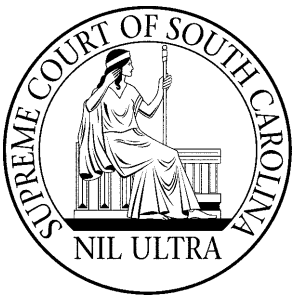

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

August 19, 2002

ADVANCE SHEET NO. 29

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Margaret Brewer, Appellant.

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

Opinion No. 25516
Heard June 26, 2002 – Filed August 19, 2002

AFFIRMED

Richard A. Harpootlian, of Richard A. Harpootlian P.A., of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney Generals Tracey C. Green and Jennifer D. Evans, of Columbia, for respondents.

JUSTICE MOORE: Appellant was convicted of one count of misconduct in public office and nine counts of embezzlement. In this appeal, we are asked to determine whether the trial court erred by finding appellant is not entitled to immunity from prosecution. We affirm.

FACTS

Appellant worked for the City of Manning as a billing clerk. Her duties included the collection of money received to pay water bills, the bank deposits of those payments, and the making of adjustments to water bills, for instance, where a customer had a large water bill solely because a leak had occurred. Bill payments were accepted by one of four methods: mail, night deposit box, in person, or bank draft. All payments received were to be posted to the customers' accounts immediately upon receipt. After appellant reviewed the payments, she would post them into the computer system or give them to an employee for posting. The posting would automatically record the amount and form of payments onto the Daily Register Report. Appellant generated this report unless she was on leave.

In February 1997, a city employee discovered appellant was failing to post deposits. Thereafter, in March, appellant was placed on administrative leave with pay while an internal investigation took place.

After the financial problems arose, the City retained an attorney, who in turn retained an accountant, Marty Ouzts, to conduct a review of the water billing system. The review began on April 17, 1997. Ouzts spoke to the other water department employees and reviewed the Daily Reports and the water and sewer billing. During his review between April 17 and April 24, Ouzts found discrepancies in the deposits between the amount of cash collected and the amount of cash deposited for each and every day he looked at in sporadic periods. He further found that appellant printed the Daily Reports and made the bank deposits. Before speaking to appellant, Ouzts determined cash was missing from the deposits. Further, he knew there was a problem because there was no explanation as to why thousands of dollars in cash would be received in a given day and only several hundred dollars of that cash would be deposited the next day.[1]

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[1]Appellant allegedly held checks so they would not be posted on the computer system as payments and would not appear on the Daily Report. She then took cash in an amount equal to the checks she had withheld. When

As a result of Ouzts' initial investigation, appellant, appearing with her attorney, was compelled to attend a meeting on April 24, 1997. She was informed if she did not attend the meeting, her employment would be terminated. She met with the Mayor of Manning, the city administrator, a town councilman, Ouzts, and the City's retained attorney. Ouzts testified the meeting was to determine why there were discrepancies in the deposits and Daily Register Reports.

At the meeting, Ouzts and appellant discussed what would cause differences in the amounts recorded for the deposit and the Daily Register Report. Appellant made the following statements: (1) she did not know what would cause the differences between the Daily Reports and the actual deposits made; (2) she had never used the Daily Report to ensure that it matched the deposits; (3) she never noticed there was a discrepancy in the amounts; (4) she never noticed the Daily Report listed the amount of checks received and the amount of cash received; (5) when asked why her reports balanced exactly to the penny (which is extremely unusual), she said she did not think that was unusual and that she had made sure her deposit and the Daily Report balanced to the penny every day; (6) she made the deposits; (7) she never had an overage or a shortage when making deposits; (8) she said other employees must be juggling the amounts for checks and cash received; (9) she never noticed that cash being deposited was less than the amount of cash being received; (10) when asked about adjustments to individual accounts, she said other employees could have made adjustments to the accounts while she was in her office doing other things; (11) that she was not aware of other employees making adjustments to individual accounts; and (12) that she was the one who should have made all adjustments to the customers' accounts.[2] Ouzts stated his final report after his investigation

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she withheld the checks received in the mail, her actions prevented those checks from being posted as payments. Therefore, to ensure the customers' accounts would not reflect an arrearage, appellant made adjustments to the accounts before the bills were sent.

[2]At trial, appellant's testimony reiterated statements numbered 2, 3, 5, 6, 9, 10, and 12.

would have been the same even if he had not spoken to appellant at the April 24th meeting.

Following the meeting, Ouzts attempted to determine whether there was information that would corroborate or contradict what appellant had stated. Ouzts related his findings to the SLED agent, who became involved after the April 24th meeting on request of the Mayor,[3] and to the state grand jury.

The City's retained attorney, Charles Boykin, who was also at the April 24th meeting, testified at the pre-trial hearing. He testified the City was initially conducting an internal investigation and law enforcement had not been contacted prior to the meeting. He stated there was no discussion of immunity or of a criminal investigation during the meeting. Boykin testified that appellant could have refused to speak with the officials but they did not inform her she did not have to speak with them. Boykin contended appellant was compelled to attend the meeting for the purpose of satisfying an employment law requirement that before the employee can be terminated, she must be allowed to respond to the allegations against her. He stated the meeting was also for appellant to have the opportunity to respond to any questions posed by Ouzts. Boykin testified appellant was never told that if she did not answer questions she would be fired. She was told, however, that she would be fired if she did not attend the meeting because she had an obligation to cooperate with the City. He further testified that, prior to the meeting, he knew funds were missing; that Ouzts had already completed an analysis of the financial documents for 1996; and Ouzts had explained to him how the embezzlement scheme operated. Before the meeting, Boykin said he would have advised the City to dismiss appellant from employment and refer the matter to SLED whether the meeting took place or not. Within days of the meeting, appellant's employment was terminated.

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[3]SLED was contacted the day after appellant's meeting with city officials and Ouzts. The letter contacting SLED states, "While we do not have direct evidence which establishes that the funds were taken by a specific individual, we believe an investigation by SLED is warranted."

Following appellant's termination, the State brought criminal charges against her for embezzlement and misconduct in public office. Prior to trial, appellant moved that she be granted immunity from prosecution because she was allegedly coerced into making incriminating statements at the April 24th meeting between her and city officials. The motion was denied.

