OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

January 16, 2001

ADVANCE SHEET NO. 2

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State of South Carolina, Respondent,

v.

Elliott G. Salisbury, Jr., Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Dorchester County
Luke N. Brown, Jr., Circuit Court Judge

Opinion No. 25230
Heard December 2, 1999 - Filed January 16, 2001

AFFIRMED AS MODIFIED

Stephen P. Groves, Sr. and Stephen L. Brown, both of Young, Clement, Rivers & Tisdale, L.L.P., of Charleston; John L. Drennan, of Joye Law Firm, L.L.P., of North Charleston, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Salley W. Elliott, all of Columbia; Solicitor Walter M. Bailey, Jr., of

Summerville, for respondent.

CHIEF JUSTICE TOAL: Elliott G. Salisbury, Jr. ("Salisbury") appeals the Court of Appeals' decision he was not entitled to a circumstantial evidence jury charge at his trial for driving under the influence ("DUI"). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

At Salisbury's trial for DUI, the State's case consisted of the following evidence. In Dorchester County on December 23, 1995, three Highway Patrol troopers observed Salisbury exceeding the speed limit in his pickup truck and crossing the center line of the road on three occasions. When Salisbury was stopped, Officer Link observed Salisbury had an odor of alcohol on his breath, he was unsteady on his feet, his eyes were bloodshot, and he had the general appearance of being under the influence. Salisbury acknowledged he had been drinking. Salisbury failed three field sobriety tests administered by Officer Link. Salisbury was unable to complete the alphabet, unable to complete the "walk and turn" test, and, according to one officer, when asked to do the "one leg stand" test, he responded he was "too drunk to do that shit." Salisbury was arrested for DUI and transported to the patrol office where Trooper Robert Beres administered a breathalyzer test that indicated he had a blood alcohol level of .21.

Salisbury presented a defense case that consisted of the following evidence. Salisbury testified at trial that a back injury contributed to his behavior the night he was arrested. He claimed he was driving to buy pain pills for his back condition when he was stopped. Salisbury admitted to drinking four beers between 8:00 and 12:00 p.m. He claimed he was crossing the center line of the road because he was unfamiliar with the truck he was driving and was having difficulty with the defroster. To explain his failure of the field sobriety tests, Salisbury claimed: (1) he was unable to recite the alphabet because he had not been in school since the 1970s; (2) he was unable to walk heel-to-toe or walk in a straight line because of his back condition; and (3) he could not stand on one foot because, weighing three hundred pounds, he "could not stand all that weight on one leg." Salisbury also denied making the statement he was "too drunk to do that shit" after he was asked to perform the "one leg stand" test. According to Salisbury, he said "I guess you think I can't do this shit because I'm drunk;

but it's because of my back."

On May 29, 1996, Salisbury was found guilty of DUI and was sentenced to one year and a $2,000 fine, suspended upon the service of sixty days or twenty days of public service and payment of $1,500 with two years probation. The trial judge refused to give a charge on circumstantial evidence. The Court of Appeals affirmed his conviction and sentence on February 17, 1998. *State v. Salisbury*, 330 S.C. 250, 498 S.E.2d 655 (Ct. App. 1998). Salisbury appeals to this Court on the following issue:

> Did the Court of Appeals err in affirming the trial judge's refusal to charge the jury on circumstantial evidence?

LAW/ANALYSIS

Salisbury argues the Court of Appeals erred by affirming the trial court's refusal to give a charge on circumstantial evidence. Salisbury contends the trial judge was required to give the jury a circumstantial evidence charge where the State relied entirely, or at least substantially, on circumstantial evidence to prove Salisbury was driving while impaired. Specifically, Salisbury argues he was entitled to the circumstantial evidence jury charge outlined in *State v. Grippon*, 327 S.C. 79, 479 S.E.2d 462 (1997). We disagree.

Salisbury was not entitled to a circumstantial evidence charge under the facts of this case. Salisbury was tried in May 1996, more than one year prior to this Court's opinion in *Grippon*. Accordingly, *Grippon* is inapplicable to this case, and whether Salisbury was entitled to a traditional circumstantial evidence charge is dependent upon the law in effect at the time of his trial. Prior to *Grippon*, if a request was made for a circumstantial evidence instruction, it was within the trial judge's discretion to deny the request when the crime and the identity of the perpetrator were established by direct evidence and the circumstances introduced were merely corroborative. *See State v. Carroll*, 277 S.C. 306, 286 S.E.2d 382 (1982); *State v. Jenkins*, 270 S.C. 365, 242 S.E.2d 420 (1978); *State v. Simmons*, 269 S.C. 649, 239 S.E.2d 656 (1977).

Prior to *Grippon*, a circumstantial evidence charge was required, even in the absence of a request, if the State relied solely on circumstantial evidence to support a conviction. *State v. Langston*, 265 S.C. 74, 216 S.E.2d 875 (1975); *State v. Fuller*, 227 S.C. 138, 87 S.E.2d 287 (1955); *State v. Baker*, 208 S.C. 195,

37 S.E.2d 525 (1946). In the absence of such a request, where there was any direct evidence supporting the conviction, the failure to give a circumstantial evidence charge was not error. *State v. Moorer*, 241 S.C. 487, 129 S.E.2d 330 (1963); *State v. White*, 211 S.C. 276, 44 S.E.2d (1947). However, if requested, as in the present case, such a charge was not required where the State relied upon direct evidence to prove the acts of the crime and the identity of the perpetrator, and circumstantial evidence was merely corroborative or offered to demonstrate intent. *State v. Carroll, supra; State v. Jenkins, supra; State v. Simmons, supra.*

In the instant case, there was sufficient direct evidence[1] establishing the elements of DUI and the identity of the perpetrator, such that the circumstantial evidence was merely corroborative. In South Carolina, the corpus delicti of DUI must be established by proof that a person's ability to drive has been materially and appreciably impaired by the use of alcohol and/or drugs.[2] *Przybyla v. South*

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[1]Evidence can be divided into two basic categories: direct and circumstantial. Direct evidence is evidence based on actual knowledge and proves a fact without inference or presumption. *See* BLACK'S LAW DICTIONARY 577 (7th ed. 1999). Direct evidence immediately establishes the main fact to be proved. *Nichols v. Indiana*, 591 N.E.2d 134 (Ind. 1992) (citing Herrick, Underhill's *Criminal Evidence* § 15 (Supp. 1970)). Circumstantial evidence immediately establishes collateral facts from which the main fact may be inferred, and is typically characterized by inference or presumption. *See Nichols, supra;* BLACK'S LAW DICTIONARY 576 (7th ed. 1999) (circumstantial evidence is "evidence based on inference and not on personal knowledge or observation."); *see also* 75B AM. JUR. 2D *Trial* § 1390 (1992) ("If the main fact sought to be proved is a matter of inference, the case is one of circumstantial evidence.").

[2]S.C. Code Ann. § 56-5-2930 (Supp. 1999) outlines the elements of DUI:

> It is unlawful for a person to drive a motor vehicle within this State while under the:
> (1) influence of alcohol to the extent that the person's faculties to drive are materially and appreciable impaired;
> (2) influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive are materially

Carolina Dep't. of Highways and Pub. Transp., 313 S.C. 116, 437 S.E.2d 70 (1993) (citing *City of Orangeburg v. Carter*, 303 S.C. 290, 400 S.E.2d 140 (1991)); *see also* S.C. Code Ann. § 56-5-2930 (Supp. 1999). In other words, the State has to prove: (1) Salisbury's ability to drive was materially and appreciably impaired; and (2) this impairment was caused by the use of drugs or alcohol.

The evidence produced at trial included the testimony of two police officers, Officer Link and Officer Woods, that Salisbury was speeding and weaving over the center line. Officer Link testified Salisbury smelled of alcohol, was unsteady on his feet, had bloodshot eyes, could not recite the alphabet, and could not do the one-leg stand test. In Link's opinion, Salisbury was grossly intoxicated and his faculties were "very much so impaired" that Salisbury could not operate a motor vehicle safely. Similarly, Officer Woods testified as to Salisbury's unsteadiness on his feet, the fact he was leaning on his truck, could not say his ABC's, or do the one-leg stand test. There was "no doubt in [Officer Woods'] mind Salisbury was intoxicated" and was "in no condition to operate a motor vehicle safely." The breathalyzer operator, Officer Beres, testified Salisbury was unsteady on his feet, had slurred speech, and bloodshot eyes; in Beres' opinion, Salisbury was intoxicated and unable to operate a motor vehicle safely. In addition to the three police officers' testimony, Salisbury admitted he had been drinking, had gotten "tripped up" saying the ABC's, could not perform the one-leg stand test, and could not walk a yellow line.

The officers' personal observations and opinions of Salisbury's actions, appearance, and condition constitute direct evidence because it is based on the officers' actual knowledge of the situation and requires no inference by the jury. *See generally New York v. Walters*, 623 N.Y.S.2d 396 (1995); *Nichols, supra*; *South Dakota v. Edmundson*, 379 N.W.2d 835 (S.D. 1985); *Nebraska v. Lewis*, 128 N.W.2d 610 (Neb. 1964); *Connor v. Duffy*, 652 A.2d 372 (Pa. Super. Ct. 1994); *Murray v. Texas*, 689 S.W.2d 247 (Tex. Ct. App. 1985); *Minnesota v. Stokes*, 354 N.W.2d 53, 56 (Minn. Ct. App.1984); *California v. Garcia*, 197 Cal. Rptr. 277 (Cal. Ct. App. 1983); *Tennessee v. Wiggs*, 1995 WL 324602 (Tenn.

> and appreciably impaired; or
> (3) combined influence of alcohol and any other drug or drugs, or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired.

1995). Accordingly, we find the direct evidence in this case is sufficient to establish the elements of the crime and the identity of the perpetrator such that the trial court did not abuse its discretion in refusing a circumstantial evidence charge. *State v. Carrol, supra.*

CONCLUSION

Based on the foregoing, the Court of Appeals' decision is **AFFIRMED** as modified.

MOORE, WALLER and BURNETT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charleston County Parents for Public Schools, Inc., The City of Charleston, Robert B. Kizer, William M. and Lynn Rogers, and Mary Priest, Plaintiffs,

v.

Peggy Moseley, In Her Official Capacity as Auditor for Charleston County School District, Defendant.

IN THE ORIGINAL JURISDICTION

Opinion No. 25231
Heard November 1, 2000 - Filed January 16, 2001

William E. Craver, III, of Craver, Hagood & Kerr, of Charleston, for Plaintiff Charleston County Parents for Public Schools. William B. Regan and Carl W. Stent, both of Charleston, for Plaintiffs City of Charleston, Robert B. Kizer William M. and Lynn Rogers, and Mary Priest.

Robert N. Rosen and Alice F. Paylor, both of Rosen, Goodstein & Hagood, of Charleston, for Defendant

Charleston County School District. Samuel W. Howell, IV., W. Kurt Taylor, Joseph Dawson, III, and Bernard E. Ferrara, Jr., all of Charleston, for Defendant Peggy Moseley.

M. William Youngblood, of McNair Law Firm, of Charleston, for Amicus Curiae Charleston Metro Chamber of Commerce.

CHIEF JUSTICE TOAL: The Charleston County Parents for Public Schools ("Petitioners") filed this proceeding against Peggy Moseley ("County Auditor"), the auditor for Charleston County, in the Court's original jurisdiction to determine whether the Charleston County School District's Board of Trustees ("School Board") has authority to impose a tax levy in excess of ninety mills[1] to operate the public school system in Charleston County.

FACTS/PROCEDURAL ANALYSIS

In 1967, the South Carolina General Assembly consolidated the eight school districts in Charleston County into a single district known as the Charleston County School District ("School District"). Financing for the District's operation was effected by vesting in the School Board the power to impose an annual tax levy. Act No. 340, 1967 S.C. Acts 470 (the "Act"). In 1972, three years after the 1969 Act, the General Assembly amended section 10 of the Act. The present Act now provides in section 11:

> The Board of Trustees of the Charleston School District shall prepare and submit to the Charleston County Legislative Delegation, as information, on or before the fifteenth day of August of each year beginning in 1968, a proposed budget for the ensuing school year. In order to obtain funds for school purposes the board is authorized to impose an annual tax levy, commencing in 1968, *not to exceed Ninety mills*, exclusive of any millage imposed for bond debt service. *In the event the Board determines that the annual tax levy should exceed Ninety mills, the Board shall hold a public*

[1]A mill is a unit of property taxation. It is one tenth of one percent.

> *hearing on the question at least two weeks prior to submitting such request to the legislative delegation. Notice of such public hearing shall be advertised in a newspaper of general circulation in the county, and shall state the date, time and place of the hearing as well as a clearly worded statement of the requested annual tax levy.* Upon certification by the Board to the county auditor of the tax levy to be imposed the auditor shall levy and the county treasurer shall collect the millage so certified upon all taxable property in the district.

Act No. 1602, § 11, 1972 S.C. Acts 3131, 3134 (emphasis added) ("section 11").

The School Board adopted a budget for its fiscal year 2001 and determined the annual tax levy must exceed ninety mills, exclusive of any millage imposed for bond debt service, in order to fund the budget. On March 20, 2000, after complying with the notice requirements in section 11, the School Board held a public hearing. On May 1, 2000, the School Board certified to the County Auditor that the tax levy for general operations of the School District for its fiscal year 2001 should be set at a level sufficient to generate $86,571,171. The School Board estimated this would require a tax levy for school district operations of approximately ninety-nine and four tenths (99.4) mills. The School Board also submitted the proposed budget for 2001 and a copy of its request to impose a tax levy in excess of ninety mills to the Charleston County Legislative Delegation ("Charleston Delegation"), as required by section 11.

The County Auditor claims she will levy sufficient taxes to fund in full the local share of the School District's budget for the fiscal year 2001. However, she refuses to levy more than ninety mills without a directive by this Court. The County Auditor asks the Court to: (1) dismiss all claims and actions against her in this matter; (2) declare section 11 requires approval by the Charleston Delegation as a condition precedent to the School Board imposing an annual tax levy in excess of 90 mills; and (3) declare the School Board cannot independently raise school tax millage over 90 mills.

The School District and the Petitioners request that the Court direct the County Auditor to levy the amount certified by the School Board in its May 1, 2000 letter, 99.4 mills. The following issues are before this Court:

I. Do the Petitioners have standing?

II. Does section 11 require approval by the Charleston Delegation as a condition precedent to the School Board imposing an annual tax levy in excess of ninety mills, exclusive of any millage imposed for bond debt service?

III. If section 11 requires approval by the Charleston Delegation as a condition precedent to the School Board imposing an annual tax levy in excess of ninety mills, exclusive of any millage imposed for bond debt service, is this condition precedent unconstitutional or otherwise legally invalid?

