumed the risk of her injuries and that her negligence exceeded that of the two defendants as a matter of law. We affirm the grant of summary judgment as to the Department and reverse and remand with respect to Helping Hands.

FACTS

Helping Hands is a charitable corporation operating a home for abused and neglected children in Aiken, South Carolina. At the time of her injury, Cunningham was fifteen years old. She was residing at Helping Hands as a ward of the Department of Social Services (DSS) and the Continuum of Care for Emotionally Disturbed Children. Helping Hands was aware that Cunningham had been evaluated for oppositional defiant disorder and had been prescribed Prozac and Ritalin.

On September 8, 1996, Lt. Frank Conoly, a public safety officer with the Department, brought a fire truck to Helping Hands' premises to visit the children and let them see and climb onto the truck. When Conoly arrived, two members of the Helping Hands staff, John Heos and Lanita Battle, brought between six and ten teenagers to the fire truck.

At the conclusion of his visit, Conoly told the teenagers he was leaving and to stand clear of the fire truck. He walked around the truck and checked to make sure all the children were off and standing clear. He then got into the truck and started to leave. As the truck began to move, Cunningham jumped onto the passenger side running board of the vehicle. As the truck drove

away, Cunningham became frightened, either jumped or slipped from the truck, and fell under the rear wheels.

No staff members were outside with the teenagers when Cunningham jumped back onto the truck. Heos had gone inside the cottage to help another child with a sprained ankle, and Battle had gone inside to use the restroom and while there had answered the telephone. Heos was inside the cottage watching the children through a window when the fire truck began to move.

Cunningham's Guardian ad Litem brought this personal injury action against Helping Hands and the Department. She contends Helping Hands breached its duty of care and supervision of Cunningham. Likewise, she contends the Department was negligent through the acts of its agents, officers, and employees, including the acts of Conoly. Helping Hands answered alleging general denials, limited immunity, assumption of risk, and comparative negligence. Similarly, the Department answered alleging general denials, limited immunity, assumption of risk, and comparative negligence.

Both Helping Hands and the Department moved for summary judgment on the ground that Cunningham's actions were the sole cause of her injuries or otherwise barred recovery as a matter of law. The trial court granted these motions, finding as a matter of law that Cunningham assumed the risk of injury and that even if assumption of risk was not a complete bar, the negligence of Cunningham was greater than that of Helping Hands and the Department combined as a matter of law. Cunningham made a motion to alter or amend the order, which the trial court denied. This appeal followed.

SCOPE OF REVIEW

On appeal from an order granting summary judgment, we must consider the evidence in the light most favorable to the nonmoving party. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997). Summary judgment should be granted only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Café Assocs. v. Gerngross, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991). "Assumption

of risk is peculiarly a question for the jury, and only in very rare cases should a trial judge direct a nonsuit or direct a verdict in favor of a defendant on this ground, but there are rare cases in which this should be done." Singleton v. McLeod, 193 S.C. 378, 386, 8 S.E.2d 908, 911-12 (1940); see also Small v. Pioneer Mach., Inc., 316 S.C. 479, 489, 450 S.E.2d 609, 615 (Ct. App. 1994) ("The defenses of contributory negligence and assumption of risk ordinarily present questions of fact for the jury and only rarely become questions of law for the court to determine.").

ANALYSIS

I. Assumption of Risk

Cunningham argues the trial court erred in granting the motions for summary judgment because a question of fact exists with respect to whether she assumed the risk of her injury. We agree as to Helping Hands and disagree as to the Department because we find Helping Hands owed a higher duty to Cunningham than did the Department.

This case is governed by the common law defense of assumption of risk because it accrued before the issuance of our supreme court's decision in Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 508 S.E.2d 565 (1998). The defense of assumption of risk has four elements: "(1) the plaintiff must have knowledge of the facts constituting a dangerous condition; (2) the plaintiff must know the condition is dangerous; (3) the plaintiff must appreciate the nature and extent of the danger; and (4) the plaintiff must voluntarily expose himself to the danger." Id. at 78-79, 508 S.E.2d at 569; see also Senn v. Sun Printing Co., 295 S.C. 169, 173, 367 S.E.2d 456, 458 (Ct. App. 1988) ("The doctrine is predicated on the factual situation of a defendant's acts alone creating the danger and causing the accident, with the plaintiff's act being that of voluntarily exposing himself to such an obvious danger with appreciation thereof which resulted in the injury.").