The trial court ruled the federal and state laws of immunity did not extend to appellant and that there was no basis to quash or dismiss the indictment against her. However, the court found appellant's statements were coerced and not voluntarily made. In making this determination, the court indicated it was analyzing the statements, as it normally would do in a Jackson v. Denno[4] hearing. Consequently, the court ruled appellant's statements during the April 24th meeting should be suppressed and could not be used at trial.

ISSUE

Whether appellant is entitled to immunity from prosecution?

DISCUSSION

Appellant argues she is entitled to transactional immunity because her April 24th statements were compelled.[5] Transactional immunity shields the

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[4]378 U.S. 368, 84 S.Ct. 1774 (1964).

[5]Appellant further argues she is entitled to use immunity, which prohibits the witness's compelled testimony and its fruits from being used in any manner in connection with criminal prosecution of the witness. However, as we stated in State v. Thrift, 312 S.C. 282, 297, 440 S.E.2d 341, 349 (1994), the South Carolina Constitution provides broader protection by permitting transactional immunity, rather than use immunity. *Id.* at 300, 440 S.E.2d at 351. *See also* Dickerson v. Coca-Cola Bottling Co. Affiliated Ltd., 312 S.C. 264, 440 S.E.2d 359 (1994) (same). Therefore, it is unnecessary to

witness from any prosecution for the transaction or offense to which her compelled testimony relates. State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994).

Initially, we note that while appellant was compelled to answer questions during the April 24th meeting, her statements at that meeting were not incriminating, but were exculpatory.[6]

Even assuming appellant's statements were incriminating, she would not be entitled to transactional immunity. At the time appellant responded to questions by the accountant hired to investigate the embezzlement scheme, a prosecuting authority was not involved in the matter, there was no agreement between a prosecuting authority and appellant promising her immunity, and there was no "testimony" involved such that appellant was being asked to testify.

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address appellant's use immunity argument given that, if appellant is entitled to immunity at all, she would be entitled to transactional immunity.

[6]Because these exculpatory statements were not made during a custodial interrogation, the prosecution was not barred from using these statements at trial. *See* Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612 (1966) (". . . prosecution may not use statements, whether exculpatory or inculpatory, stemming from *custodial* interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers *after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.*") (emphasis added); State v. Ridgely, 251 S.C. 556, 164 S.E.2d 439 (1968) (same). Consequently, the trial judge's suppression of appellant's statements gave appellant relief to which she was not entitled. *Cf.* State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993) ("[a]ppellate courts are bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.").

Further, appellant's claim she should be granted immunity from prosecution conflicts with the very nature and purpose of the immunity from prosecution doctrine.

> The purpose of immunity provisions is to aid *prosecuting officers* by inducing criminals or their confederates to turn state's evidence and tell on each other; to enable *prosecuting officers* to procure evidence which would otherwise be denied to them because of the constitutional right against self-incrimination; and at the same time to protect every person from giving testimony that directly or indirectly would be helpful to the prosecution in securing an indictment or a conviction.

21 Am. Jur. 2d *Criminal Law* § 271 (1998) (emphasis added). *See also* Dickerson v. Coca-Cola Bottling Co. Affiliated Ltd., *supra* (primary purpose for immunity is to assist prosecutors in obtaining evidence that could otherwise be withheld by witnesses who invoke Fifth Amendment privilege against self-incrimination). The instant case does not involve the situation where a prosecutor was attempting to induce appellant to turn state's evidence and tell on someone else regarding the embezzlement scheme. Further, evidence of the embezzlement scheme was not denied to the prosecutor because, even without appellant's statements, the accountant had already determined that an embezzlement scheme was occurring and the method by which it was being carried out. Consequently, the prosecution had another source by which it procured evidence regarding the scheme.

Accordingly, the trial judge properly denied the motion to dismiss or quash the indictment because appellant was not entitled to immunity from prosecution.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James L. Floyd, Jr., as parental guardian of James Leon Floyd, III, Ronald Dendy, as parental guardian of April B. Dendy, K. Wayne Nix, as parental guardian of Kenneth Lance Nix, Michael Wooten, as parental guardian of Erica Page Wooten, Dennis Springs, as parental guardian of Dennis Holmes Springs, Jr., David Williamson, Jr., as parental guardian of David Thomas Williamson, III, Richard Dean Swanson, as parental guardian of John David Swanson, Sherry Hill Ballard, as parental guardian of Jonathan Eric Ballard, Donald Stephen Lathrom, as parental guardian of Andrew Kirk Lathrom, Petitioners,

v.

Horry County School

District, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
J. Stanton Cross, Jr., Master-in-Equity

Opinion No.25517
Heard June 11, 2002 - Filed August 19, 2002

AFFIRMED IN RESULT

J. Jackson Thomas and Emma Ruth Brittain, of The Thompson Law Firm, of Myrtle Beach, for petitioners.

Kenneth L. Childs, John M. Reagle, and Keith R. Powell, of Childs & Halligan, P.A., of Columbia, for respondent.

JUSTICE MOORE: We granted a writ of certiorari in this school suspension case to review the Court of Appeals' unpublished opinion construing our decision in Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996). Although this appeal from an order granting a temporary injunction is moot, in the interest of judicial economy we address the merits and affirm the result

reached by the Court of Appeals.[1]

FACTS

Petitioners are the parents of former Socastee High School students (Students). Socastee High School is located in Horry County within respondent Horry County School District (District). Students, who were seniors at the time, admitted to vandalizing another high school on December 11, 1998.[2] On December 18, they were advised by the school principal they would be suspended from school for three days.

Before the suspension was implemented, Students brought this action for injunctive relief in circuit court. As a preliminary matter, the circuit court granted a temporary injunction. District appealed to the Court of Appeals and sought a supersedeas of the temporary injunction. On April 28, 1999, the Court of Appeals superseded the temporary injunction effective May 12, 1999.[3] The three-day suspension was subsequently implemented.

On the merits of District's appeal of the temporary injunction, the Court of Appeals found in an unpublished opinion, with one dissenter, that the appeal was not moot but that the circuit court has no subject matter jurisdiction over short-term student suspensions under Byrd, *supra*. Accordingly, the Court of Appeals vacated the temporary injunction.

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[1]Where a temporary injunction has expired, as here, the issue is moot. Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001). We may, however, address the merits for the sake of judicial economy. *Id.* Our decision today disposes of the underlying cause of action in this case.