IV. If section 11 does not require approval by the Charleston Delegation as a condition precedent to the School Board imposing an annual tax levy in excess of ninety mills, does it require the County Auditor to levy the millage set by the School Board, even if such millage exceeds ninety mills, exclusive of any millage imposed for bond debt service, so long as the School District complies with the requirements?

V. If section 11 does not require the County Auditor to levy the millage set by the School Board if such millage exceeds ninety mills, exclusive of any millage imposed for bond debt service, does the Education Improvement Act of 1977, the Education Finance Act of 1977, or other State spending mandates require the County Auditor to levy sufficient millage so the School District is in compliance with the spending requirements of those acts, even if the millage levied exceeds ninety mills, exclusive of any millage imposed for bond debt service?

LAW/ANALYSIS

I. Standing and Joinder

All parties concede Petitioners have standing because the issue is one of public importance that requires resolution for future guidance. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *see Thompson v. South Carolina Comm'n on Alcohol & Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718 (1976) (holding the plaintiffs had standing because the questions involved were of such

wide concern, both to law enforcement personnel and to the public); *Berry v. Zahler*, 220 S.C. 86, 66 S.E.2d 459 (1951) (holding the question of public interest originally encompassed in an action should be decided for future guidance).

The County Auditor argues the case should be dismissed because Petitioners failed to join the Charleston Delegation as an indispensable party pursuant to Rule 19, SCRCP. We disagree.

The County Auditor asserts the Charleston Delegation is the "most vitally interested party" in this litigation and should be joined in the case. She claims this Court must dismiss the Complaint for failure to join the Charleston Delegation as an indispensable party. First, the remedy under Rule 19, SCRCP is for the Court to make the Charleston Delegation a party, not to dismiss the action. According to Rule 19, SCRCP: "If [an indispensable party] has not been so joined, *the court shall order that he be made a party*. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff." (emphasis added). Second, the Charleston Delegation is not an indispensable party under Rule 19, SCRCP because complete relief can be accorded to the Petitioners and the School District without the joinder of the Charleston Delegation, and the Charleston Delegation has not claimed an interest in the subject of the action.

II. The Charleston Delegation's Approval of the Millage Rate

Petitioners argue section 11 authorizes the School Board to impose an annual tax levy in excess of ninety mills provided the School Board: (1) advertises notice of the public hearing; (2) states the date, place, and time of the hearing; (3) states the requested annual tax levy; and (4) holds a public hearing at least two weeks before sending the request to the Charleston Delegation. Petitioners argue the language of section 11 does not require the Charleston Delegation's approval before the County Auditor sets the millage rate. We agree.

The primary concern in interpreting a statute is to ascertain and effectuate legislative intent. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). All rules of statutory construction are subservient to the rule that legislative intent must prevail if it can reasonably be discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 440 S.E.2d 364 (1994). As in this case, where a statute is complete, plain, and unambiguous,

legislative intent must be determined from the language of the statute itself. *Whitner*, 328 S.C. at 6, 492 S.E.2d at 779.

The heart of this dispute concerns the language used in section 11. The current Act authorizes the School Board to impose an annual tax levy not to exceed ninety mills, exclusive of any millage imposed for bond debt service. Section 11 adds the following two sentences to the Act:

> In the event the Board determines that the annual tax levy should exceed Ninety mills, the Board shall hold a public hearing on the question at least two weeks prior to submitting such request to the legislative delegation. Notice of such public hearing shall be advertised in a newspaper of general circulation in the county, and shall state the date, time and place of the hearing as well as a clearly worded statement of the requested annual tax levy.

Nothing in the plain language of section 11 requires approval from the Charleston Delegation before the County Auditor sets the millage rate. Section 11 indicates the contingency occurs only "[i]n the event the *Board* determines the annual tax levy should exceed Ninety mills . . . ." 1972 S.C. Acts at 3134 (emphasis added). In other words, the School Board determines whether an annual tax levy should exceed ninety mills, not the Charleston Delegation. Furthermore, no provision of section 11 authorizes the Charleston Delegation to vote on, authorize, or reject the School District's budget. Section 11 is silent concerning any intervening action by the Charleston Delegation or any need for the School Board to await the Charleston Delegation's approval.

When the General Assembly has intended to give a legislative delegation budgetary oversight of another entity, it has done so in explicit terms. In *Thomas v. Cooper River Park*, 322 S.C. 32, 471 S.E.2d 170 (1996), the respondents challenged the constitutionality of legislation requiring the St. Andrew's Public Service District to submit its budget to the county's legislative delegation for approval. The Court held the following provision, which required the delegation's involvement in the budgeting and taxing functions of the St. Andrew's Public Service District, violated the separation of powers doctrine:

> [T]he County Auditor of Charleston County shall annually levy, and the County Treasurer of Charleston County shall collect, a tax of such number of mills on the dollar on all taxable property in the

> territorial limits of [District] as shall be fixed, determined and directed by a written resolution of the St. Andrew's Public Service District Commission duly transmitted to the said County Auditor . . . ; *PROVIDED, HOWEVER, that no tax shall be levied by the County Auditor hereunder unless and until the resolution fixing, determining and directing the same shall have been approved in writing by the Senator and a majority of the Members of the House of Representatives for Charleston County and for the purpose of consideration of the same the said commission shall present all such resolutions to the said Senator and Members of the House of Representatives together with the itemized budget of the district upon which the same is based*.

Id. at 33-34, 471 S.E.2d at 171 (emphasis added) (citations omitted). This Court held the provisions requiring approval by the legislative delegation for the St. Andrew's Public Service District was unconstitutional, but severable. *Id*.

The Act in *Thomas* manifests a clear intent on the part of the legislature to subject St. Andrews to budgetary oversight. This intent is revealed by the explicit wording of the Act: "[N]o tax shall be levied by the County Auditor hereunder unless and until the resolution fixing, determining and directing the same shall have been approved in writing by [the Charleston County Legislative Delegation]." *Id*. Section 11 does not contain a comparable clause requiring written approval. All section 11 requires is for the School Board to *submit* a request to the legislative delegation, it does not require any form of acceptance or rejection by the Charleston Delegation.

Other Acts giving legislative delegations budgetary oversight include specific provisions requiring such approval and explaining how such approval should be obtained. For example, in 1969, the General Assembly amended Act No. 685, to include a limitation upon the power of the Board of Trustees to fix the amount of the annual tax levy for school taxes to operate the schools in Cherokee County. The amendment states, "[N]o such tax levy shall be increased in any year *without the approval of a majority of the resident members of the Cherokee County Legislative Delegation*." *Gunter v. Blanton*, 259 S.C. 436, 440, 192 S.E.2d 473, 474 (1972) (emphasis added). The Court held the language was unconstitutional because it assigned to the Cherokee County Legislative Delegation a dual role in violation of the separation of powers clause in the South Carolina Constitution, S.C. Const. art I, § 8.

Similar language was held unconstitutional as a violation of separation of powers in *Aiken County Board of Education v. Knotts*, 274 S.C. 144, 262 S.E.2d 14 (1980). The right of the Aiken County Board of Education to authorize the assessment of millage to meet its budget was limited by the following provision:

> Provided, however, that if a majority of the members of the board conclude that the tax millage for operating school purposes in the district should be increased, they shall, on or before the first day of July, *submit a request for such increase to the members of the Aiken County Legislative Delegation and if a majority of the members approve such increase the auditor shall levy and the treasurer shall collect the additional millage to provide for such an increase.* If a majority of the members of the legislative delegation refuse to approve the proposed increase, the chairman of the board of education, with the approval of a majority of the members of the board, may call for a referendum in the next general election.

Id. at 147, 262 S.E.2d at 17 (emphasis added). As in *Gunter*, the Court held the statute was unconstitutional because it violated the separation of powers doctrine. The clear language in *Gunter* demonstrates that if the General Assembly intends for a legislative delegation to have budgetary oversight, they will explicitly require the approval of the legislative delegation and will explain exactly how such approval is obtained.

The County Auditor also argues the use of the word "request" implies the Charleston Delegation has the power to approve or disapprove the millage rate. Section 11 states: "[T]he Board shall hold a public hearing on the question at least two weeks prior to submitting such *request* to the legislative delegation." (emphasis added). However, the first sentence of section 11 states: "The Board of Trustees of the Charleston County School District should prepare and submit to the Charleston County Legislative Delegation, *as information*, on or before the fifteenth day of August of each year beginning in 1968, a proposed budget for the ensuing school year." (emphasis added). When section 11 is read in the context of the entire Act, the language indicates the School Board must submit its proposed budget to the Charleston Delegation simply for informational purposes. The plain language of section 11 indicates the General Assembly did not intend for the Charleston Delegation to have approval power over the millage rate as determined by the School Board. The General Assembly intended for the Charleston Delegation to serve only as advisors in this matter.

Because we find the General Assembly did not intend for the Charleston Delegation to have oversight powers, we do not address the constitutionality of section 11.

III. County Auditor's Duty to Levy the Millage Requested by the Board

According to Petitioners, section 11 requires the County Auditor to levy the millage set by the School Board, even if such millage exceeds ninety mills. Petitioners argue the language in section 11 is direct and mandatory, and the County Auditor cannot refuse to carry out the directive by the School Board. We agree.

The words used in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (1999). Ordinarily, the use of the word "shall" in a statutory provision indicates the provision is mandatory. *See TNS Mills Inc. v. South Carolina Dep't of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998); *South Carolina Dep't of Highways & Pub. Transp. v. Dickinson*, 288 S.C. 189, 341 S.E.2d 134 (1986). The final sentence in the relevant portion of section 11 contains an absolute directive that requires the County Auditor to levy the amount determined by the School Board: "Upon certification by the Board to the county auditor of the tax levy to be imposed the auditor *shall* levy and the county treasurer *shall* collect the millage so certified upon all taxable property in the district." Act No. 1602, 1972 S.C. Acts 3131, 3134 (emphasis added).

Because we find the plain language of section 11 is direct and mandatory and indicates the General Assembly intended for the County Auditor to levy the taxes once the School Board duly complies with the Act, we do not address the School Board's authority to exceed 90 mills in order to comply with the Education Improvement Act of 1984, the Education Finance Act of 1977, or other State spending mandates.

CONCLUSION

We direct the County Auditor to levy the millage sufficient to generate $86,571,171, even if such millage exceeds 90 mills, because: (1) the plain language of section 11 is direct and mandatory and requires the County Auditor

to levy the taxes once the School Board has duly complied with the other portions of the Act; and (2) nothing in the plain language of section 11 requires the Charleston Delegation's approval before the millage rate can be increased.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Eugene Charles Fulton, Jr., Respondent.

Opinion No. 25232
Submitted December 7, 2000 - Filed January 16, 2001

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Deputy Disciplinary Counsel Susan M. Johnston, and Debbie S. McKeown, all of Columbia, for the Office of Disciplinary Counsel.

Eugene C. Fulton, Jr., of Columbia, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a public reprimand. We accept the agreement and publicly reprimand respondent. The facts as admitted in the agreement are as follows.

Facts

In 1996, respondent was retained to represent a client in a personal injury matter. A lawsuit was filed and the case went to trial in August 1998. The client's treating physician testified at respondent's request. The case was subsequently settled. On September 2, 1998, physician sent respondent an invoice for $750 for the court appearance. On September 14, 1998, respondent disbursed the settlement proceeds to the client but failed to pay physician's court appearance fee. Although physician contacted respondent on numerous occasions to secure payment, the court appearance fee was never paid.

In April 2000, physician's medical records supervisor filed a Complaint with the Commission on Lawyer Conduct. On April 25, 2000, Disciplinary Counsel notified respondent about the Complaint and requested a response. He did not reply. Disciplinary Counsel wrote respondent again on June 13, 2000, requesting a response to the Complaint. When respondent failed to respond, Disciplinary Counsel served him with a Notice of Full Investigation on August 1, 2000. Respondent failed to submit a response to the Notice of Full Investigation and was ultimately served with a subpoena pursuant to Rule 19(c)(4), RLDE, requiring him to appear on October 26, 2000, to respond to questions under oath concerning the Complaint. Respondent appeared but failed to provide the client file and trust account records to Disciplinary Counsel as required by the subpoena. Respondent finally submitted the documents after a second request.

Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (reasonable diligence and promptness in representing clients); Rule 1.15 (upon receiving funds in which a third person has an interest, a lawyer shall promptly notify the third person); Rule 4.4 (respect for the rights of third persons); Rule 8.1 (knowingly fail to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a) (violating the Rules of Professional Conduct); and Rule 8.4(e) (engaging in conduct that is

prejudicial to the administration of justice).

Respondent has also violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating or attempting to violate the Rules of Professional Conduct); Rule 7(a)(3) (willfully failing to comply with a subpoena issued under these rules, or knowingly failing to respond to a lawful demand from a disciplinary authority to include a request for a response under Rule 19); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or bringing the legal profession into disrepute, and engaging in conduct demonstrating an unfitness to practice law); and Rule 7(a)(6) (violating the oath of office taken upon admission to practice law in this state).

Conclusion

Since respondent cannot provide a reasonable explanation for his failure to satisfy physician's court appearance fee, his failure to respond to Disciplinary Counsel's inquiries or his failure to timely provide the subpoenaed documents to Disciplinary Counsel and since he has been previously sanctioned for misconduct,[1] we accept the Agreement for Discipline by Consent and publicly reprimand respondent. Accordingly, respondent is hereby publicly reprimanded.

PUBLIC REPRIMAND.

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

[1]Respondent received a Public Reprimand on October 30, 1995. See In the Matter of Eugene C. Fulton, Jr., 320 S.C. 95, 463 S.E.2d 319 (1995).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Larry F. Grant, Respondent.

Opinion No. 25233
Submitted December 7, 2000 - Filed January 16, 2001

PUBLIC REPRIMAND

Henry B. Richardson, Jr., and Michael S. Pauley, both of Columbia, for the Office of Disciplinary Counsel.

Leland B. Greeley, of Rock Hill, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a public reprimand. We accept the agreement and publicly reprimand respondent.

Facts

Respondent violated the discovery requirements contained in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), by failing to fully disclose exculpatory material and impeachment evidence regarding

statements given by the State's key witness in a murder prosecution.[1] The accused pled guilty to voluntary manslaughter as a result of the Brady violation.

Law

By his conduct, respondent has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 3.4(d)(failing to make a diligent effort to comply with the discovery request of an opposing party); Rule 3.8(d)(failing to make a timely disclosure to the defense of known evidence or information that tends to negate the guilt of the accused or mitigate the offense); Rule 8.4(a)(violating the Rules of Professional Conduct); and Rule 8.4(e)(engaging in conduct that is prejudicial to the administration of justice).

Respondent has also violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1)(violating rules regarding the professional conduct of lawyers); Rule 7(a)(5)(engaging in conduct tending to pollute the administration of justice or bring the legal profession into disrepute); and Rule 7(a)(6)(violating the oath of office taken upon admission to practice law in this state).

Conclusion

We find that respondent's misconduct warrants a public reprimand. We therefore accept the Agreement for Discipline by Consent and publicly reprimand respondent.