A. Helping Hands

The trial court found that Helping Hands owed Cunningham a "nonspecific, generalized duty to supervise and monitor teenagers committed to its care" and held that an adult is not required to keep a constant and unremitting watch over a child, citing Dennis by Evans v. Timmons, 313 S.C. 338, 437 S.E.2d 138 (Ct. App. 1993). We do not agree that the principles articulated in Dennis define the scope of the duty Helping Hands owed to Cunningham.

In Dennis, a child was injured with a screwdriver while playing on a neighbor's property. The screwdriver had been inadvertently left underneath a mobile home, and as the child and his playmates tossed it around, it struck him in the eye. This court upheld the grant of a directed verdict in favor of the landowners, holding that (1) a screwdriver is not always a dangerous instrumentality and (2) although a property owner may owe a heightened duty to children beyond that owed to adult licensees or trespassers where a dangerous instrumentality is involved, the landowners had no legal duty to supervise continuously children playing in their yard. Without evidence that the landowners furnished or negligently permitted access to the screwdriver, the directed verdict was proper.

Because we find the facts in Dennis so widely different from those presented here, we do not find Dennis controlling. We cannot equate the duty owed by a landowner to a neighbor's child with that owed by a licensed group home to children placed under its care and supervision.

By regulation, group homes are licensed to provide programs of care "which include adequate protection, supervision and maintenance of children in care; safe physical facilities; and opportunities for appropriate learning experiences for the children and which allow for the healthy physical and mental growth of the children in care and are directed toward the development of well-adjusted, independent, responsible individuals." 27 S.C. Code Ann. Regs. 114-590(A)(1) (1976). Therefore, Helping Hands had a specific duty to supervise Cunningham and the other children living there. Its personnel manual states that clients are to be supervised at all times by Helping Hands staff, and

further, "staff are expected to only take breaks when it will not interfere with the daily routine of the children, supervision or activities of the children." Employees of facilities like Helping Hands are required by law to be familiar with their procedural manuals. 27 S.C. Code Ann. Regs. 114-590(C)(ii) (1976). Lanita Battle, the counselor on duty when Cunningham was injured, admitted that the responsibilities of a Helping Hands Teen Counselor included client safety and supervision at all times.[1] Moreover, Helping Hands' staff knew that Cunningham suffered from oppositional defiant disorder and therefore might not obey a warning to stand clear of the fire truck. Thus, we disagree with the trial judge's characterization of Helping Hands' duty as "general" and "nonspecific."

"Where a duty to protect exists, a Defendant cannot claim that the victim's injury was the result of assumption of risk or contributory negligence if the victim's conduct was within the foreseeable risk to be protected." F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts 94 (2d ed. 1997). South Carolina courts have previously recognized that assumption of risk cannot be a defense in cases where a defendant has a duty to prevent a patient from committing suicide and the patient commits suicide. Hoeffner v. The Citadel, 311 S.C. 361, 367, 429 S.E.2d 190, 193 (1993); Bramlette v.

---

[1]The following testimony by Battle shows her understanding of the duty undertaken by Helping Hands with respect to its wards:

> Q. Now would you agree that one of your job duties is the safety of the children in your care?
>
> A. Yes.
>
> Q. And are you given any instruction, particularly in what you are supposed to do to provide for the safety of the children in your care?
>
> A. We are supposed to monitor the children.
>
> Q. What does that mean exactly?
>
> A. To know their whereabouts at all times.