[2]Students spray-painted graffiti on buildings, sidewalks, school buses, and tennis courts and trashed the school grounds. The cost of clean-up was at least $800.

[3]Meanwhile, Students' administrative appeal to District's agent as provided by District policy was denied.

ISSUES

1. Does Byrd preclude any action in circuit court challenging a temporary student suspension?

2. Were the standards of Goss v. Lopez, 419 U.S. 565 (1975), met in this case?

DISCUSSION

Students contend the Court of Appeals erred in holding the circuit court has no subject matter jurisdiction over these three-day student suspensions. We agree in part and now clarify that our decision in Byrd allows for limited judicial review.

In Byrd, we explicitly held that our statutory scheme does not provide for judicial review of temporary student suspensions that are for ten days or less.[4]

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[4]The applicable provisions are S.C. Code Ann. §§ 59-63-210 through -230 (1990). Section 59-63-210 sets forth the reasons a district board of trustees may authorize suspension, including "for violation of written rules and promulgated regulations established by the district board." Section 59-63-220 provides that the district board may confer upon any administrator the authority to suspend a student for a maximum of ten days for any one offense. Finally, § 59-63-230 provides the applicable suspension procedure:

> When a pupil is suspended from a class or a school, the administrator shall notify, in writing, the parents or legal guardian of the pupil, giving the reason for such suspension and setting a time and place when the administrator shall be available for a conference with the parents or guardian. The conference shall be set within three days of the date of the suspension. After the conference the parents or legal guardian may appeal the suspension to the board of trustees or to its authorized agent.

We further stated the policy reasons for precluding judicial review of temporary student suspensions:

> If students and parents were allowed to appeal every short-term suspension, then circuit courts could be flooded potentially with thousands of such cases. Not only would this place a severe strain on an already overburdened judicial system, but perhaps more importantly, the limited financial and human resources of schools and school districts would be deleteriously affected if every student suspension had to be defended through the court system.

321 S.C. at 435-36, 468 S.E.2d at 866-67. We reiterate our adherence to this policy but find limited judicial review appropriate.

The United States Supreme Court has recognized a student's legitimate entitlement to a public education as a property interest protected by the Due Process Clause of the federal constitution; further, a student's standing with fellow pupils and teachers is a protected liberty interest. Goss v. Lopez, *supra.* The minimal process constitutionally due a student for a suspension of ten days or less is: 1) oral or written notice of the charges; 2) an explanation of the evidence; and 3) an opportunity to present his or her side of the story. *Id.* at 579. Consistent with these due process rights,[5] we hold one may appeal to circuit court for the sole purpose of challenging a temporary school suspension under Goss v. Lopez. If the minimal procedural standards of Goss v. Lopez are met, the suspension shall be affirmed.[6]

Here, Students allege District did not follow its own suspension policies.

No further appeal is authorized by statute.

[5]*See also* S.C. Const. art. I, § 2 ("nor shall any person be deprived of life, liberty, or property without due process of law").

[6]We note that in Byrd, we found no subject matter jurisdiction but analyzed the case under Goss v. Lopez in any event.

They allege they were deprived of the independent administrative review provided under District policy because the principal suspended them at the direction of the District superintendent whose office was responsible for reviewing the principal's decision.[7] However, Students clearly received notice, an explanation, and an opportunity to respond, which is all the process due in a temporary student suspension case under Goss v. Lopez. Accordingly, we affirm the Court of Appeals' decision vacating the temporary injunction.

AFFIRMED IN RESULT.

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

[7]The administrator reviewing their claim found the District had not violated any policy, the procedure was fair, and the suspensions were warranted.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James H. Satcher, III a/k/a Chip Satcher,
Appellant,

v.

Benjamin Wright Satcher, in his own right and as Personal Representative of the Estate of James H. Satcher, Sr.; James H. Satcher, Jr.; Satcher Realty, Inc; and Judy Livingston,

Respondents.

Appeal From Edgefield County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 3541
Heard June 5, 2002 – Filed August 19, 2002

AFFIRMED IN PART & REVERSED & REMANDED IN PART

Rebecca G. Fulmer, of Columbia, for appellant.

B. Michael Brackett, of Columbia, respondents.

HEARN, C.J.: James H. Satcher, III (Chip) claims ownership of a farm and residence where he lived with his grandfather, James H. Satcher, Sr. (Grandfather), asserting theories of an oral gift, oral contract to devise, and promissory estoppel. The trial court found Chip failed to prove ownership under any of these theories. We find Chip established entitlement to a portion of Grandfather's property based on promissory estoppel but agree that Chip did not prevail as to the other claimed property. Accordingly, we affirm in part and reverse and remand in part.

FACTS

After Chip's parents separated when he was fourteen years old, he lived with his grandparents. In 1976, when Chip was twenty, his grandparents separated, and Grandfather and Chip moved to a farmhouse on Slide Hill Road (Slide Hill). Chip's girlfriend and later fiancée, Georgianna Vine (Gigi), moved to Slide Hill in 1987.

In February 1990, Chip began working at the Westinghouse Savannah River Plant. In 1993, he was promoted from a general maintenance employee to a power operator, earning $26,520 per year plus benefits. Nevertheless, Chip left Westinghouse in early 1993 to farm Grandfather's land. At trial, several witnesses testified that Grandfather wanted Chip to work the farm and it was their understanding that Grandfather promised Chip that if he came back to the farm, it would be his.

Chip borrowed money to purchase farm equipment and obtain working capital. Until Grandfather's death, Chip planted crops, cleared new land, installed irrigation, and sharecropped with neighboring farmers. During this time, Grandfather sold some of his property and leased other portions.

Grandfather died testate in May 1998. The introductory paragraph of the will specifically named Grandfather's two sons, Ben and James Satcher, and nine grandchildren, but no grandchild inherited under the will. Ben was granted the "'Home Place' in Edgefield County, South Carolina, consisting of the lands on Slide Hill Road, Halford Place, and the

Son Jeff Place, all to contain 175 acres, more or less, and also my interest, if any, in the 'Johnson Place' . . . ."— all the land to which Chip believed he was entitled.

On June 3, 1998, Chip filed the first of four notices of *lis pendens* on the property. Later that month, Ben demanded he vacate the property so it could be sold. Chip filed a complaint seeking specific performance for legal title, alleging equitable title passed to him through either a (1) parol gift of the residence and farmland; (2) breach of contract to devise the residence; and (3) promissory estoppel as to the residence and farmland. Lastly, Chip sought a declaratory judgment as to the personal property at Slide Hill; however, this claim was later settled in probate court. Ben answered and asserted various counterclaims including trespass.