PUBLIC REPRIMAND.

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

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[1]The facts are discussed in detail in this Court's opinion in Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999).

The Supreme Court of South Carolina

Patsy Stone Petitioner,

v.

Hugh K. Leatherman and
Florence County
Election Commission, Respondents.

O R D E R

The South Carolina Election Commission upheld the denial of petitioner's protest of the election result in her race against respondent Hugh K. Leatherman for a Senate seat. Petitioner has filed a Notice of Appeal from the order of the Election Commission with both this Court and the Senate. Respondents move to dismiss the appeal and request costs.

Article III, § 11 of the South Carolina Constitution provides that the Senate has the authority to judge the election returns and qualifications of its own members. Pursuant to S.C. Code Ann. § 7-17-250 (1976), all appeals from protests concerning elections of Senate members are to the Senate itself. Petitioner argues, however, that both Article III, § 11 and § 7-17-250 conflict with § 7-17-270 (Supp. 2000), which provides that all appeals from the Commission shall be to the Supreme Court on writ of certiorari. Since the constitutional provision and § 7-17-250 are specific rules concerning elections of members of the General Assembly, these provisions are not superseded by the more general § 7-17-270. Spartanburg County Dep't of

Soc. Serv. v. Little, 309 S.C. 122, 420 S.E.2d 499 (1992). Accordingly, this Court does not have jurisdiction over this matter. Scott v. Thornton, 234 S.C. 19, 106 S.E.2d 446 (1959); Anderson v. Blackwell, 168 S.C. 137, 167 S.E. 30 (1932). The motions to dismiss are, therefore, granted.

Pursuant to Rule 222(b), SCACR, respondents are awarded attorney's fees in the amount of $500.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.

Pleicones, J., not participating

Columbia, South Carolina

January 9, 2001

The Supreme Court of South Carolina

In the Matter of Michael G. Olivetti, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR, because he poses a threat of serious harm to the public or to the administration of justice. The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that the petition is granted and respondent is suspended from the practice of law in this State until further order of this Court.

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

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

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that James P. Scheider, Jr., Esquire, has been duly appointed by this Court and has the authority to

receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Scheider's office.

s/ Jean H. Toal C.J.

FOR THE COURT

Columbia, South Carolina

January 10, 2001

The Supreme Court of South Carolina

Merrill Lynch, Pierce,
Fenner & Smith
Incorporated, and
McKendree Long, III, Petitioners,

v.

Janelle Havird, Respondent.

O R D E R

This Court granted the petition for a writ of certiorari to review the Court of Appeals' opinion in Merrill Lynch, Pierce, Fenner & Smith Inc. v. Havird, 335 S.C. 642, 518 S.E.2d 48 (Ct. App. 1999). The parties have now filed a motion requesting that this Court dismiss the matter and remit it to the trial court for entry of dismissal with prejudice, with each party bearing their own costs.

The motion to dismiss is granted. See Rule 231(b), SCACR.

Because this case concerns a novel issue involving a split in jurisdictions, the Court of Appeals' opinion is vacated.

IT IS SO ORDERED.

s/James E. Moore A.C.J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Toal, C.J., not participating.

Columbia, South Carolina

January 10, 2001

The Supreme Court of South Carolina

O R D E R

Pursuant to Article V, §4, of the South Carolina Constitution, Rule 408(b)(2)(E), SCACR, is amended to read as follows:

> (E) direct a staff headed by an Executive Director appointed by the Supreme Court. The staff shall assist the Commission and the Specialization Advisory Boards in administering this Rule, including processing appplications for certified specialist status and for recertification, and processing decertification orders, advising Specialization Boards on CLE course accreditation, providing information about the requirements of this Rule, assisting the Commission and Specialization Advisory Boards in preparing reports, and performing other adminstrative assignments as directed by the Commission.

This amendment shall be effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

January 11, 2001

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Miriam Pee,

Respondent,

v.

AVM, Inc. and Arvin Industries, Inc.,

Appellants.

Appeal From Marion County
James R. Barber, III, Circuit Court Judge

Opinion No. 3280
Heard October 11, 2000 - Filed January 8, 2001

AFFIRMED

Stanford E. Lacy and Peter H. Dworjanyn, both of Collins & Lacy, of Columbia, for appellants.

Rodney C. Jernigan, Jr., of Florence, for respondent.

HOWARD, J.: This is a workers' compensation case, presenting the question of whether carpal tunnel syndrome is compensable under the South Carolina Workers' Compensation Act (the Act) as an injury by accident. The

Workers' Compensation Commission awarded benefits to Miriam Pee, finding her carpal tunnel syndrome to be an injury by accident. The circuit court affirmed the award. We also affirm.

FACTS/PROCEDURAL HISTORY

Miriam Pee was employed by AVM, Inc. in various capacities beginning in 1987. Each of her jobs involved the repetitive use of her hands. In 1992, Pee developed an unrelated cyst in her left wrist which was surgically removed. By the spring of 1995, she experienced tingling and numbness in both hands, although the symptoms in her left hand and wrist were worse than in the right hand and wrist. On April 25, 1995, Pee was diagnosed with carpal tunnel syndrome in both wrists. The employer was notified of her physical condition. On June 16, 1995, Pee underwent "left Carpal Tunnel Release" surgery. She was authorized to return to work at the end of July 1995.

In January 1996, Pee noticed the symptoms in her left wrist were returning, and the symptoms in her right wrist were worsening. She returned to her treating neurologist, who removed her from work beginning April 20, 1996. Surgery was recommended for her right wrist in October 1996, but has not been performed.

Pee filed her claim for workers' compensation benefits on July 21, 1995, asserting she sustained an injury by accident from repetitive trauma to both arms while employed at AVM, Inc., resulting in carpal tunnel syndrome. The employer filed a Form 51 denying the claim on the ground that Pee did not suffer an injury by accident within the meaning of the Act.

Following a hearing, the Single Commissioner found Pee sustained a compensable injury by accident to both arms and awarded benefits. The employer appealed to the Full Commission on the grounds that Pee did not prove an injury by accident and carpal tunnel syndrome should be analyzed as an occupational disease. The Full Commission affirmed the order of the Single Commissioner, adopting it in its entirety.

The employer then appealed to the circuit court, asserting the same arguments. The circuit court affirmed the order of the Full Commission. This appeal follows.

DISCUSSION

The issue presented in this appeal is one of first impression in this State. See Rodney v. Michelin Tire Corp., 320 S.C. 515, 519, n.1, 466 S.E.2d 357, 359, n.1 (1996).

The question of whether a claimant asserts an "injury by accident" within the meaning of the Act is a question of law. Creech v. Ducane Co., 320 S.C. 559, 467 S.E.2d 114 (Ct. App. 1995). This Court may review the Commission's legal conclusion to determine if it is affected by an error of law. Id.; S.C. Code Ann. § 1-23-380(A)(6) (Supp. 1999). Notwithstanding the scope of review on this legal question, this Court must affirm the Commission's factual findings if they are supported by substantial evidence and not controlled by legal error. Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 513 S.E.2d 843 (1999). "An appellate court may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the record." Id., at 339, 513 S.E.2d at 845. "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." Id., at 338, 513 S.E.2d at 845 (citing Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E.2d 320 (1995)).

The employer argues that Pee's carpal tunnel syndrome is not an injury by accident because it is not unexpected in either cause or result, and it has no definiteness in time as to either cause or result. The employer contends that this Court should treat a claim for carpal tunnel syndrome as an occupational disease, following North Carolina law. See McDowell v. Stilley Plywood Co., 210 S.C. 173, 181, 41 S.E.2d 872, 876 (1947) ("Our Workmen's Compensation Act having been fashioned to the North Carolina Workmen's Compensation Act, and practically a copy thereof, the opinions of the Supreme Court of that State construing such Act are entitled to great respect."); Blair v. American

Television and Communications, Corp., 477 S.E.2d 190 (N.C. Ct. App. 1996) (treating carpal tunnel syndrome "injury by accident" as an occupational disease).

However, unlike the South Carolina Workers' Compensation Act, the North Carolina Workers' Compensation Act has been amended to include a specific provision excluding repetitive trauma cases from compensation unless they meet the definition of an occupational disease. See N.C. Gen. Stat. §97-52 (1999).[1] Consequently, the decisions of the North Carolina courts are not helpful.

The South Carolina Workers' Compensation Act does not contain a provision categorizing a condition resulting from repetitive activity or trauma, such as carpal tunnel syndrome, as a disease or an injury. There are some characteristics which are more easily analyzed in a disease setting. For example, carpal tunnel syndrome typically occurs gradually, rather than as a result of one traumatic event. Other characteristics render it more readily identifiable as an injury by accident, such as the fact that it is often attributed to repetitive mechanical motion, described as small traumatic events.

If carpal tunnel syndrome is treated as an occupational disease, then the claimant has the burden of proving that it is "caused by a hazard recognized as peculiar to a particular trade, process, occupation or employment as a direct result of continuous exposure to the normal working conditions thereof." S.C. Code Ann. § 42-11-10 (1985); Mohasco Corp., Dixiana Mill Div. v. Rising, 292 S.C. 489, 357 S.E.2d 456 (1987). Of course, if treated as an injury by accident, the claimant must still establish that the injury arises out of and in the course of the employment. S.C. Code Ann. § 42-1-160 (Supp. 1999).

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[1] N.C. Gen. Stat. §97-52 states that an "accident" may not "be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously, or at frequent intervals in the course of employment, over extended periods of time, whether such events may or may not be attributable to the fault of the employer and disease attributable to such causes shall be compensable only if culminating in an occupational disease mentioned and compensable under this Article. . . ."

After careful consideration of the statutes and case law, we conclude there is no error in the Commission's treatment of carpal tunnel syndrome, where factually supported, as an injury by accident.

We begin our analysis by reviewing the occupational disease definition found in the Act, keeping in mind that a firmly rooted rule of statutory construction in South Carolina is that words should be given their plain and ordinary meaning. "In the interpretation of statutes, our sole function is to determine and, within constitutional limits, give effect to the intention of the legislature, with reference to the meaning of the language used and the subject matter and purpose of the statute." State v. Ramsey, 311 S.C. 555, 561, 430 S.E.2d 511, 515 (1993). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The legislature is presumed to have fully understood the meaning of the words used in a statute and, unless this meaning is vague or indefinite, intended to use them in their ordinary and common meaning or in their well-defined legal sense. Powers v. Fidelity & Deposit Co., 180 S.C. 501, 186 S.E. 523 (1936). Where the legislature chooses not to define a term in the statute, courts should interpret the term in accordance with its usual and customary meaning. Adoptive Parents v. Biological Parents, 315 S.C. 535, 543, 446 S.E.2d 404, 409 (1994).

In South Carolina, an occupational disease is defined as a disease which the employee is exposed to in the workplace.[2] As other courts have recognized

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[2] § 42-11-10. "Occupational disease" defined.

The words "occupational disease" mean a disease arising out of and in the course of employment which is due to hazards in excess of those ordinarily incident to employment and is peculiar to the occupation in which the employee is engaged. A disease shall be deemed an occupational disease only if caused by a hazard recognized as peculiar to a particular trade, process, occupation or employment as a direct result of continuous exposure to the normal working conditions thereof.

No disease shall be deemed an occupational disease when:

(1) It does not result directly and naturally from exposure in this State to the hazards peculiar to the particular employment;

in construing comparable provisions, the definition of an occupational disease is incomplete, and focuses on causation while assuming the claimant suffers from a disease. See Duvall v. ICI Americas, Inc., 621 N.E.2d 1122, 1126 (Ind. App. Ct. 1993).

As the Iowa Supreme Court pointed out in its analysis of a comparable occupational disease provision, none of the commonly understood meanings for the word "disease" trace the cause of disease to a trauma. See Noble v. Lamoni Prods., 512 N.W.2d 290, 295 (Iowa 1994) (affirming carpal tunnel syndrome in claimant's case was not caused by "an invasion of her body by outside agent but by external traumatic forces," and was properly characterized as an injury, not a disease); see also Duvall, 621 N.E.2d at 1126 ("A trauma is defined as a 'wound, especially one produced by sudden physical injury'. . . . Similarly, a 'traumatism' is an 'injury' or a 'wound produced by injury; trauma.'"); Lutrell v. Industrial Comm'n, 507 N.E.2d 533, 542 (Ill. App. Ct. 1987) ("[I]njury has its origin in a specific, identifiable trauma or physical occurrence, or, in the case of repetitive trauma, a series of such occurrences. A disease, on the other hand, originates from a source that is neither traumatic nor physical . . . .").

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(2) It results from exposure to outside climatic conditions;

(3) It is a contagious disease resulting from exposure to fellow employees or from a hazard to which the workman would have been equally exposed outside of his employment;

(4) It is one of the ordinary diseases of life to which the general public is equally exposed, unless such disease follows as a complication and a natural incident of an occupational disease or unless there is a constant exposure peculiar to the occupation itself which makes such disease a hazard inherent in such occupation;

(5) It is any disease of the cardiac, pulmonary or circulatory system not resulting directly from abnormal external gaseous pressure exerted upon the body or the natural entrance into the body through the skin or natural orifices thereof of foreign organic or inorganic matter under circumstances peculiar to the employment and the processes utilized therein; or

(6) It is any chronic disease of the skeletal joints.

S.C. Code Ann. § 42-11-10 (1985).

As the Duvall court noted, the term "'exposure' indicates a passive relationship between the worker and his work environment rather than an event or occurrence, or series of occurrences, which constitute injury under the Workers' Compensation Act." 621 N.E.2d at 1125. The claimant in that case was found by the Workers' Compensation Board to have carpal tunnel syndrome caused by repetitive trauma resulting from the ordinary conditions of her employment. On appeal, the court concluded that the claimant's carpal tunnel syndrome did not result from "exposure" to workplace conditions, but from hand and wrist mechanics associated with work on the production line. As the court succinctly stated, "[claimant's] carpal tunnel syndrome did not result from where she worked but from the work she did." Id. at 1126. Noting that compensation for injury in Indiana requires "injury by accident arising out of and in the course of the employment and does not include disease in any form except as it results from injury," Ind. Code § 22-3-6-1(e) (Supp. 1999), the court concluded claimant's carpal tunnel syndrome was properly treated as an injury by accident, rather than as an occupational disease.[3]

We see no reason why, if factually supported, carpal tunnel syndrome cannot be compensable as an injury by accident under our Act and existing case law. To be compensable under the Act, the injury must be an "injury by accident arising out of and in the course of the employment." S.C. Code Ann. § 42-1-160 (Supp. 1999). To determine whether an "injury by accident" has been established, the focus is on the injury itself, and not on some specific event. Creech, 320 S.C. at 563, 467 S.E.2d at 116. "'[A]ccident' means an unlooked for and untoward event which is not expected or designed by the person who suffers the injury." Id. It is an event "not within one's foresight and expectation and may be due to purely accidental causes or to oversight and negligence,

[3] The Indiana view of injury is substantially similar to that of South Carolina. To be compensable as an injury under Indiana law, "a claimant is no longer required to prove that his injury arose from an accident as a specific, identifiable event; rather, an employee's injury is considered 'accidental' when it is the unexpected consequence of the usual exertion or routine performance of the particular employee's duties. Either an accidental cause or an unexpected result will support a claim." Duvall, 621 N.E.2d at 1126, (citing Evans v. Yankeetown Dock Corp., 491 N.E.2d 969 (Ind. 1986)). As stated in the body of this opinion, under South Carolina law proof of a causative event is not required. The unexpected result or industrial injury itself is considered the compensable accident. Stokes v. First Nat'l Bank, 306 S.C. 46, 410 S.E.2d 248 (1991).

carelessness, fatigue, or miscalculation of the effects of voluntary action." Linnen v. Beaufort County Sheriff's Dep't, 305 S.C. 341, 344, 408 S.E.2d 248, 250 (Ct. App. 1991). A slip, fall, or other fortuitous event or accident in the cause of the injury is not required. Creech, 320 S.C. at 563, 467 S.E.2d at 116. Proof of a "causative event" is not required to establish "injury by accident." Sigmon v. Dayco Corp., 316 S.C. 260, 449 S.E.2d 497 (Ct. App. 1994). The unexpected result or industrial injury is considered the compensable accident. Creech, 320 S.C. at 563, 467 S.E.2d at 116.