Charter-Medical-Columbia, 302 S.C. 68, 74, 393 S.E.2d 914, 917 (1990). We believe this principle is applicable here because Helping Hands had a duty to supervise Cunningham at all times and its breach of that duty may have caused her injury.[2]

We find Helping Hands' duty to Cunningham is similar to that present in Grooms v. Marlboro County School District, 307 S.C. 310, 414 S.E.2d 802 (Ct. App. 1992). In Grooms, the parents of a mentally disabled fifteen-year-old student sued the school district for injuries he sustained while under the supervision of the school janitor. Because the child had been a discipline problem at school, he had been instructed to skip class and report to the janitor when he thought he might cause trouble in the classroom. While under the janitor's supervision, the child wrestled with another student and injured his head. In reversing summary judgment, this court held that a genuine issue of material fact existed as to whether the school district was grossly negligent in the exercise of its duty to supervise students. We believe a similar question of fact exists here.

Helping Hands had knowledge of Cunningham's disorder and a duty to prevent her from harming herself and others as a result of that disorder. Cunningham was placed under Helping Hands' care, and by regulation and its own policies, Helping Hands had a duty to supervise her at all times. Even if there is evidence that Cunningham assumed the risk of her injury, that evidence is not sufficient to warrant judgment as a matter of law given Helping Hands' duty to supervise its charges. We therefore hold a jury question exists as to whether Helping Hands' failure to supervise resulted in Cunningham's injury.

---

[2]At least one other jurisdiction has adopted a similar approach and held that if a defendant has a clearly defined legal duty to supervise a plaintiff in order to prevent the type of harm suffered, the doctrine of assumption of risk will not bar recovery. Lucas v. Fresno Unified Sch. Dist., 18 Cal. Rptr. 2d 79, 83 (Ct. App. 1993) (holding school district could not assert defense of assumption of risk against child injured in dirt clod fight at recess in light of the school district's statutory duty to supervise).

B. The Department

We concur with the grant of summary judgment to the Department. Cunningham admitted she jumped on the side of the fire truck as she heard Conoly start it. She admitted she decided to wait until the truck was moving to jump off. Cunningham did not deny that Conoly warned everyone to stand clear of the truck; she only testified that she did not remember such a warning. In response to the question whether Conoly knew she was still on the truck when he pulled away, Cunningham stated, "I knew that he didn't know we were on the truck."

Absent an enhanced duty to supervise and protect, the Department was entitled to summary judgment based upon Cunningham's assumption of risk because even when the evidence is viewed in the light most favorable to Cunningham, she knew of the condition, knew it was dangerous, appreciated the nature and extent of that danger, and she still chose to expose herself to that danger. See Davenport, 333 S.C. at 79, 508 S.E.2d at 569. Accordingly, we affirm the grant of summary judgment to the Department.

II. Comparative Negligence

In granting summary judgment, the trial court also found: "Even if the facts constituting an assumption of risk were merged into and subsumed by, the doctrine of comparative negligence, I would still be constrained to view Cunningham's negligence as greater than the combined negligence of the defendants as a matter of law." Cunningham argues the trial court erred in making this finding because it failed to view the facts in the light most favorable to her and because a jury should have determined each party's degree of negligence. We agree as to Helping Hands.[3]

A plaintiff in a negligence action may recover damages if his or her own negligence is not greater than that of the defendant. Nelson v. Concrete

[3]We need not reach this issue as to the Department because we find that the trial judge correctly granted the Department's motion for summary judgment based on Cunningham's assumption of risk.

Supply Co., 303 S.C. 243, 399 S.E.2d 783 (1991). The assignment of respective degrees of negligence attributable to the plaintiff and the defendant is a question of fact for the jury if conflicting inferences may arise. Brown v. Smalls, 325 S.C. 547, 481 S.E.2d 444 (Ct. App. 1997); see also Reiland v. Southland Equip. Servs., Inc., 330 S.C. 617, 639-40, 500 S.E.2d 145, 157 (Ct. App. 1998) ("[A]pportionment of negligence, which determines both whether a plaintiff is barred from recovery or can recover some of his damages and the proportion of damages to which he is entitled, is usually a function of the jury.").

Based on Helping Hands' duty to supervise Cunningham, and its staff's knowledge of her propensity to disobey authority, together with the circumstances surrounding Cunningham's accident and injury, we hold the trial court erred in finding Cunningham's negligence greater than the negligence of Helping Hands as a matter of law. The apportionment of negligence to each party should have been a question for the jury.

For the foregoing reasons, the order of the trial court is

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

CURETON and SHULER, JJ., concur.