A bench trial was held, and the trial court found that Chip had not proved his claim under any of his theories. It also dismissed Ben Satcher's counterclaim for trespass and dissolved Chip's notices of *lis pendens*. This appeal followed.

STANDARD OF REVIEW AND BURDEN OF PROOF

Chip seeks specific performance of title in property in which he claims equitable title. This remedy sounds in equity. Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 290 (2000); Wright v. Trask, 329 S.C. 170, 176, 495 S.E.2d 222, 225 (Ct. App. 1997). In equity actions, this court may review the record and make findings based on its view of the preponderance of the evidence. Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, we are not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility. Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989).

To prevail under any of these theories and avoid the application

of the Statute of Frauds[1], Chip must prove each element by clear, cogent, and convincing evidence. South Carolina case law provides a requirement of clear and convincing evidence for proving a parol gift of land and a contract to devise. See Brown v. Graham, 242 S.C. 491, 493, 131 S.E.2d 421, 422 (1963) (holding contracts to make a will "are regarded with suspicion and will not be sustained unless established by definite, clear, cogent and convincing evidence"); Knight v. Stroud, 214 S.C. 437, 441, 53 S.E.2d 72, 73 (1949) (giving burden of proof required to establish oral gift). With respect to promissory estoppel in real property cases, the burden is less clearly defined. However, we are instructed by Knight that the partial performance exception for an oral gift "is more in the nature of equitable estoppel." 214 S.C. at 442, 53 S.E.2d at 74. We therefore extend this analogy to require the same burden of proof in promissory estoppel cases where real property is claimed.

Clear and convincing evidence is that "degree of proof which will produce in the [fact finder] a firm belief as to the allegations sought to be established. Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." Anonymous v. State Bd. of Med. Exam'rs, 329 S.C. 371, 374 n.2, 496 S.E.2d 17, 18 n.2 (1998).

DISCUSSION

I. Promissory Estoppel

A contract and promissory estoppel are two separate and distinct legal theories. They "are two different creatures of the law; they are not legally synonymous; the birth of one does not spawn the other." Duke Power Co. v. S.C. Pub. Serv. Comm'n, 284 S.C. 81, 100, 326 S.E.2d 395, 406 (1985). Our courts recognize a remedy in equity if the claimant can prove:

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[1]S.C. Code Ann. § 32-3-10 (1991).

> (1) the presence of a promise unambiguous in its terms; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise.

Woods v. State, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993). The applicability of the doctrine depends on whether the refusal to apply it "would be virtually to sanction the perpetration of a fraud or would result in other injustice." Citizens Bank v. Gregory's Warehouse, Inc., 297 S.C. 151, 154, 375 S.E.2d 316, 318 (Ct. App. 1988). Unlike a contract which requires a meeting of the minds and consideration, promissory estoppel looks at a promise, its subsequent effect on the promisee, and in certain cases bars the promisor from making an inconsistent disposition of the property.

A. Slide Hill

Chip argues he should receive title to Slide Hill under the theory of promissory estoppel. We agree and find the record proves Chip is entitled to Slide Hill, described as "Parcel No. 1" in his second amended complaint.[2] This tract, as shown on an Edgefield County tax map, contains 83.5 acres and includes a house and pond.

There is ample testimony from several disinterested witnesses that Grandfather promised Slide Hill to Chip. Grandfather's former girlfriend testified that Chip was the favorite grandchild and that Grandfather told her when Chip was working at the Savannah River Plant he wanted Chip "to

[2]In addition, Chip contends the record reflects the existence of an oral contract to execute a will devising Slide Hill to him. However, in light of our decision on Chip's promissory estoppel argument, we need not reach this issue.

come back home." After Chip returned, he repeatedly told her that "[t]he house is [Chip's] to do what he wants to do" and when Slide Hill was being remodeled he said, "It doesn't matter to me what they do because it's going to be [Chip's] anyway." Although she could not name with certainty which farmlands Grandfather referenced when describing the property which would eventually be Chip's, she testified that "the land around the house at Slide Hill, we looked at all that. [Grandfather] said he was leaving that to Chip and the house. He said he would be well-fixed." Gigi recalled that Grandfather said on numerous occasions, "It's Chip's house."

Chris Harper, Grandfather's fishing partner, testified that Grandfather told him he was trying to get Chip to return to the farm. He stated, "If he comes back, I will give him the land and all." Harper approached Grandfather about selling the pond behind the house, but Grandfather responded to his requests by saying, "Well, that pond belongs to Chip. This is Chip's pond and that's Chip's house." Another friend testified that "Mr. Satcher told me on several occasions the house and the farm was Chip's" and that upon visiting Slide Hill Grandfather said, "This is Chip's place." Grandfather's neighbor testified that Grandfather referred to Slide Hill as Chip's house and when he asked Grandfather about whether he had deeded the house to Chip, Grandfather responded, "Old boy, you know he is going to get that." One witness stated "if [Chip] would come back and run it and live at the place, it would be his one day."

Lanyce Hatcher worked at the Savannah River Plant and farmed with Grandfather. Hatcher testified he worked with Chip at the plant and that Grandfather told him he "should talk to Chip. Chip needed to be on the farm with them . . . . and it was going to be his anyway." Hatcher stated that he told Grandfather, "From Chip's point, . . . you haven't given him anything in his name. He's just taking a chance working for you here."

Q: And what was Mr. Satcher's response to that?

> A: He told me, "Aw, Chip knows he won't ever have anything to worry about. I will take care of him. He is going to get everything." I said, "Why don't you go on and give him something now, at least give him the house and all. You say you are going to give him that . . . . he said "Yeah, I sure did that."

Chip's father, James Satcher, testified against his own interest in the estate that "All during [Grandfather's] lifetime, he told me that was Chip's house, that it belonged to him." Additionally, "He told me that [Slide Hill] belonged to Chip, that it was Chip's. If he moved out there, it was his. Daddy was the type of person he [sic] was scared to stay by himself." In light of this testimony, we find clear and convincing evidence of an unambiguous promise by Grandfather to leave Chip Slide Hill.