The employer contends that the result of the repetitive action in the workplace is not an "injury by accident" because it is not unexpected. However, there is no finding by the Commission that Pee knew she would develop carpal tunnel syndrome if she executed repetitive movements with her hands and wrists. There is no evidence that repetitive movements such as those made by Pee always result in carpal tunnel syndrome. Furthermore, the Commission concluded that the result was not expected, and that fact is supported by the record.

The employer has confused the symptoms with the injury. The testimony reveals that Pee's carpal tunnel syndrome was a condition produced by compression of the median nerve as it travels through the carpal tunnel at the wrist, resulting in symptoms of tingling, pain, and weakness. Dr. Healy, Pee's treating physician, testified that carpal tunnel syndrome results, as a rule, from repetitive stress as opposed to a single traumatic event.[4] In Pee's case, Dr. Healy opined her carpal tunnel syndrome was work related. Although Pee experienced her symptoms for some time during her repetitive work activity, there is no indication she expected or intended the resulting condition of median nerve compression. See Linnen, 305 S.C. at 344, 408 S.E.2d at 250 ("accident . . . may be due to oversight and negligence, carelessness, fatigue, or miscalculation of the effects of voluntary action") (emphasis added).

[4] Carpal tunnel syndrome can also be caused by "a variety of factors, including age, gender, weight, acute trauma, rheumatoid arthritis, and other inflammatory diseases, pregnancy, diabetes, tumors, hormonal factors, and congenital defects." 14 A.L.R.5th 1, 16, n.3 (1993) (citing 8 Am. Jur. Proof of Facts 3d 1, Carpal Tunnel Syndrome § 6 (1990)).

Next, the employer asserts that Pee's carpal tunnel syndrome occurred gradually, having no "definiteness of time." To support the contention that an injury by accident must have a definitive time of occurrence, the employer asserts that no South Carolina case has found a claimant's condition to be compensable as an injury by accident without a definite time of occurrence. Furthermore, the employer argues that in cases involving the gradual onset of injury, such as Stokes v. First National Bank, 306 S.C. 46, 410 S.E.2d 248 (1991) (involving a stress-related nervous breakdown), and Grayson v. Gulf Oil Co., 292 S.C. 528, 357 S.E.2d 479 (Ct. App. 1987) (involving hypersensitivity to normal environmental factors from long term exposure to petroleum fumes), the forces at work resulted in one catastrophic event, which was the single, traumatically induced injury.

We reject this argument. An injury need only be unexpected to be considered an injury by accident. Creech, 320 S.C. at 559, 467 S.E.2d at 114. There is no requirement in the Act that it be distinct, as opposed to gradual. To impose such a requirement would refocus the inquiry on a discrete event, as opposed to the injury itself, in violation of Creech, 320 S.C. at 559, 467 S.E.2d at 114, and Sigmon, 316 S.C. at 260, 449 S.E.2d at 497. In Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992), our supreme court ruled that the two-year limitation period provided in section 42-15-40 begins to run from the date the claimant first discovers the compensable injury. It is this discrete event which provides the necessary certainty as to time.

For the foregoing reasons, we conclude the Commission did not err in treating Pee's carpal tunnel syndrome as an injury by accident. The substantial evidence in the record supports the Commission's decision, and the circuit court correctly affirmed the award.

AFFIRMED.

STILWELL, and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Amy N. Heins,

Appellant,

v.

Donald L. Heins,

Respondent.

Appeal From Charleston County
Paul W. Garfinkel, Family Court Judge

Opinion No. 3281
Heard December 13, 2000 - Filed January 8, 2001

REVERSED

Charles S. Altman and Robert E. Culver, of Finkel & Altman, of Charleston, for appellant.

D. Dusty Rhoades, of Charleston, for respondent.

ANDERSON, J.: Amy N. Heins ("Wife") brought a contempt action against her former husband, Donald L. Heins ("Husband"), to enforce

several provisions of their property settlement agreement. The agreement was incorporated into the couple's final decree of divorce. The Family Court initially held Husband in contempt; however, it reversed itself on reconsideration and additionally awarded Husband attorney's fees and costs. We reverse.

FACTS/PROCEDURAL BACKGROUND

In September 1997, Wife brought an action against Husband for divorce. On the day of trial, the parties reached a settlement agreement. The court held a final hearing, which included extensive discussion on the terms of the agreement. By written order, the Family Court granted Wife a divorce on the grounds of adultery. The decree incorporated the parties' property settlement agreement. The agreement contained the following provisions:

- "Husband agrees to hold harmless and indemnify Wife from any debt personally incurred by him subsequent to the parties' separation.";

- "Wife agrees to hold harmless and indemnify Husband of any debts personally incurred by Donald Heins on behalf of Heins Plumbing, Inc. in the necessary and legitimate operation thereof disclosed by Husband prior to the final hearing ….";
and

- "Within thirty (30) days from the date of this Order, Husband agrees to transfer all his right, title, and interest to all assets, both business and personal, including but not limited to, the following:

  . . . .

  e. The business known as Heins Plumbing, Inc., and all its assets, tangible or intangible, including, but not limited to, its trade name, its vehicles; its tools and equipment;

> its telephones; its facsimile machine; its pagers; its cellular phones; its inventory, furniture, and fixtures;"

Some five months later, Wife petitioned the court for a contempt order. Wife asserted Husband failed to: (1) indemnify and hold her harmless for $9,477.61 in personal debts he incurred after their separation and satisfied using Heins Plumbing funds; (2) disclose to her, before the final hearing, additional accounts payable totaling $5,646.21;[1] and (3) surrender certain business assets to Wife valued at $4,381.00.

After a hearing, the Family Court issued an order holding Husband in contempt for his willful failure to surrender business assets. As a result, Husband was ordered to pay Wife $4,146.00.[2] Husband was additionally required to pay Wife $750.00 in attorneys' fees. The court found, however, Husband was under no obligation to repay either the incurred personal expenses or the undisclosed accounts payable. The court reasoned:

> [Wife] is an accountant, almost a Certified Public Accountant, who has access to all of the books and records of Heins Plumbing, Inc., and is involved more than most people usually are in

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[1] In an amended affidavit supporting her contempt motion, Wife claimed Husband had failed to show an additional $5,646.21 in accounts payable before the date of the final hearing. Nevertheless, during the contempt hearing, Wife stipulated the sum was $5,486.29. Her brief to this Court continues to refer to $5,486.29 as the undisclosed amount.

Husband provided a financial statement from his accountant the month of the final hearing that detailed the financial status of Heins Plumbing. Husband's accounting revealed $11,378.85 in accounts payable. When Wife assumed control of the business following the final hearing, she discovered the accounts payable were actually $16,865.14.

[2] Wife initially valued the untransferred business assets at $4,381.00; however, this valuation was revised at the contempt hearing and established as $4,146.00.

> accounting, [and] could have discovered any possible errors or discrepancies of the financial disclosures that she asserted to the Court she had at the time of entering into the final consent order and divorce decree.

Wife moved for reconsideration, arguing, inter alia, the Family Court erred in failing to require Husband to be responsible for his personal debts and the undisclosed accounts payable. In his return, Husband denied Wife was entitled to the relief she requested. He requested disbursement of his portion of the funds escrowed from the sale of real property that was required to be sold pursuant to the couple's settlement agreement. Husband did not otherwise seek reconsideration. The Family Court denied Wife's motion. As well, the court reversed its prior decision, sua sponte, which held Husband in contempt. The judge found Wife's action against Husband was based on "regrets" and "dissatisfaction for having entered into [the property settlement] agreement." The court further rescinded its earlier commandment requiring Husband to contribute $750.00 to Wife's attorneys' fees, and instead directed Wife to pay Husband $4113.92 for attorney's fees he accumulated in defense of the reconsideration motion. Husband was awarded the escrowed funds.

Wife again moved for reconsideration. That motion was denied, with the exception of a $170.00 downward adjustment in the award of attorney's fees to Husband. This appeal followed.

STANDARD OF REVIEW

On appeal from the Family Court, this Court has jurisdiction to find the facts in accordance with its view of the preponderance of the evidence. Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999). This tribunal, however, is not required to disregard the Family Court's findings. Badeaux v. Davis, 337 S.C. 195, 522 S.E.2d 835 (Ct. App. 1999). Likewise, we are not obligated to ignore the fact the Family Court judge, who saw and heard the witnesses, was in a better position to evaluate their testimony. Smith v. Smith, 327 S.C. 448, 486 S.E.2d 516 (Ct. App. 1997); see also Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 477 S.E.2d 476 (Ct. App.

1996) (because the appellate court lacks the opportunity for direct observation of witnesses, it should accord great deference to the Family Court's findings where matters of credibility are involved); Terwilliger v. Terwilliger, 298 S.C. 144, 378 S.E.2d 609 (Ct. App. 1989) (resolving questions regarding credibility and the weight given to testimony is a function of the Family Court judge who heard the testimony).

ISSUES

I. Did the Family Court err in sua sponte reversing its initial decision that Husband had willfully failed to surrender certain business assets?

II. Did the Family Court err in failing to find Husband liable for the personal expenses he incurred following the couple's separation and satisfied using Heins Plumbing funds?

III. Did the Family Court err in declining to interpret the couple's agreement as requiring Husband to be responsible for business debts he failed to disclose to Wife before the date of the final hearing?

IV. Did the Family Court err in awarding Husband attorney's fees?

LAW/ANALYSIS

I. Husband's Failure to Surrender Business Assets

Wife avers the Family Court erred in sua sponte reversing its initial order following the contempt action that Husband had willfully failed to surrender certain business assets. We agree.

It is well settled that ordinarily a party may not receive relief not contemplated in his pleadings. Loftis v. Loftis, 286 S.C. 12, 331 S.E.2d 372

(Ct. App. 1985).

> While it is true that pleadings in the family court must be liberally construed, this rule cannot be stretched so as to permit the judge to award relief not contemplated by the pleadings. Due process requires that a litigant be placed on notice of the issues which the court is to consider.

Bass v. Bass, 272 S.C. 177, 180, 249 S.E.2d 905, 906 (1978) (footnote omitted).

The Family Court found Husband in contempt because he did not relinquish $4,146.00 in business assets to Wife. Husband was mandated to pay Wife this amount. Husband did not make a request to alter or amend this decision. Moreover, neither Wife's subsequent Rule 59(e), SCRCP motion nor Husband's reply can be read to have brought this issue before the court for reconsideration.

While much has been written about the propriety of courts ruling on issues included in a Rule 59(e), SCRCP motion, but not raised at trial, a review of cases decided since the enactment of the South Carolina Rules of Civil Procedure reveals little comment on the permissibility of a trial court altering or amending an order on its own initiative. Because Rule 59(e), SCRCP is substantially the federal rule,[3] an examination of authorities addressing this dilemma, as it pertains to the federal courts, is appropriate. A leading treatise on federal practice elucidates:

> Rule 59(e) is silent on the power of a court to alter or amend a judgment on its **own initiative**, unlike Rule 59(d), which authorizes the court to grant a new trial on its **own initiative**. It is unclear whether or not a court has this authority. Arguably, a court should have the power to alter or amend a judgment on its own motion, as long as it acts no later than 10 days after the entry of the

[3] 25 S.C. Juris. Rules of Civil Procedure § 59.1 (1994)

> judgment. The authorization in Rule 59(d) (and Rule 60(a)) for the court to act on its **own initiative** has been held to be only a declaratory example of the general power of a court to act on its **own initiative** in many respects. However, when the court acts on its **own initiative**, the court must act within 10 days of the entry of judgment.

25 Moore's Federal Practice § 59.33 (Matthew Bender 3d ed. 2000) (emphasis added) (footnotes omitted).

In Burnam v. Amoco Container Company, 738 F.2d 1230 (11th Cir. 1984), an employee of Amoco filed a complaint against the company, alleging she was a victim of age discrimination. Amoco filed its answer and a motion to dismiss. The employee in turn filed a response to Amoco's motion. Soon thereafter, the federal district court issued an order dismissing the employee's complaint. No additional motions or other documents of any nature were filed by either party after the trial court's order. Nonetheless, 10 days later, the district court, on its own volition, entered another order, explaining that it had not received the employee's response to Amoco's motion to dismiss until after the initial order was entered. The court further stated: "[t]he court has now considered the plaintiff's arguments in opposition to the motion to dismiss and finds them to be without merit. The court's [initial] order … remains the order of this court. The instant order is issued as a clarification of the grounds set forth in the previous order." Id. at 1231. On appeal, the Eleventh Circuit was faced with the question of whether, pursuant to Rule 59(e), the trial court had the power to amend its initial judgment, sua sponte. The appellate tribunal responded:

> The Rules of Civil Procedure are unclear [regarding whether a district court may, sua sponte, consider the availability of Rule 59(e) relief]. For example, Rule 60(a) authorizes the court to correct clerical mistakes and other errors on its own initiative. Likewise, Rule 59(d) states that a court may grant a new trial on its own initiative. In contrast, Rule 59(e) is silent on the power of the

> court to order relief on its own initiative. Arguably, such silence implies that the court lacks such power. We decline to make such an inference …. Thus, so long as the court acts within ten days after the entry of judgment, the court has the power on its own motion to consider altering or amending a judgment ….

Id. at 1232.

The Burnam holding has been recognized and applied on numerous occasions. E.g., Continental Lab. Prods., Inc. v. Medax Int'l., Inc., 114 F. Supp. 2d 992 (S.D.Cal. 2000); Marshall v. Shalala, 5 F.3d 453 (10th Cir. 1993); Useden v. Acker, 947 F.2d 1563 (11th Cir. 1991).

In addition to Burnam, this Court finds Hidle v. Geneva County Board of Education, 792 F.2d 1098 (11th Cir. 1986), edifying. Hidle filed suit in federal district court, alleging the Geneva County Board of Education had established a pattern and practice of favoring males over females in its hiring for supervisory and administrative positions, which resulted in the school board denying employment to Hidle, a female. After trial, the court issued a written opinion that asseverated the school board had violated federal law by refusing to hire Hidle for an assistant principal's position because of her sex. Regarding damages, the court did not grant Hidle her request for back-pay; however, it did order the school district to offer Hidle the next vacant assistant principalship. Hidle timely filed a motion to alter and amend the judgment pursuant to Rule 59(e). She raised only the questions of back-pay and the court's failure to require her immediate instatement into the job she was originally denied. The school board filed no post-judgment motion requesting alteration or amendment. The district court subsequently denied Hidle's motion, set aside its order, and entered an amended judgment in favor of the school district. The time period between the initial judgment and the second order was seven months.

At issue on appeal was whether a party's motion to alter or amend a judgment pursuant to Rule 59(e) permits the trial court, sua sponte, to vacate a judgment in favor of the moving party so as to rule in favor of the non-moving

party:

> Strong policy considerations militate against what occurred here. The court … arguably erred in denying [back-pay], job instatement, and injunctive relief against future discrimination, as well as in assigning the burden of proof of mitigation. When plaintiff sought to present these matters as a basis for altering or amending the remedies afforded her, she lost her judgment to the defendant who had not asked any post-judgment relief. This inhibits the error-correcting function of a Rule 59(e) motion. If the district court is correct, a successful plaintiff given a less-than-complete remedy could not ask for correction without putting at risk the judgment in her favor though the party cast in judgment has raised no question of the validity of the judgment. A defendant successful on five claims cannot safely seek for correction concerning claim six.

. . . .

> The lapse of time is of real concern. This court has held, in Burnam v. Amoco … that where no motion has been filed by either party[,] a district court has a limited power to act sua sponte to alter or amend a judgment so long as done within ten days after the judgment is entered. If Burnam controls, the district court here exceeded its authority because of the … delay. Here a motion was made by plaintiff. Possibly the filing of a motion by a party opens up the judgment to a greater extent than the court itself can open it up without a motion. Nevertheless, the interest of the parties and society in the finality of judgments, and the legitimate expectation of the parties concerning the judgment to the extent it is not questioned by the parties, speak against pulling the rug from under the plaintiff [seven] months after she filed her motion to correct errors in the remedy granted her.

Id. at 1100.

A recent case decided by our Supreme Court, Leviner v. Sonoco Products Company, 339 S.C. 492, 530 S.E.2d 127 (2000), lends support to the proposition that a trial judge may alter or amend a judgment, sua sponte, but must do so within 10 days after the judgment was entered. Leviner was a workers' compensation case. In that dispute, the single commissioner found Leviner had reached maximum medical improvement and awarded him permanent disability. The full commission affirmed. Leviner appealed to the Circuit Court, which issued a form order, remanding the case to the single commissioner. Neither party filed a Rule 59(e), SCRCP motion within the 10-day period allowed by the rule. A month later, the Circuit Court entered a full written order purporting to vacate the commission's orders and finding Leviner totally disabled. Sonoco appealed. The Court of Appeals reversed the second order, holding the Circuit Court exceeded its appellate jurisdiction in finding Leviner totally disabled. The matter was remanded to the single commissioner for a de novo hearing, pursuant to the initial form order. Upon its review, the Supreme Court concluded the second order was void:

> [T]he trial judge's full written order filed … more than thirty days later, was patently untimely. Under Rule 59(e), SCRCP, trial judge has only ten days from entry of judgment to alter or amend an earlier order on his own initiative …. When no timely Rule 59 motion was made nor timely sua sponte order filed under Rule 59(e), the … form order "matured" into a final judgment. The [subsequent] order … was a nullity because the trial judge no longer had jurisdiction over the matter.

Id. at 494, 530 S.E.2d at 128.

The Leviner holding was founded in large part upon the Supreme Court's ruling in Doran v. Doran, 288 S.C. 477, 343 S.E.2d 618 (1986). Doran was a domestic relations case. In his petition for divorce, Husband sought equitable distribution of the marital assets. Wife listed a savings account on her financial

declaration. In his final order, the trial judge divided the parties' various real and personal property, but did not expressly mention the savings account. Neither party appealed the order. More than a month later, the judge, on his own volition, issued a supplemental order reserving jurisdiction to divide the savings account. After a hearing, the judge awarded 57% of the savings account to Husband. This case was heard before the promulgation of Rule 59(e), SCRCP; nevertheless, Chief Justice Ness, writing for a unanimous Court, declared a trial court's authority to alter or amend its decision, sua sponte, was time-limited:

> A trial judge loses jurisdiction to modify an order after the term at which it is issued …. Once the term ends, the order is no longer subject to any amendment or modification which involves the exercise of judgment or discretion on the merits of the action.[4]

Id. at 478, 343 S.E.2d 619 (citations omitted).

We rule a Family Court judge does not have the authority to alter or amend a judgment, sua sponte, once the judgment is more than 10-days-old. In the case sub judice, the order addressing Wife's contempt motion was filed January 29, 1999. On June 3, 1999, the Family Court entered its order in response to Wife's first reconsideration motion. The interim between these orders clearly exceeded the 10-day period permitted by Rule 59(e), SCRCP. Therefore, the Family Court's grant of relief to Husband from his obligation to Wife regarding the business assets is reversed.

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[4] In a footnote, the Court noted that under Rule 59(e), SCRCP, which was enacted in the time between the initial proceedings and the appeal, the trial judge would have had the authority to alter or amend the order, but only for a 10-day period after entry of the judgment.

II. Personal Expenses in the Amount of $9,477.61

Wife asserts the Family Court erred in failing to find Husband liable for the $9,477.61 in personal expenses he incurred following the couple's separation and satisfied using Heins Plumbing funds. We agree.

The parties' agreement enunciated:

> Husband agrees to hold harmless and indemnify Wife from any debt personally incurred by him subsequent to the parties' separation.

The parties separated on August 14, 1997. The report of Husband's accountant identified $9,477.61 in personal debt incurred by Husband after the parties separated, including attorney's fees and costs, which Husband paid from the Heins Plumbing account.

Unambiguous marital agreements will be enforced according to their terms. Lindsay v. Lindsay, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997). Where an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it. Ebert v. Ebert, 320 S.C. 331, 465 S.E.2d 121 (Ct. App. 1995). The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. Ellis v. Taylor, 316 S.C. 245, 449 S.E.2d 487 (1994). To discover the intention of a contract, the court must first look to its language — if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect. Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 199 S.E.2d 719 (1973); see also McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 33 S.E.2d 501(1945) (the court cannot read words into a contract that import an intent wholly unexpressed when the contract was executed); Stewart v. Morris, 84 S.C. 148, 65 S.E. 1044 (1909) (the court must interpret language in its natural and ordinary sense, except where technical language or the context requires another meaning).

In his brief, Husband does not contest the personal nature of the expenses

at issue. Neither does he argue the debts were necessary to the operation of the business. Rather, Husband asserts Wife did not incur any loss or damage to a third party due to his actions; thus, his duty to indemnify her was not triggered. We reject this argument.

This Court finds the agreement unambiguously holds Husband solely accountable for the personal debts he incurred after the parties' separation. The agreement is clear and capable of only one legal interpretation, i.e., husband is liable for the personal expenses paid from Heins Plumbing funds. Under separate provisions of the agreement, Husband was obligated to surrender all Heins Plumbing assets to Wife. His draining of corporate funds to pay his personal debts diminished the value of the assets that were to be transferred. Such activity was inequitable. Accordingly, we hold Husband must pay Wife $9,477.61 for the personal expenses he impermissibly appropriated from Heins Plumbing.

III. Husband's Failure to Disclose All Business Debts Before Date of Final Hearing

Wife maintains the Family Court erred in declining to interpret the property settlement agreement as requiring Husband to be responsible for business debts he failed to disclose before the date of the final hearing. We agree.

The parties' agreement specifically provides:

> Wife agrees to hold harmless and indemnify Husband of any debts personally incurred by Donald Heins on behalf of Heins Plumbing, Inc., in the necessary and legitimate operation thereof **disclosed by Husband prior to the final hearing**."

(emphasis added).

In June 1998, Husband had an accountant prepare a financial statement,

which showed $11,378.85 in current liabilities at Heins Plumbing. Wife relied on the accuracy of this statement in entering into the parties' settlement agreement. When Wife assumed control over the business after the final hearing, she learned the financials failed to reveal an additional $5,486.29 in debts.

The provision obligating Wife to pay the disclosed debts is, in our view, rendered meaningless unless it is read to infer the complimentary measure — Husband will be held responsible for any undisclosed obligations. Wilder Corp. v. Wilke, 324 S.C. 570, 582, 479 S.E.2d 510, 516 (Ct. App. 1996) ("[T]he law will imply consistent terms into a contract if reason, justice, honesty, or fairness would lead a court to believe that the parties omitted the implied terms.") (citing Southern Realty and Constr. Co. v. Bryan, 290 S.C. 302, 350 S.E.2d 194 (Ct. App. 1986)). Clearly, the purpose of the disclosure provision is to allocate all business debts between the parties, with Wife ultimately responsible for all disclosed legitimate business debts.

We reject Husband's argument Wife waived any right she may have had to complain about the undisclosed debts by her failure to discover them before entering into the agreement. The requirement that Husband disclose all business debts before the final hearing was not conditioned on Wife's independent discovery. Rather, Husband had an absolute affirmative duty to inform Wife of all business debts he incurred prior to the final hearing, notwithstanding Wife's pursuits into investigating the books.

IV. Family Court's Award of Attorney's Fees to Husband

Wife contends the Family Court erred in awarding Husband attorney's fees. We agree.

In determining whether to award attorney's fees, the court should consider: each party's ability to pay his or her own fees; the beneficial results obtained by the attorney; the parties' respective financial conditions; and the effect of the attorney's fee on each party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 415 S.E.2d 812 (1992); Doe v. Doe, 324 S.C. 492, 478 S.E.2d 854

(Ct. App. 1996).

In light of our disposition of the merits of this appeal, which has negated any beneficial results obtained by Husband's counsel at the trial court level, an award of attorney's fees to Husband is not warranted.

CONCLUSION

We hold a Family Court judge does not have the jurisdiction to alter or amend a judgment, sua sponte, when more than 10 days have elapsed since the judgment's entry by the clerk of court. In the instant case, the Family Court, on its own initiative, reversed its contempt order regarding Husband's wilful failure to transfer certain business assets to Wife in a subsequent decision more than five months later. The court undeniably surpassed the 10-day limitation; therefore, the latter determination regarding the business assets is invalid.

A property settlement agreement between a divorcing husband and wife is a contract. The rules that govern the interpretation and enforcement of contracts are therefore in force. It is well-settled that an unambiguous contract must be applied by the courts pursuant to the agreement's terms. In the instant case, Husband and Wife clearly agreed, without condition, that: Husband would transfer his interest in Heins Plumbing's assets to Wife; Wife would be indemnified by Husband for any personal debt he incurred after their separation; and Wife would assume all liabilities Husband undertook on behalf of Heins Plumbing, provided he disclosed the debts to Wife before the date of the final hearing. Husband is required to immediately remit $19,859.90 to Wife.[5]

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[5] This sum was calculated as follows:

$4,146.00 (Value of the untransferred business assets)
9,477.61 (Amount of personal expenses incurred by Husband following separation)
5,486.29 (Amount of business debts not disclosed by Husband before final hearing date)

Accordingly, the Family Court's post-divorce decree determinations that granted Husband an award of attorney's fees and costs and absolved him from his obligations to pay his personal expenditures, undisclosed business debts, and the value of the untransferred business assets are

REVERSED.

HEARN, C.J. and STILWELL, J., concur.

750.00 (Attorneys' fees granted to Wife in the Family Court's Contempt Order)

$19,859.90 Total Amount Due to Wife

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services,
. . . . . Respondent,

v.

Larry B. Basnight, ... Appellant.

Appeal From Horry County
Haskell T. Abbott, III, Family Court Judge

Opinion No. 3282
Heard December 13, 2000 - Filed January 8, 2001

AFFIRMED

Steven G. Mikell, of Florence; and H. Mac Tyson, II, of Fayetteville, North Carolina, for appellant.

Gus C. Smith, of the South Carolina Department of Social Services, of Conway, for respondent.

PER CURIAM: Larry B. Basnight appeals from an order of the family court adjudicating him the father of a minor child and awarding child support. We affirm.

FACTS/PROCEDURAL HISTORY

Helen Point is the natural mother of the minor child. In January of 1986, the mother filed a petition in North Carolina, pursuant to the Uniform Reciprocal Enforcement of Support Act,[1] to establish paternity and support for the minor child, born December 14, 1984.

The State of North Carolina instituted an action against Basnight. On April 11, 1986, the State of North Carolina filed a voluntary dismissal of the action. The State of South Carolina thereafter moved to reopen the North Carolina case. Basnight filed a motion to dismiss the action, which was denied.

Basnight appealed this denial and, by order dated July 6, 1987, the North Carolina Court of Appeals reversed and remanded the action on the ground that "a party cannot make any motions, and the court cannot enter any order, in a cause after a voluntary dismissal has been taken in the cause." On remand, the North Carolina district court dismissed the case with prejudice.

On August 16, 1994, the South Carolina Department of Social Services (DSS), as assignee of any support payments due to the child, instituted this action against Basnight in South Carolina. The complaint alleged, inter alia, personal jurisdiction over Basnight, a resident of Texas, pursuant to South Carolina Code Annotated Section 20-7-953(A)(1985).

By amended answer, Basnight denied DSS's allegations as to personal jurisdiction, and asserted the claim was barred by the doctrine of res judicata. Basnight also filed a motion to dismiss for, among other things, lack of personal jurisdiction. After a December 7, 1994 hearing, the family court denied the motion to dismiss. Basnight filed "exceptions" to the order with the family court, objecting to "any and all findings of fact, conclusions of law, [and] the entry and signing of a 'Final Order.'"

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[1] Formerly codified at S.C. Code Ann. §§ 20-7-960 et seq. (1985); replaced by the Uniform Interstate Family Support Act, S.C. Code Ann. §§ 20-7-960 et seq. (Supp. 1999), by 1994 Act No. 494, eff. July 1, 1994.

The family court held a hearing on the exceptions and reaffirmed the prior order denying Basnight's motion to dismiss. Basnight filed an appeal, which was dismissed by our Supreme Court as an unappealable interlocutory order.