In reasonable reliance on that promise, Chip moved to the house and provided Grandfather with companionship and other services for more than twenty years. In further reliance, Chip gave up his opportunity to purchase a house, investing time and effort in Slide Hill and Grandfather's care. All of this was foreseeable and intended by Grandfather who did not wish to live alone on the property. Additionally, we find that Grandfather's actions during the course of the time Chip lived with him reinforced Chip's reliance on that promise. Grandfather's subsequent inconsistent actions do not weaken Chip's promissory estoppel claim for Slide Hill. See Furman Univ. v. Waller, 124 S.C. 68, 87, 117 S.E. 356, 362 (1923) (finding that in the presence of a clear promise, the promisee may make the promise irrevocable by spending money or incurring liabilities in furtherance of the enterprise or undertaking as intended by the promisor). Moreover, we believe it would be an injustice not to apply the doctrine of promissory estoppel here because of the extreme amount of time and energy Chip has expended in reliance on Grandfather's promise. Therefore, we find Chip has proved his claim to Slide Hill and remand this matter for further proceedings consistent with our decision.

B. Farmland

Chip argues he is also entitled to the acres he was farming at Grandfather's death under this theory. We disagree.

Although there was testimony that Chip and Grandfather had some arrangement regarding the farmland, we find insufficient evidence of a specific promise by Grandfather to leave Chip the land he claims. Chip does not seek all of Grandfather's holdings; instead, he seeks only the property he was actively farming. Between the time he left his job and Grandfather's death, Chip gradually cleared and cultivated 698.11 acres of the 1138.35 acres Grandfather owned.

The witnesses described general references to "it" or the farm, but none described Grandfather's promise in terms of the acreage Chip actually farmed. For example, one witness testified Chip was to have "Right there around Slide Hill Road is the only thing I can say, that pond to the house. The other farmland out there, I don't really know." The most telling evidence of Grandfather's and Chip's understanding comes from Chip's testimony on cross-examination, as quoted in part below:

> Q: What did Mr. Satcher say about what farmland was? Did he tell you, did he ever make a statement to you that says, "If you come back and farm parcel one, parcel two, this field, that field, this place, that place"? Did he ever describe it for you?
>
> A: He would – no, not farm. He did not say, "Take this farmland, tract number one or whatever, and do that." He just said the farm. I consider any crops that's planted on land, whether it's peaches, cotton, that is farmland. That is my– that's what you wanted to know I think.
>
> Q: I was asking how he described it. You are telling me he didn't describe it?

A: No.

Q: Other than just saying farmland?

A: He just said farm, that's right.

. . .

Q: And it's unclear in your mind right now as to whether he meant it was going to be yours immediately or going to be yours at some point in the future; isn't that true?

A: I took it the way he said it. The way he said it at the time was when I left Westinghouse if I would do that, it would be mine. I didn't question that. I just took his word for it.

Thus, even Chip was unclear as to the details of the promise. In addition, no other witness testified to any specific promises by Grandfather other than those relating to Slide Hill. Therefore, Chip has not shown by clear and convincing evidence that there was an unambiguous promise that he would receive the property he actively farmed. Accordingly, we find the test for promissory estoppel has not been met with respect to the farmland. See Woods, 314 S.C. at 505, 431 S.E.2d at 263.

II. Oral Gift

Chip also argues the trial court erred in finding he did not prove an oral gift of Slide Hill and the farmland. We disagree.

The trial court found insufficient evidence to avoid the requirement that transfers of land must be in writing. In order to remove a parol gift of land from the Statute of Frauds, the donee must either: (1) take possession of the land and perfect his title to it by adverse possession for the statutory period; or (2) prove sufficient partial performance, such as taking full possession of the property and making permanent and valuable improvements to it. Brevard v. Fortune, 221 S.C. 117, 125-26, 69 S.E.2d

355, 358 (1952). However, mere possession of the property with only slight improvements is insufficient to remove an oral gift from the Statute of Frauds. Barnwell v. Barnwell, 323 S.C. 548, 557, 476 S.E.2d 493, 498 (Ct. App. 1996).

Chip asserts title through sufficient partial performance. He and Gigi testified about their contributions to the farm and household, including improvements to the house. Chip also cleared land and performed other farm maintenance. However, Grandfather continued to pay the larger expenses such as replacing the roof on the house and paying property taxes. The trial court found that Chip's efforts "were not such as would have been made only by an owner. A tenant or permissive user would just as likely have made the same expenditures for his or her benefit without regard to ownership of the house." It also found that Chip's farming activities were "as consistent with a tenant sharecrop arrangement as with ownership. Buying equipment, clearing land, and borrowing money for farm operations are not activities restricted to property owners."

Although evidence in the record suggests a definite intent to give Chip the property, we agree with the trial court that Chip did not prove an oral gift of Slide Hill and the farmland by clear and convincing evidence. Moreover, we agree with the trial court that there was no delivery of the gift. To constitute a gift, there must be an actual or constructive delivery of possession of the property. Barnwell at 556, 476 S.E.2d at 497. "There can be no such thing as a parol gift commencing in futuro." Knight, 214 S.C. at 441, 53 S.E.2d at 73. Chip's evidence was not clear and convincing as to when or if Grandfather actually gave the property to him. Witnesses testified that Grandfather said everything from "This is Chip's place" to "He is going to get it all anyway." Chip testified that he was shocked that he had not been left the property in the will, which is inconsistent with the theory of an outright gift. Thus, we find Chip had only the expectation of an outright gift.

III. Mutual Mistake

Chip argues the language of the lease agreement entered by Grandfather invalidates the parties' trial stipulation that there was no writing supporting Chip's claim of ownership and he was entitled to relief from that stipulation under Rule 60(b)(1), SCRCP. We find no error.

Jimmy Forrest leased one of Grandfather's peach orchards. Article IX of the lease reads:

> LESSEE shall herewith be given and granted water rights for irrigation by LESSOR and by J.M. (Chip) Satcher, III, *who is also signing herewith as adjoining property owner for use as is needed during the life of this lease and renewal periods.*

(emphasis added).

Chip contends the quoted provision evidences an ownership interest in property and, therefore, conflicts with a stipulation entered into at trial.[3] However, the stipulation covered writings that might bring Chip's claim within the Statute of Frauds, not any written reference to Chip's claim. Therefore, we find there is no conflict between the stipulation and the lease provision.