Following a hearing on the merits, the family court issued its final order concluding Basnight was the natural father of the minor child, and establishing his child support obligation at $474.09 per month. The court found the support obligation should be made retroactive to the date of the December 7, 1994 hearing, and thereby established Basnight's arrearage at $22,282.23, to be repaid at a rate of $25.00 per week. This appeal followed.

LAW/ANALYSIS

Personal Jurisdiction[2]

Basnight argues the family court should have dismissed the action for lack of personal jurisdiction. We disagree.

The party seeking to invoke personal jurisdiction against a nonresident defendant via a long-arm statute has the burden of establishing jurisdiction. White v. Stephens, 300 S.C. 241, 387 S.E.2d 260 (1990). The determination of whether a trial court may exercise personal jurisdiction over a nonresident defendant involves a two step analysis. Id. First, the defendant's conduct must meet the requirements of the applicable long-arm statute. Id. Second, the defendant must have sufficient contacts with South Carolina so that the constitutional standards of due process are not violated. Id.

Long-Arm Statute

We find Basnight's conduct met the requirements of the long-arm statute applied by the family court. The family court exercised personal jurisdiction over Basnight pursuant to South Carolina Code Annotated Section 20-7-953(A) (1985). Section 20-7-953(A) provides, in pertinent part:

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[2] Basnight's first, second, and seventh through tenth issues on appeal.

> Any person who has sexual intercourse in this State thereby submits to the jurisdiction of the courts of this State as to an action brought under this subarticle with respect to a child who may have been conceived by that act of intercourse.

S.C. Code Ann. § 20-7-953(A)(1985). The mother alleged she and Basnight had sexual intercourse in South Carolina the weekend of March 16, 1984, which resulted in the conception of the minor child.

Basnight argues the long-arm statute does not apply as it was not enacted until after the date of the minor child's conception. We disagree.

Section 20-7-953(A) became effective on March 22, 1984, six days after the child's conception. See 1984 Act No. 307, § 1. In Thompson v. Hofmann, our Supreme Court considered the application of a long-arm statute to actions commenced after the passage of the statute. Thompson, 263 S.C. 314, 210 S.E.2d 461 (1974). Distinguishing long-arm statutes from implied consent statutes, the court concluded the long-arm statute applied "regardless of when the cause of action may have arisen." Id. at 320, 210 S.E.2d at 463. See E.H. Schopler, Annotation, Retrospective Operation of State Statutes or Rules of Court Conferring in Personam Jurisdiction Over Nonresidents or Foreign Corporations on the Basis of Isolated Acts or Transactions, 19 A.L.R.3d 138, 141-42 (1968)(comparing long-arm statutes that base jurisdiction on certain acts or transactions specified therein to implied consent statutes that provide that certain acts or transactions are deemed to be the consent to the appointment of a local agent for the purpose of service of process; concluding the former operate retrospectively but the latter do not as it is not possible to imply consent retroactively); see also Johnson v. Baldwin, 214 S.C. 545, 53 S.E.2d 785 (1949)(refusing to permit the retrospective operation of an implied consent statute).

We conclude the long-arm statute acted retrospectively to confer personal jurisdiction over Basnight although the minor child was conceived prior to the enactment of the statute. Accordingly, we affirm the family court's application of the long-arm statute to Basnight.

Sufficient Minimum Contacts

In analyzing the second step necessary to exercise personal jurisdiction over a nonresident defendant, we find Basnight had sufficient minimum contacts with South Carolina to meet the constitutional standards of due process. In determining whether a finding of minimum contacts comports with the due process requirements of traditional notions of fair play and substantial justice, the court must consider: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident's act; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the state's interest in exercising jurisdiction. Clark v. Key, 304 S.C. 497, 405 S.E.2d 599 (1991).

The mother testified she met Basnight in late 1982 when he was stationed at the United States Army post in Columbia, South Carolina. Basnight and the mother engaged in sexual relations in early 1983 and again in March, 1984. We find Basnight's tour of duty in South Carolina and continuing relationship with the mother from at least late 1982 to early 1984 sufficient under the first and second factors.

In analyzing the third factor, the inconvenience to the parties, we recognize that Basnight is now stationed outside the state and defending a suit in South Carolina is inconvenient. However, we must weigh this against the final factor, South Carolina's interest in exercising personal jurisdiction over Basnight. We conclude South Carolina's interest in the support of a minor child residing within its borders is compelling. Accordingly, we find the state's interest in exercising personal jurisdiction over Basnight outweighs any hardship or inconvenience created by hailing Basnight into the courts of this state.

Res Judicata[3]

Basnight also argues the family court erred in failing to find that the North Carolina order of dismissal barred this action under the doctrine of res judicata.

[3] Basnight's third and fourth issues on appeal.

We disagree.

"The doctrine of *res adjudicata* (or *res judicata*) in the strict sense of that time-honored Latin phrase had its origin in the principle that it is in the public interest that there should be an end of litigation and that no one should be twice sued for the same cause of action." First Nat'l Bank v. United States Fid. & Guar. Co., 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945). Under the doctrine of res judicata, a final judgment on the merits rendered by a court of competent jurisdiction, without fraud or collusion, is conclusive as to the rights of the parties and their privies. Griggs v. Griggs, 214 S.C. 177, 51 S.E.2d 622 (1949).

Res judicata precludes the parties from relitigating any issues actually litigated or those that might have been litigated in the first action. Town of Sullivans Island v. Felger, 318 S.C. 340, 457 S.E.2d 626 (Ct. App. 1995). In order for the doctrine of res judicata to apply, the following elements must be shown: (1) the identities of the parties are the same as the prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction. Garris v. Governing Bd. of South Carolina Reinsurance Facility, 333 S.C. 432, 511 S.E.2d 48 (1998); Lowe v. Clayton, 264 S.C. 75, 212 S.E.2d 582 (1975); Wold v. Funderburg, 250 S.C. 205, 157 S.E.2d 180 (1967).

Basnight has failed to establish the third element. A North Carolina court never issued a final order adjudicating the issues of paternity or the minor child's entitlement to support. Res judicata, therefore, does not apply to bar the subsequent suit on the merits. See Garris, 333 S.C. 432, 511 S.E.2d 48 (noting restraint in the application of the doctrine of res judicata is warranted when the prior action was dismissed on procedural grounds); Allen v. Southern Ry., 218 S.C. 291, 62 S.E.2d 507 (1950) (plaintiff's voluntary dismissal of first action leaves situation as though no suit had ever been brought). Accordingly, we affirm the family court's finding that the action was not barred by res judicata.

Rule 60(b), SCRCP[4]

Basnight next argues the family court erred in refusing to allow a record hearing on the merits of his Rule 60(b), SCRCP, motion for relief from judgment and/or in failing to issue a stay pending a hearing on the motion. DSS avers Basnight filed his Rule 60(b) motion, then requested, in chambers, the family court hold an emergency hearing. The court refused, and allegedly advised Basnight to file a written request for a hearing with the clerk of court. Basnight filed this appeal instead.

The issue Basnight relies on in support of his Rule 60(b) motion has not yet been presented to or ruled upon by the family court.[5] DSS admits the issue "may have been collateral" and does not object to the matter being raised post-trial. We find the issue is not ripe for review by this Court. See Baber v. Greenville County, 327 S.C. 31, 488 S.E.2d 314 (1997)(finding an issue not yet presented to the Tax Commission not ripe for appellate review).

Error Preservation[6]

In his brief, Basnight finally argues the family court erred in: (1) failing to dismiss this action because there exists no affidavit of proof of service of process on Basnight; and (2) failing to dismiss the action where no guardian ad litem was appointed for the child. Neither of these issues was raised to or ruled upon by the family court, and are therefore not properly before this court for review. McDavid v. McDavid, 333 S.C. 490, 511 S.E.2d 365 (1999)(holding an issue not raised to or ruled on by the family court should not be considered by the appellate court).

At oral argument, Basnight argued for the first time that the family court erred in failing to apply Rule 41(b) of the North Carolina Rules of Civil

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[4] Basnight's eleventh issue on appeal.

[5] Basnight argues the determination of his child support must take into account his obligation to his other children.

[6] Basnight's fifth and sixth issues on appeal.

Procedure. This issue is likewise not preserved for appellate review. See In the Interest of Bruce O., 311 S.C. 514, 429 S.E.2d 858 (Ct. App. 1993) (An appellant may not use oral argument as a vehicle to argue issues not argued in the appellant's brief.).

For the foregoing reasons, the order on appeal is

AFFIRMED.

CURETON, GOOLSBY and CONNOR, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Murray,

Appellant,

v.

Holnam, Inc. and Thomas Thornton,

Defendants,

Of whom Holnam, Inc. is

Respondent.

Appeal From Dorchester County
James Carlyle Williams, Jr., Circuit Court Judge

Opinion No. 3283
Heard December 13, 2000 - Filed January 8, 2001

REVERSED and REMANDED

Coming B. Gibbs, Jr., of Gibbs & Holmes, of Charleston, for Appellant.

J. Michelle Childs and Susan P. McWilliams, both of Nexsen, Pruet, Jacobs & Pollard, of Columbia, for Respondent.

ANDERSON, J.: John Murray appeals from an order of the Circuit Court granting summary judgment to his former employer, Holnam, Inc., as to Murray's slander cause of action. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Holnam operates a cement plant near Holly Hill, South Carolina. The plant includes a quarry which houses a large diesel fuel storage tank. Holnam hired Murray in 1989 as a control room operator. Murray's responsibilities involved operating cement-mixing machinery. Michael Smoak supervised Murray's shift. When Smoak was absent, Murray acted as the relief supervisor.

While working as relief supervisor one evening in June, 1996, Murray noticed that Chris Barnes, a coworker, was absent for approximately six hours. Murray confronted Barnes, who denied the absenteeism. Murray and Barnes argued. Murray threatened to report Barnes to Smoak. Barnes accused Murray of stealing diesel fuel by loading it into a fuel tank on the back of his truck. Murray declared he notified Smoak of the incident and of Barnes' allegation. Murray told Derome Wilson, a coworker, of Barnes' accusation, and of Murray's report to Smoak. Murray claims Smoak told him not to worry about the incident or Barnes' allegation.

Shortly after the occurrence, Barnes called Jim Bacot, a Holnam purchasing agent, and alleged he saw Murray steal diesel fuel on at least two occasions. According to Barnes, he and a coworker, Terry Jenkins, watched Murray fill his tanks with diesel fuel on the nights of March 15, 1996, and May 21, 1996. Barnes maintained they viewed the incidents from the top of an elevator about 100 yards from the storage tank. He averred that on May 21, 1996, he and Jenkins checked the gauge of the diesel tank and concluded Murray took 371 gallons. When asked whether he would have "told anybody

about the diesel fuel" if Murray had not informed Smoak that he had been absent from work for six hours, Barnes responded: "I can't say."

At his deposition, Terry Jenkins denied observing Murray steal fuel or antifreeze. Further, as to the alleged May 21, 1996, incident, Jenkins acknowledged he did not check the gauge of the diesel tank prior to Murray entering the quarry. Jenkins stated one time he was on top of a crane when he saw Murray in the quarry, but he could not see Murray's actions because it was dark. However, in a statement prepared by the human resources manager, Jenkins stated he observed Murray steal fuel and antifreeze. Jenkins, Barnes' high school acquaintance, admitted Barnes told him he was going to report Murray for stealing in response to Murray reporting Barnes absent from work.

Bacot reported the allegations to his supervisor and to Robbie Mims, production superintendent. At the time, Bonnie Connelly was the human resources manager and William Patterson was the plant manager. Mims and Smoak decided to "keep a watch on" Murray. Smoak believed Murray arrived at work the evening of June 8, 1996, with an empty tank on his truck. Mims thought Murray left the following morning with the tank full. Mims admitted he did not see Murray take any fuel. Patterson and Connelly explained to Mims that they could not proceed with action against Murray based solely on Barnes' allegations and Mims' and Smoak's suppositions.

Approximately one year later, in May of 1997, Barnes contacted Bacot and stated: "We've got a new administration and maybe we ought to give it another try." Bacot was unaware of the altercation between Murray and Barnes. Barnes alleged four additional incidents of Murray stealing fuel, oil, and antifreeze. After Barnes reported this information to him, Bacot notified Debbie Lightfoot, the new human resources manager, and Tom Thornton, the new plant manager. Bacot and Mims explained to Thornton and Lightfoot that the 1996 allegations had been determined to be insufficient by the previous management team. Lightfoot investigated by interviewing numerous employees.

On June 13, 1997, when Murray drove into the parking lot at work, Smoak requested Murray accompany him to Thornton's office. Thornton, Lightfoot,

Smoak, and Mims were present. Thornton informed Murray he was suspended for stealing company property. When Murray asked what he was accused of stealing, Thornton refused to answer stating the Orangeburg County Sheriff's Office was investigating. Thornton did not notify Murray of a definite time for the suspension but stated someone from Holnam would get in touch with him.

Murray testified that on Thursday of the following week, Lightfoot called him and asked him to meet with Holnam representatives the following day. The same people that attended the suspension meeting were at this second meeting. Thornton again advised Murray that he had been accused of stealing company property. Thornton refused to: (1) tell Murray what he was accused of stealing; (2) identify the witnesses reporting the theft; or (3) explain the allegations. Murray initially assumed the accusation stemmed from an incident involving a coat. Murray next suspected the accusations were related to the incident with Barnes. Murray explained he had reported the incident to Smoak. Smoak denied Murray communicated this information to him.

Murray produced receipts for fuel he purchased. Thornton informed Murray the receipts were insufficient. Murray was terminated at the meeting. Murray denied stealing fuel, oil, or antifreeze from Holnam. The allegations were never reported to the sheriff's office. No one from Holnam investigated the incident between Barnes and Murray.

Barnes and Jenkins testified Mike Smoak held a meeting of his employees, including at least six workers, and told them Murray was fired for misappropriating or misusing company property. Smoak alleges he held the meeting after the suspension and notified the employees that Murray was "suspended for misuse of company property pending investigation." Murray's appeal centers on the statement made by Smoak to the employees in the meeting.

Murray filed this action against his former employer, Holnam, Inc., and Thomas Thornton, Holnam's plant manager, alleging wrongful discharge and slander. Holnam and Thornton moved for summary judgment. Prior to the hearing on this motion, Murray moved to amend the complaint to include a cause of action for libel. In addition, Murray withdrew the wrongful discharge

claim. Although the trial judge did not specifically address the motion to amend, he considered the parties' arguments on libel and ruled on the issue.[1]

The trial judge granted summary judgment to Holnam and Thornton. Murray appeals the portion of the order granting summary judgment to Holnam on the slander claim. Murray does not appeal the grant of summary judgment to Thornton.

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); Rule 56(c), SCRCP. See also Bruce v. Durney, 341 S.C. 563, 534 S.E.2d 720 (Ct. App. 2000)(motion for summary judgment shall be granted if pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgment as matter of law). In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). If triable issues exist, those issues must go to the jury. Rothrock v. Copeland, 305 S.C. 402, 409 S.E.2d 366 (1991); Young, supra.

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[1] Amendment to a complaint may be impliedly consented to in a summary judgment hearing where the trial judge fails to expressly rule on the motion to amend, but the parties and trial judge treat the complaint as if amended. See Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543 (2000). See also Rule 15(b), SCRCP (issues not raised by the pleadings but tried by consent of the parties shall be treated as if they had been raised in the pleadings).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000); Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing and Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Vermeer, supra. Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000); Vermeer, supra.

In general, if the pleadings and the evidentiary matter in support of summary judgment do not establish the absence of a genuine issue of material fact, summary judgment must be denied, even if no opposing evidentiary matter is presented. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. Carolina Alliance, supra.

An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP. Brockbank, supra; Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998).

LAW/ANALYSIS

I. Defamation and Agency

Murray contends the trial judge erred in concluding Holnam was not liable for defamation arising from Smoak's statement because Holnam did not expressly direct Smoak to make the statement. We agree.

In Fleming v. Rose, 338 S.C. 524, 526 S.E.2d 732 (Ct. App. 2000), this Court explained:

> The tort of defamation allows a plaintiff to recover for injury to his or her reputation as the result of the defendant's communications to others of a false message about the plaintiff. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (1999). The focus of defamation is not on the hurt to the defamed party's feelings, but on the injury to his reputation. See Wardlaw v. Peck, 282 S.C. 199, 318 S.E.2d 270 (Ct. App. 1984). Defamatory communications take two forms: libel and slander. Swinton Creek Nursery, supra. Slander is a spoken defamation, while libel is a written defamation or one accomplished by actions or conduct. Id.

Fleming, 338 S.C. at 532, 526 S.E.2d at 737. Defamation need not be accomplished in a direct manner. Eubanks v. Smith, 292 S.C. 57, 354 S.E.2d 898 (1987); Tyler v. Macks Stores, 275 S.C. 456, 272 S.E.2d 633 (1980). A mere insinuation is actionable as a positive assertion if it is false and malicious and its meaning is plain. Eubanks, supra; Tyler, supra.

The elements of defamation include: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 506 S.E.2d 497 (1998)(Toal, J., concurring in result in separate opinion); Fleming, supra. A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. Fleming, supra.

Here, the trial judge concluded a principal could not be vicariously liable for statements made by an agent unless the agent was expressly authorized to make the statement. However, a principal may be held liable for defamatory statements made by an agent acting within the scope of his employment or within the scope of his apparent authority. Abofreka v. Alston Tobacco Co., 288 S.C. 122, 341 S.E.2d 622 (1986). See also Restatement (Second) of Agency § 247 (1965)(master is subject to liability for defamatory statements made by

servant acting within scope of his employment, or, as to those hearing or reading the statement, within his apparent authority).

The trial judge improperly concluded Holnam could not be held liable absent express authorization to Smoak.

II. Qualified Privilege

Murray argues the trial judge erred in concluding: (1) Smoak's statement was protected by qualified privilege and (2) Smoak did not exceed the scope of the privilege.

Our Supreme Court addressed a similar issue in Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (1999):

> In a defamation action, the defendant may assert the affirmative defense of conditional or qualified privilege. Under this defense, one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused. Restatement (Second) of Torts § 593 (1977); see Bell v. Bank of Abbeville, 208 S.C. 490, 38 S.E.2d 641 (1946). In Bell, this Court held:
>
> > In determining whether or not the communication was qualifiedly privileged, regard must be had to the occasion and to the relationship of the parties. When one has an interest in the subject matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion. The statement, however, must be such as the occasion warrants, and must be made in good faith to

> protect the interests of the one who makes it and the persons to whom it is addressed.
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> Bell, 208 S.C. at 493-94, 38 S.E.2d at 643. . . . .
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> . . . .
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> In general, the question whether an occasion gives rise to a qualified or conditional privilege is one of law for the court. 50 Am. Jur. 2d Libel and Slander § 276 (1995). However, the question whether the privilege has been abused is one for the jury. Id. Factual inquiries, such as whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited in its scope, and whether the statement was sent only to the proper parties, are generally left in the hands of the jury to determine whether the privilege was abused. Id.; see also Restatement (Second) of Torts §§ 599-610. In Fulton [v. Atlantic Coast Line R.R., 220 S.C. 287, 67 S.E.2d 425 (1951)], this Court held that it was a question for the jury to determine if the publication went beyond what the occasion required and was unnecessarily defamatory. Fulton, 220 S.C. at 297, 67 S.E.2d at 429; cf. Woodward, 277 S.C. at 32-33, 282 S.E.2d at 601 ("While abuse of privilege is ordinarily an issue for the jury, . . . in the absence of a controversy as to the facts . . . it is for the court to say in a given instance whether or not the privilege has been abused or exceeded.").

Swinton Creek Nursery, 334 S.C. at 484-85, 514 S.E.2d at 134.

It is the duty of the trial judge to determine if the statement is privileged. Id. A communication made in good faith on any subject matter in which the person communicating has an interest or duty is qualifiedly privileged if made to a person with a corresponding interest or duty even though it contains matter which, without this privilege, would be actionable. Constant v. Spartanburg Steel Prods., Inc., 316 S.C. 86, 447 S.E.2d 194 (1994); Prentiss v. Nationwide

Mut. Ins. Co., 256 S.C. 141, 181 S.E.2d 325 (1971). Communications between officers and employees of a corporation are qualifiedly privileged if made in good faith and in the usual course of business. Conwell v. Spur Oil Co., 240 S.C. 170, 125 S.E.2d 270 (1962).

We find the trial judge did not err in initially concluding Smoak was protected by a qualified privilege. Yet, the protection of a qualified privilege may be lost by the manner of its exercise. Fulton v. Atlantic Coast Line R.R., 220 S.C. 287, 67 S.E.2d 425 (1951). The publisher must not wander beyond the scope of the occasion. Constant, supra; Woodward v. South Carolina Farm Bureau Ins. Co., 277 S.C. 29, 282 S.E.2d 599 (1981). The privilege does not protect any unnecessary defamation. Fulton, supra. In order for a communication to be privileged, the person making it must be careful to go no further than his interests or his duties require. Id. Where the speaker exceeds his privilege and the communication complained of goes beyond what the occasion demands that he should publish, and is unnecessarily defamatory of the plaintiff, he will not be protected. Id. The existence of a duty, a common interest, or a confidential relation is not a defense. Id.

Whether the publication went too far beyond what the occasion required, resulting in the loss of the qualified privilege, is a question for the jury. Id. See also Constant, 316 S.C. at 89, 447 S.E.2d at 196 ("It is ordinarily for the jury to determine whether the privilege has been abused or exceeded.").

We find there is a genuine issue of material fact as to whether the qualified privilege was lost.

III. Actual Malice

Murray maintains the trial judge erred in concluding there were no genuine issues of fact regarding whether Smoak made the statements with actual malice. We agree.

If a defamation is actionable per se, then under common law principles the law presumes the defendant acted with common law malice and that the plaintiff

suffered general damages. Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 506 S.E.2d 497 (1998). If a defamation is not actionable per se, then at common law the plaintiff must plead and prove common law actual malice and special damages. Id. Slander is actionable per se if it charges the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession. Id.

However, even if the slander is actionable per se, if the communication is privileged, the plaintiff must prove actual malice. Bell v. Bank of Abbeville, 208 S.C. 490, 38 S.E.2d 641 (1946)(privileged communication is exception to rule that malice will be presumed where offending statement is actionable per se). A qualified privilege does not prevent liability for defamation where the statement is made with actual malice. Eubanks v. Smith, 292 S.C. 57, 354 S.E.2d 898 (1987). See also Bell, supra (in defamation action, if defendant proves qualified privilege, plaintiff may not recover unless he overcomes privilege by proving actual malice).

Common law actual malice means the defendant acted with ill will toward the plaintiff or acted recklessly or wantonly, meaning with conscious indifference toward the plaintiff's rights. Padgett v. Sun News, 278 S.C. 26, 292 S.E.2d 30 (1982). The Court, in Fulton v. Atlantic Coast Line R.R., 220 S.C. 287, 67 S.E.2d 425 (1951), discussed malice:

> That the appellant believed the charges to be true did not justify it in publishing them in an improper and unjustified manner or with improper and unjustified motives. Proof that they were published in such manner and with such motives would constitute sufficient proof of malice, or malice in fact. It is not necessary that evidence must be offered of malignity or ill will, nor that those facts should be found. The time, place, and other circumstances of the preparation and publication of defamatory charges, as well as the language of the publication itself, are admissible evidence to show that the false charge was made with malice.

Fulton, 220 S.C. at 296, 67 S.E.2d at 429. An academic review of malice is presented in Jones v. Garner, 250 S.C. 479, 158 S.E.2d 909 (1968). Jones enunciates:

> Malice, in actions for libel or slander, is of two kinds: implied malice or malice in law, and actual malice or malice in fact.
>
> "Malice in law, or legal malice, is a presumption of law and dispenses with the proof of malice when words which raise such presumption are shown to have been uttered. This form of malice is not necessarily inconsistent with an honest or even laudable purpose and does not imply ill will, personal malice, hatred, or a purpose to injure." 33 Am. Jur. Libel and Slander, Section 111. Also, 53 C.J.S. Libel and Slander § 2.
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> . . . .
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> Actual malice or malice in fact is not presumed and must be proved. Actual malice means that the defendant was actuated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff; or that the statements were published with such recklessness as to show a conscious indifference toward plaintiff's rights.

Jones, 250 S.C. at 488, 158 S.E.2d at 913-14. See also Eubanks v. Smith, 292 S.C. 57, 63, 354 S.E.2d 898, 902 (1987)("Actual malice is ill will, recklessness, wantonness, or conscious indifference to the plaintiff's rights.").

In Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 506 S.E.2d 497 (1998), our Supreme Court revisited malice and lifted the definition of common law actual malice from Jones v. Garner, supra: "[C]ommon law actual malice, that is 'the defendant was activated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff; or that the statements were published with such recklessness as to show a conscious indifference toward plaintiff's reports.'" Holtzscheiter, 332 S.C. at 510 n.3, 506 S.E.2d at

501 n.3. The case sub judice is controlled by the definition of common law actual malice because the plaintiff is a private citizen. A different definition of malice is efficacious in regard to a public official or public figure:

> In defamation actions involving a "public official" or "public figure," the plaintiff must prove the statement was made with "actual malice," i.e., with either knowledge that it was false or reckless disregard for its truth. New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).
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> The actual malice standard is not satisfied merely through a showing of ill will or "malice" in the ordinary sense of the term.

Elder v. Gaffney Ledger, 341 S.C. 108, 113-14, 533 S.E.2d 899, 901-02 (2000). The public official or public figure definition of actual malice is inapposite to the case at bar.

Actual malice requires that at the time of the defendant's act or omission he was conscious or chargeable with consciousness of his wrongdoing. Padgett v. Sun News, 278 S.C. 26, 292 S.E.2d 30 (1982). Malice may be proved by direct or circumstantial evidence. Hainer v. American Medical Int'l, Inc., 328 S.C. 128, 492 S.E.2d 103 (1997); Smith v. Smith, 194 S.C. 247, 9 S.E.2d 584 (1940).

Whether malice is the incentive for a publication is ordinarily for the jury to decide. See Ponticelli v. Mine Safety Appliance Co., 247 A.2d 303 (R.I. 1968)(citing 3 Restatement of Torts § 619(2)). Proof that statements were published in an improper and unjustified manner is sufficient evidence to submit the issue of actual malice to a jury. Hainer, supra; Mains v. K Mart Corp., 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988). See also Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (1999)(finding factual

inquiries, such as whether the defendants acted in good faith in making the statement, questions for the jury).

We find genuine issues of fact exist regarding whether the statement was made with actual malice. The issue of actual malice is properly a question for the jury.

IV. Self-Publication

Murray claims the trial judge erred in finding Murray's self-publication barred him from recovering damages. We agree.

Self-publication of the allegedly defamatory statement may bar a plaintiff from recovery. David P. Chapus, Annotation, Publication of Allegedly Defamatory Matter by Plaintiff ("Self-Publication") As Sufficient to Support Defamation Action, 62 A.L.R. 4th 616 (1988). See also 50 Am. Jur. 2d Libel and Slander § 241 (1995)(as a general rule, where a person communicates a defamatory statement only to person defamed and defamed person then repeats statement to others, publication of statement by person defamed, or "self-publication," will not support defamation action against originator of statements). In the instant case, the trial judge concluded Murray's report to Smoak and Derome Wilson, was self-publication of the "defamation of his character."

Murray's statements to Smoak and Wilson were not publications of the allegedly defamatory statements. Murray reported Barnes' absenteeism and subsequent accusations to Smoak. Murray informed Wilson about the incident and his report to Smoak. Smoak's alleged defamatory statement was that Murray was terminated for misappropriating company property.

We find Murray's statements are not comparable to Smoak's statement. Concomitantly, Murray's statements were not self-publication. The judge erred in determining Murray's self-publication bars him from recovery.

CONCLUSION

We hold Holnam can be liable for Smoak's allegedly defamatory statement even though Smoak did not have express authority to make the statement. We rule a principal may be held liable for defamatory statements made by an agent acting within the scope of his employment or within the scope of his apparent authority. Further, although the trial judge properly concluded Smoak was protected by a qualified privilege, genuine issues of material fact exist regarding whether Smoak exceeded the scope of his qualified privilege. Additionally, the issue of common law actual malice is a question for the jury. Finally, Murray is not barred from recovery by self-publication. Accordingly, we REVERSE the trial judge's order granting summary judgment and REMAND for trial.

REVERSED and REMANDED.

HEARN, C.J., and STILWELL, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joel P. Bayle, as Personal Representative for Patricia F. Bayle, Deceased,

Appellant,

v.

South Carolina Department of Transportation, Blythe Construction, Inc.,

Defendants,

Of whom South Carolina Department of Transportation is

Respondent.

Appeal From Anderson County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 3284
Heard December 13, 2000 - Filed January 8, 2001

AFFIRMED

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

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

ANDERSON, J.: Joel Bayle, as Personal Representative for Patricia Bayle, initiated these actions for survival and wrongful death. Bayle appeals the grant of summary judgment to the South Carolina Department of Transportation (DOT). The court ruled Bayle's actions were barred by the statute of limitations. We affirm.

FACTS/PROCEDURAL BACKGROUND

Patricia Bayle was killed on October 12, 1994, when she lost control of her vehicle as she drove into a large amount of standing water in the northbound lane of I-85. Bayle's car crossed the median and struck an oncoming tractor-trailer in the southbound lane of I-85. Bayle died at the scene.