IV. Jury Trial

Chip argues that he was entitled to a jury trial as of right under Rule 38(a), SCRCP, or in the alternative, a jury trial should have been

[3]As stated by the Defendants' attorney at trial, "We have stipulated previously that there is nothing in writing, either a contract, a memorandum, a deed, nothing in writing that would evidence the claim that [Chip] makes to receive title to the real estate." Chip's counsel agreed that there was no "writing that would pass legal title."

granted by the trial court pursuant to Rule 39, SCRCP. We find both arguments are without merit.

Chip's argument under Rule 38(a) is not appealable at this time. Orders affecting the mode of trial affect substantial rights protected by statute[4] and must, therefore, be immediately appealed. Lester v. Dawson, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997). "Moreover, the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue." Id.

However, Chip also sought a jury trial under Rule 39 which provides, "notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues." A decision denying a jury trial based on Rule 39(b) is discretionary and not immediately appealable. Rowe Furniture Corp. v. Carolina Wholesale Furniture Co., 292 S.C. 575, 576, 357 S.E.2d 725, 725 (Ct. App. 1987). Therefore, we will consider this argument on its merits.

Based on the plain language of Rule 39, we will review the trial court's denial of a jury trial on an abuse of discretion standard. An abuse of discretion occurs if a trial court's decision is unsupported by the evidence or controlled by a legal error. Ledford v. Pa. Life Ins. Co., 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976). Here, Chip did not request a jury trial until after filing his second amended complaint. The trial court denied the request after considering the issues involved, prejudice to Chip, timeliness of the request, the docket, and the reason for Chip's delayed request. It found that transferring the case to the jury docket would not result in the "speedy decision on the issues in the case." In addition to the trial court's findings, we are unable to discern any prejudice to Chip from the denial of a jury trial because the estate's legal counterclaims were dismissed. Accordingly, we find no abuse of discretion.

[4]S.C. Code Ann. § 14-3-330(2) (1977).

CONCLUSION

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

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

HOWARD and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Warren Burch and Kathy Freeman,

Respondents,

v.

South Carolina Farm Bureau Mutual Insurance Company,

Appellant.

Appeal From Chesterfield County
James I. Redfearn, Special Referee

Opinion No. 3542
Submitted May 6, 2002 - Filed August 19, 2002

REVERSED

Robert J. Thomas, of Columbia, for appellant.

William O. Spencer, Jr., of Chesterfield; and Stephen R. Suggs, of Columbia, for respondents.

HUFF, J.: Warren Burch brought this declaratory judgment action seeking reformation of an insurance policy to include underinsured motorist (UIM) coverage. The special referee found the insurer, South Carolina Farm

Bureau Mutual Insurance Company (Farm Bureau), failed to make an effective offer of UIM coverage and reformed the policy because it did not specifically offer amounts less than the minimum liability limits carried by the insured. Farm Bureau appeals. We reverse.[1]

FACTUAL/PROCEDURAL BACKGROUND

Burch is seeking UIM coverage for an automobile accident that occurred on October 22, 1995 when he was struck by an at-fault motorist whose insurance did not cover all of his losses. Freeman was a passenger in Burch's vehicle.

At the time of the accident, Burch was driving a 1993 Toyota Tercel which was insured by Farm Bureau under Policy No. 805760. The policy carried bodily injury liability limits of $50,000/$100,000, but the declaration page did not list any UIM coverage.

Burch originally obtained the policy in question in January 1986 for coverage on a 1985 Chevrolet Chevette. On the 1986 application, the blocks for uninsured (UM) and UIM coverages listed no coverage, and these blocks were initialed by Burch where he rejected the coverage. In January 1988, Farm Bureau sent a separate offer form to Burch, which he signed rejecting UIM coverage. He checked the box which provided, "I want only the minimum UM benefits. I understand NO UIM benefits are provided."

After the enactment of S.C. Code Ann. § 38-77-350, Farm Bureau made a new offer of UIM coverage to Burch in November 1989 on a form approved by the South Carolina Department of Insurance. Burch signed the form on December 4, 1989, again rejecting UIM coverage.

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

In 1993, Burch purchased the 1993 Toyota Tercel and transferred coverage from the Chevrolet to the Toyota. Burch also added comprehensive and collision coverages to his policy at that time and added a lienholder.

After his automobile accident in October 1995, Burch brought this declaratory judgment action seeking reformation of the insurance policy to include UIM coverage for the accident.[2] The matter was referred to the special referee with finality. The referee found Farm Bureau did not make a meaningful offer of UIM coverage because Farm Bureau "failed to offer UIM coverage in amounts less than the minimum liability limits, which were [Burch's] liability limits at the time the form was signed." The referee reformed Burch's policy to include UIM coverage in the amounts of $50,000/$100,000, which were his liability limits at the time of the accident. Farm Bureau appeals.

LAW/ANALYSIS

Farm Bureau contends the referee erred in finding it did not make a meaningful offer of UIM coverage to Burch. We agree.

Section 38-77-160 provides automobile insurance carriers shall offer, "at the option of the insured, underinsured motorist coverage up to the limits of the insured['s] liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist. . . ." S.C. Code Ann. § 38-77-160 (2002). This statute mandates that "underinsured motorist coverage in any amount up to the insured's liability coverage must be offered to a policyholder." Garris v. Cincinnati Ins. Co., 280 S.C. 149, 154, 311 S.E.2d 723, 726 (1984) (emphasis added).

The initial burden is on the insurer to prove a meaningful offer of optional coverage has been made to the insured. Butler v. Unisun Ins. Co., 323

[2] By consent of all parties, Freeman was added as a party plaintiff based on her interest in coverage as a passenger. All references to "Burch" shall also include Freeman where appropriate.

S.C. 402, 475 S.E.2d 758 (1996). If the insurer fails to comply with its statutory duty to make a meaningful offer of UIM coverage to the insured, the policy will be reformed, by operation of law, to include such coverage up to the limits of liability insurance carried by the insured. Id. A noncomplying offer has the legal effect of no offer at all. Id.

In State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 354 S.E.2d 555 (1987), our supreme court held "the statute mandates the insured to be provided with adequate information, and in such a manner, as to allow the insured to make an intelligent decision of whether to accept or reject the coverage." Id. at 521, 354 S.E.2d at 556. The Wannamaker court expressly adopted a four-part standard to determine whether an insurer has complied with its duty to offer the optional coverage: "(1) the insurer's notification process must be commercially reasonable, whether oral or in writing; (2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms; (3) the insurer must intelligently advise the insured of the nature of the optional coverage; and (4) the insured must be told that optional coverages are available for an additional premium." Id.

In 1989, the South Carolina Legislature enacted § 38-77-350, which provides in pertinent part as follows:

> (A) The director or his designee shall approve a form which automobile insurers shall use in offering optional coverages required to be offered pursuant to law to applicants for automobile insurance policies. This form must be used by insurers for all new applicants. The form, at a minimum, must provide for each optional coverage required to be offered:
>
> (1) a brief and concise explanation of the coverage,
> (2) a list of available limits and the range of premiums for the limits,
> (3) a space for the insured to mark whether the insured chooses to accept or reject the coverage and a space for the insured to select the limits of coverage he desires,

> (4) a space for the insured to sign the form which acknowledges that he has been offered the optional coverages,
> (5) the mailing address and telephone number of the Insurance Department which the applicant may contact if the applicant has any questions that the insurance agent is unable to answer.
>
> (B) If this form is properly completed and executed by the named insured it is conclusively presumed that there was an informed, knowing selection of coverage and neither the insurance company nor any insurance agent has any liability to the named insured or any other insured under the policy for the insured's failure to purchase any optional coverage or higher limits.
>
> (D) Compliance with this section satisfies the insurer and agent's duty to explain and offer optional coverages and higher limits and no person, including, but not limited to, an insurer and insurance agent is liable in an action for damages on account of the selection or rejection made by the named insured.

S.C. Code Ann. § 38-77-350 (2002).

The cover letter Farm Bureau sent to Burch in 1989 instructed the insured to contact his or her agent if there were any questions about the form or policy coverages, limits, or rates, and directed the insured to read the instructions before filling out the form. Section I of the enclosure, entitled "EXPLANATION OF COVERAGES," stated in pertinent part:

> Your automobile insurance policy does not automatically provide any underinsured motorist coverage. You have, however, a right to buy underinsured motorist coverage <u>in limits up to the limits of liability coverage</u> you will carry under your

automobile insurance policy. Some of the more commonly sold limits of underinsured motorist coverage, together with the additional premiums you will be charged, are shown upon this Form. If there are other limits in which you are interested, but which are not shown upon this Form, then fill in those limits. If your insurance company is allowed to market those limits within this State, your insurance agent will fill in the amount of increased premium. (Emphasis added.)

The explanation portion of the form also informed the insured he could increase or decrease his UIM coverage in the future.

Following the above section, Section III, entitled "OFFER OF UNDERINSURED MOTORIST COVERAGE," listed various split limits and premium amounts as follows:

Limits of Coverage	Amount of Increased Premium (These increased premium charges must be filled in by your insurance agent prior to your decision and signature.)
$ 15,000/$ 30,000/$15,000	$ 4.76
$ 25,000/$ 50,000/$25,000	$ 8.65
$ 50,000/$100,000/$25,000	$ 12.17
$100,000/$300,000/$50,000	$ 18.81
_____/_____/_____	$_____
$250,000/$500,000/$50,000	$ 27.66

Do you wish to purchase the coverage,
"Underinsured Motorist Coverage"? Yes _____ No _____

If your answer is "no" you have rejected this coverage and you must sign here: _____

If your answer is "yes," then you must specify the limits you desire.
These limits cannot exceed your automobile liability limits.
I select _____/_____/_____.

Burch placed an "x" on the line indicating he did not wish to purchase UIM, and signed his name on the following line.

In this case, the referee found Burch's liability limits at the time of the 1989 UIM offer were $15,000/$30,000, based on a reconstruction of the offer that was mailed to Burch in November 1989.[3] He determined the form offer included only one blank line on which the insured could write in other limits, and the blank line was positioned between $100,000/$300,000/$50,000 UIM coverage and $250,000/$500,000/$50,000 UIM coverage, such that it failed to indicate "Burch could have selected coverage in an amount less than $15,000/$30,000." He therefore concluded, "Farm Bureau's offer form signed by Mr. Burch, although approved by the Department of Insurance, failed to offer UIM coverage in amounts less than the minimum liability limits, which were his liability limits at the time the form was signed." While the referee acknowledged the text of Farm Bureau's mailing did contain language that the policyholder could increase or decrease his UIM coverage to any amount up to the liability limits of the policy, he concluded that "the offer form signed by Mr. Burch did not list various levels of UIM coverage below the minimum liability limits, which were the insured's stated limits at the time of the offer in 1989." He therefore ruled Farm Bureau failed to meet its burden of proving that it made a meaningful offer of UIM coverage, and he reformed the policy to include UIM coverage of $50,000/$100,000.

On appeal, Farm Bureau argues the referee erred in concluding it did not make a meaningful offer of UIM. Farm Bureau contends, consistent with

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[3] Farm Bureau asserts on appeal that the reconstruction of the letter sent to Burch in November 1989 erroneously showed minimum liability limits on Burch's existing policy, and that his limits were actually $50,000/$100,000 in 1989 when Burch rejected the offer of UIM. For purposes of this appeal, we assume Burch carried limits of $15,000/$30,000 as found by the referee.

South Carolina law, its Commission-approved form listed optional UIM coverage in five different amounts, included a blank line for the policyholder to write in any amounts desired but not specifically listed, and explained that the policy holder had the right to purchase UIM coverage "up to" the limits of the insured's liability coverage. Farm Bureau argues its offer comes within the parameters of the offers approved in Norwood v. Allstate Ins. Co., 327 S.C. 503, 489 S.E.2d 661 (Ct. App. 1997), Tucker v. Allstate Ins. Co., 337 S.C. 128, 522 S.E.2d 819 (Ct. App. 1999), and Rabb v. Catawba Ins. Co., 339 S.C. 228, 528 S.E.2d 693 (Ct. App. 2000). We agree that the form used by Farm Bureau in this case falls within the requirements of South Carolina's statutory and case law, such that Farm Bureau made a meaningful and effective offer of UIM coverage to Burch.