More than two years after Patricia Bayle's death, an attorney for Paul Wilson contacted Bayle's husband, Joel. As a result, Joel learned that ten days prior to his wife's accident, Paul Wilson was involved in a collision with Robert Latham, who lost control of his vehicle after driving into standing water in the northbound lane of I-85. After finding out about the Wilson wreck and other similar accidents on I-85 from Wilson's counsel, Joel Bayle filed these actions for wrongful death and survival against DOT on September 19, 1997.

The actions allege DOT negligently constructed, maintained, and/or repaired the roadway, failed to warn drivers of a water hazard, and/or failed to construct barricades or guardrails to protect persons using the roadway.

DOT answered asserting the actions were barred by the South Carolina Tort Claims Act's two-year statute of limitations. The Circuit Court agreed and granted summary judgment to DOT.

STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); Rule 56(c), SCRCP. See also Bruce v. Durney, 341 S.C. 563, 534 S.E.2d 720 (Ct. App. 2000)(motion for summary judgment shall be granted if pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgment as matter of law). In determining whether any triable issues of fact exist, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). If triable issues exist, those issues must be submitted to the jury. Young, supra.

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant. Vermeer, supra. Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997).

An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP.

Brockbank, supra; Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998).

ISSUES

I. Did the Circuit Court err in granting summary judgment to DOT based on the statute of limitations?

II. Did the Circuit Court err in quashing discovery?

LAW/ANALYSIS

I. Summary Judgment

Bayle contends the Circuit Court erred in granting summary judgment to DOT because (1) the court incorrectly defined the term "loss"; (2) the discovery rule tolled the statute of limitations; (3) he was reasonably diligent in filing suit; and (4) he presented evidence of latent defects in the roadway.

Bayle brought this action against DOT, a governmental entity. Thus, the South Carolina Tort Claims Act delineates the parameters within which Bayle may pursue his claims. DOT is a governmental entity as defined by the Act. See S.C. Code Ann. § 15-78-30(d), (e) & (h) (Supp. 1999).

The Tort Claims Act waives sovereign immunity for torts committed by the State, its political subdivisions, and governmental employees acting within the scope of their official duties. See Pike v. South Carolina Dep't of Transp., Op. No. 25208 (S.C. Sup. Ct. filed November 6, 2000)(Shearouse Adv. Sh. No. 40 at 10); S.C. Code Ann. § 15-78-40 (Supp. 1999). The Act does not create a cause of action. See Summers v. Harrison Constr., 298 S.C. 451, 381 S.E.2d 493 (Ct. App. 1989); see also Moore v. Florence Sch. Dist. No. 1, 314 S.C. 335, 444 S.E.2d 498 (1994)(Tort Claims Act does not create new substantive cause of action against government entity). Rather, it removes the common law bar of sovereign immunity in certain circumstances, but only to the extent mandated by the Act. Summers, supra.

The Tort Claims Act "is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty." S.C. Code Ann. § 15-78-200 (Supp. 1999)(emphasis added). The Act contains a two-year statute of limitations. Section 15-78-110 declares:

> Except as provided for in Section 15-3-40, any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.

S.C. Code Ann. § 15-78-110 (Supp. 1999)(emphasis added).

Bayle asserts the Circuit Court erred in defining "loss" as the date of his wife's death rather than the date he learned of a possible latent defect in the road surface. We disagree.

The Tort Claims Act specifically defines loss:

> "Loss" means bodily injury, disease, death, or damage to tangible property, including lost wages and economic loss to the person who suffered the injury, disease, or death, pain and suffering, mental anguish, and any other element of actual damages recoverable in actions for negligence, but does not include the intentional infliction of emotional harm.

S.C. Code Ann. § 15-78-30(f) (Supp. 1999)(emphasis added). The Tort Claims Act contains a definition of loss that differs from that of other statutes. Therefore, Bayle's reliance on medical or legal malpractice cases not governed by the Act is misplaced.

In his brief, Bayle cited Johnston v. Bowen, 313 S.C. 61, 437 S.E.2d 45 (1993), for the proposition that whether a claimant knew or should have known a cause of action existed is a jury question. First, Johnston construes a different statute of limitations, S.C. Code Ann. § 15-3-545 (Supp. 1999). Additionally, Johnston reaches the same result as the court in the instant case. The Johnston Court held the statute of limitations begins to run when a person of common knowledge and experience would be on notice a claim might exist, not when the plaintiff discovers a witness to support or prove the case.

Bayle's "loss," according to the clear provisions of the statute, was the death of his wife, rather than the date he learned of a possible latent defect in the road surface. When statutory language is unambiguous, this Court may not impose a contrary meaning. In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998).

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Joiner v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (2000). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Id. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Id. Therefore, the courts are bound to give effect to the expressed intent of the legislature. Id.

Provisions of the Tort Claims Act establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed in favor of limiting the liability of the State. See S.C. Code Ann. §§ 15-78-20(f) & -200 (Supp. 1999); Steinke v. South Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999); Baker v. Sanders, 301 S.C. 170, 391 S.E.2d 229 (1990). We conclude the Circuit Court correctly held Bayle's loss occurred on the date of his wife's death.

Bayle asserts the discovery rule tolled the statute of limitations until he knew a cause of action existed against DOT for his wife's death. The discovery rule is applicable to actions brought under the Tort Claims Act. See Joubert v. South Carolina Dep't of Social Servs., 341 S.C. 176, 534 S.E.2d 1 (Ct. App. 2000).

According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996). The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999). The date on which discovery of the cause of action should have been made is an objective, rather than subjective, question. See Joubert, supra; Young, supra. "In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist." Young, 333 S.C. at 719, 511 S.E.2d at 416.

In Young, this Court held that an inmate was not required to know the sight in his right eye was permanently lost to be put on notice the Department of Corrections had caused him injury by delaying appropriate medical treatment. The Court found:

> Viewing the facts and inferences in the light most favorable to Young, we rule he was put on notice in May of 1993 that he had a claim against the Department of Corrections for the delay in diagnosis, treatment, or referral to a specialist. Two doctors, Dr. McLane and Dr. Gross, commented on the delay in medical treatment. On May 11, 1993, the date of his retinal repair surgery, Young was aware he had suffered a delay in treatment, that the delay concerned doctors, and that he had scar tissue built up in his eye. Thus, the statute of limitations on his claim began to run on May 11, 1993.

> Although Young could not determine the extent of his loss until after the July 1994 cataract surgery, the law is clear the statute of limitations is not tolled during the period of time in which a plaintiff is merely unaware of the extent of an actionable injury. The fact that Young's vision did not deteriorate between January of 1993, when he first complained to medical personnel at Perry and May of 1993, when he was diagnosed and treated, does not present a genuine issue of material fact as to when the statute of limitations began to run. Young was not required to understand fully the ramifications of the scar tissue buildup or delay in diagnosis and treatment to be put on notice the delay had resulted in an injury.
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> We hold the concernment expressed by the doctors, in conjunction with the other evidence in this case, was sufficient to place a reasonable person of common knowledge and experience on notice that a claim against the Department of Corrections might exist. Acting with reasonable diligence, Young could or should have known a cause of action might exist as of May 11, 1993. Young had until May 11, 1995, to file this action. Instead, Young did not bring this action until June 2, 1996. Because he did not file this action within two years from the time he discovered or reasonably should have discovered the injury, Young's claim is barred by the statute of limitations.

Young, 333 S.C. at 719-20, 511 S.E.2d at 416-17 (citations omitted).

This Court revisited the date of loss issue in Joubert v. South Carolina Department of Social Services, 341 S.C. 176, 534 S.E.2d 1 (Ct. App. 2000). In that case, DSS denied Joubert's application for renewal of his license to operate The Pines, a residential treatment facility for emotionally disturbed teenage girls, after determining Joubert, the director of the Pines, had neglected and failed to adequately supervise two teenage clients. Joubert filed a tort action against DSS alleging, inter alia, gross negligence in the failure to renew the

treatment center's license. The Circuit Court granted summary judgment to DSS on the basis of the statute of limitations.

Joubert contended his loss occurred not on the date of the unfavorable DSS decision or action, but rather on the date the Family Court agreed with him the DSS decisions were improper. The Circuit Court disagreed. On appeal, this Court affirmed the Circuit Court, finding that "[u]nder the Tort Claims Act, . . . the statute of limitations begins to run when the plaintiff should know that he might have a potential claim against another, not when he develops a full-blown theory of recovery." Joubert, 341 S.C. at 190, 534 S.E.2d at 8.

Bayle attempts to distinguish this case from Tanyel v. Osborne, 312 S.C. 473, 441 S.E.2d 329 (Ct. App. 1994). The facts in Tanyel involve a collision at an intersection. Tanyel was stopped at a red light. Osborne entered the intersection and turned left in front of an oncoming school bus driven by an employee of the Department of Education. The bus hit Osborne's car pushing it into Tanyel's car. The accident occurred on November 14, 1990. In early 1991, Tanyel brought an action against Osborne only. In early December of 1992, Tanyel amended his complaint to add the bus driver as a defendant when he discovered new evidence indicating negligence by the bus driver. Tanyel alleged the statute did not begin to run until he "discovered" evidence supporting a claim of negligence against the bus driver. The Court determined the statute of limitations on Tanyel's claim against the school bus driver began to run when Tanyel witnessed the events causing his loss, thereby putting him on notice he might have a potential claim against another person, not when he later discovered evidence to support his claim.

Bayle argues that, unlike Tanyel, he did not witness the accident and did not have personal knowledge of the circumstances surrounding it. Thus, he did not know of the loss on that date. This argument is without merit.

Bayle was informed of his wife's death on the day it occurred. The accident report read: "[Patricia Bayle's car] struck water on the road." Bayle therefore had knowledge of the circumstances of the accident. In his brief, Bayle concedes he knew it was raining on the day of his wife's accident and that

Patricia's car struck a puddle of water. It is unavailing that Bayle did not personally witness the accident.

Viewing the evidence, as we are constrained to do, in the light most favorable to Bayle, the evidence does not demonstrate a genuine issue of material fact existed that a person possessing common knowledge and experience would not have known a possible cause of action existed on the date of Patricia's tragic death. Bayle knew the circumstances of Patricia's death and should have been on notice to investigate further.

Bayle proposes an interpretation of the discovery rule that would require absolute certainty a cause of action exists before the statute of limitations begins to run. However, that is not the law of this state.

Bayle avers the question of whether he was reasonably diligent in pursuing his claim is a jury issue that precluded summary judgment. We disagree.

Reasonable diligence is intrinsically tied to the issue of notice. The Joubert Court explicated: "We have interpreted the 'exercise of reasonable diligence' to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist." Joubert, 341 S.C. at 191, 534 S.E.2d at 8 (quoting Dean v. Ruscon Corp., 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996)). See also Burgess v. American Cancer Soc'y, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989)(holding statute starts to run upon discovery of such facts as would have led to knowledge thereof if pursued with reasonable diligence).

There is no evidence in the record that Bayle took any action within the two years after his wife's death. In contrast, armed with the same information, Paul Wilson filed a Freedom of Information Act request to determine if other accidents had occurred under similar circumstances.

Bayle asseverates the court erred in granting summary judgment because the court improperly found the alleged defect in the road surface and the absence of a barrier were patent rather than latent. In its order granting summary judgment, the court concluded: "The existence of water on the roadway and the absence of a barrier between the north [sic] bound and south [sic] bound lanes of travel were readily observable conditions on the date of the accident. These alleged 'defects' thus existed on the day of this accident, i.e. the date the 'loss' occurred."

The cause of Bayle's loss was not an issue of material fact with regard to the grant of summary judgment and does not mandate reversal. Counsel for Bayle conceded at the hearing that the defect was evident when it rains. The evidence showed it was raining at the time of the accident. We agree with the Circuit Court's finding the lack of a barrier on that portion of the interstate highway is immediately apparent.

Bayle cites Ford v. South Carolina Department of Transportation, 328 S.C. 481, 492 S.E.2d 811 (Ct. App. 1997), for the proposition that the determination of whether a defect is latent or patent is a jury issue. Ford is not controlling because it did not involve the construction and interpretation of the Tort Claims Act's statute of limitations.

The Tort Claims Act provides potential claimants with two years in which to file suits. This two year period begins on the date of loss regardless of whether the plaintiff knows the cause of the loss. Bayle's knowledge of his loss triggered the statute and put Bayle on notice to timely investigate and determine its cause. Bayle's belated discovery of the cause of the loss does not entitle him to reversal of the order granting summary judgment. Bayle did not investigate sooner and did not file this claim until more than two years from the date of his wife's death.

II. Necessity of Further Discovery

Finally, Bayle challenges the Circuit Court's grant of DOT's motion to quash further discovery. Bayle maintains the court erred in granting summary judgment prior to permitting him to complete discovery. We disagree.

The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion. Dunn v. Dunn, 298 S.C. 499, 381 S.E.2d 734 (1989); Osborne v. Adams, 338 S.C. 82, 525 S.E.2d 268 (Ct. App. 1999). An abuse of discretion occurs when the trial judge's ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support. Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987); Osborne, supra.

We note initially that Bayle did not move for a continuance in which to pursue further discovery. Therefore, this issue is not preserved for review on appeal. See Degenhart v. Knights of Columbus, 309 S.C. 114, 420 S.E.2d 495 (1992)(stating whether court erred in granting summary judgment while appellants had motion to compel outstanding was not preserved when appellants failed to move for a continuance and did not request motion for summary judgment be held in abeyance until after ruling on discovery motion); Pryor v. Northwest Apartments, Ltd., 321 S.C. 524, 469 S.E.2d 630 (Ct. App. 1996)(holding that issue as to whether judge erred in granting summary judgment because discovery requests were outstanding was not preserved where appellant did not ask court to continue case so discovery could be completed).

Bayle did not present argument regarding the necessity for additional discovery until after the motion for summary judgment had been granted. DOT briefly addressed the discovery issue in anticipation of Bayle's response to its motion for summary judgment. This is insufficient to preserve the issue for review. See 4 C.J.S. Appeal & Error § 219 (1993)("As a general rule, the objection in the trial court must have been made by the party who urges the error in the appellate court.").

Assuming, arguendo, this issue is preserved, we find the trial judge did not abuse his discretion in quashing the motion for additional discovery and granting summary judgment. The record in the case sub judice does not demonstrate further discovery would have contributed to the resolution of the issue at hand--namely, whether the statute of limitations barred Bayle's action. See Thomas v. Waters, 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994)(affirming grant of summary judgment when plaintiff did not demonstrate likelihood that further discovery would produce additional relevant evidence).

CONCLUSION

We rule that issues relating to the cause of the loss rather than the date of the loss are not determinative. We hold the clear legislative intent reveals the date of the loss, not the date of the discovery of the cause of the loss, triggers the running of the statute of limitations under the Tort Claims Act. Further discovery regarding the nature of the alleged defect would not have affected the outcome of this case. Concomitantly, the trial court properly granted DOT's motion for summary judgment. Accordingly, the order of the Circuit Court granting summary judgment is hereby

AFFIRMED.

HEARN, C.J., and STILWELL, J., concur.