In Butler v. Unisun Ins. Co., 323 S.C. 402, 475 S.E.2d 758 (1996), our supreme court held § 38-77-350 does not modify the requirement of § 38-77-160 that insurance companies offer UIM coverage "up to" the limits of the insured's liability limits. Thus, the insured was entitled to reformation of her policy where the insurer failed to offer coverage below the minimum liability limits of the policy. However, the court also expressly approved the following language from Osborne v. Allstate Ins. Co., 319 S.C. 479, 462 S.E.2d 291 (Ct. App. 1995) as satisfying the requirements of § 38-77-350 as they interact with § 38-77-160:

> Some of the more commonly sold limits of underinsured motorist coverage, together with the additional premiums you will be charged, are shown upon this Form. If there are other limits in which you are interested, but which are not shown upon this Form, then fill in those limits. If your insurance company is allowed to market those limits within this State, your insurance agent will fill-in the amount of increased premium.

Butler, 323 S.C. at 408, 475 S.E.2d at 761. This exact language was used by Farm Bureau in its offer of UIM coverage to Burch.

In Norwood, Allstate specifically offered Norwood three choices of UIM coverage up to Norwood's $25,000/$50,000/$25,000 liability limits: $15,000/$30,000/$5,000, $15,000/$30,000/$10,000, and $25,000/$50,000/$10,000. In addition, Allstate's offer form indicated Norwood could purchase UIM coverage "up to" her liability limits. We found that Allstate's inclusion of at least three specific options of UIM coverage below Norwood's liability limits, coupled with the plain language of Allstate's offer form notifying Norwood that she could increase or decrease her UIM coverage, satisfied the requirements of § 38-77-160. Norwood, 327 S.C. at 506-507, 489 S.E.2d at 663.

In Tucker, Allstate's form offered five levels of UIM coverage below Tucker's liability limits, and one above, but did not specifically offer the exact same liability limits, nor any limits below the statutorily required minimum limits. This court held the failure of the insurance company to specifically offer the exact amount of liability coverage in its UIM offer did not render the offer invalid because the offer specified that UIM coverage could be purchased with limits up to the limits of liability coverage and informed the insured UIM coverage could be increased or decreased. Tucker, 337 S.C. at 131-32, 522 S.E.2d at 821-22.

In Rabb, this Court affirmed the lower court's finding of a meaningful offer of UIM coverage where the form included the approved language of Osborne and Butler. We found the form, which also included "a number of split limit and single limit UIM coverage amounts and their accompanying premium costs," as well as blanks in which to fill in a different coverage and premium amount, provided the insured with the opportunity to select coverage in any amount, including amounts up to the limits of liability coverage. Rabb, 339 S.C. at 233-34, 528 S.E.2d at 695-96. As to the assertion that the offer was ineffective because the insurer did not have advance approval to market UIM premium rates under the minimum $15,000 limits, we found this lack of authorization was irrelevant since the offers were meaningful and the insureds expressly rejected them. Id. at 234-35, 528 S.E.2d at 696.

After considering the foregoing, the circumstances present in the case at hand lead us to the conclusion that Farm Bureau's offer of UIM coverage

to Burch effectively complied with the prevailing law, in particular with the mandates of §§ 38-77-160 and 38-77-350. Although we find the placement of blank lines between the $100,000/$300,000/$50,000 limits and the $250,000/$500,000/$50,000 limits to be less than ideal, the explanation of coverage on the form contains the precise language approved in Butler and Osborne, informing the insured that if he is interested in other limits which do not appear with the common examples on the form, he may fill in those amounts and his agent will provide the attendant premium amounts if those limits are marketable within this State. Additionally, there are instructions specifically advising the insured that he may purchase UIM coverage in limits "up to" the limits of his liability coverage. Finally, we note there is another blank line on the form, below the various examples of commonly sold UIM limits, which asks the insured to specify the limits desired, and specifically notes such limits cannot exceed the insured's liability limits.

Based on the foregoing circumstances, we conclude Farm Bureau made a meaningful offer of UIM coverage to Burch. We therefore reverse the referee's order granting reformation of the policy to include UIM coverage.

REVERSED.

HOWARD and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Electric & Gas Company and SCANA Corporation,

Appellants,

v.

Town of Awendaw and Berkeley Electric Cooperative, Inc.,

Respondents.

Appeal From Charleston County
Roger M. Young, Master-in-Equity

Opinion No. 3543
Heard June 4, 2002 - Filed August 19, 2002

REVERSED

James B. Richardson, Jr., Patricia Smith; and Catherine D. Taylor, all of Columbia, for appellants.

C. Mac Gibson, Jr., of Mt. Pleasant; Michael A. Molony and Lea B. Kerrison, both of Charleston, for respondents.

STILWELL, J.: South Carolina Electric and Gas Company (SCE&G) brought this action against the Town of Awendaw (Awendaw) seeking a refund of fees it paid Awendaw under protest. The circuit court granted Awendaw's motion for summary judgment. SCE&G appeals. We reverse.

FACTS

When the Town of Awendaw was incorporated in 1992, all of its inhabitants received their electric service from Berkeley Electric Cooperative. Awendaw adopted an ordinance and executed a franchise agreement designating Berkeley as the primary supplier of electrical energy to the town. In exchange, Berkeley agreed to pay an annual franchise fee of 3% of its gross income derived from sales of electricity in the town.

SCE&G had no customers within Awendaw at the time of incorporation, but did service customers outside the town in areas assigned to it by the Public Service Commission. As a result of the annexation of some of these areas, approximately twenty-six SCE&G customers and four SCE&G poles are now inside Awendaw's town limits. SCE&G has 770 feet of electric lines suspended above the town's public roads. SCE&G has never entered into a franchise agreement with Awendaw as the parties were unable to agree on terms.

Awendaw adopted a business license ordinance and notified SCE&G that the ordinance required all businesses to obtain a business license. SCE&G was required to pay a business license tax, which it did under protest. After unsuccessful appeals to the Charleston County Business License/Users Fee Appeals Board and the Awendaw Town Council, SCE&G filed this action in circuit court, seeking a refund of the license tax it paid under protest. In its answer, Awendaw characterized the sum SCE&G paid as a franchise fee. Both parties moved for summary judgment. The court held SCE&G's complaint was without merit and granted Awendaw's motion for summary judgment. SCE&G appeals.

STANDARD OF REVIEW

"In reviewing the grant of a summary judgment motion, this Court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001) (citing Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991)). "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." Id. (citing Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997)). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Id. (citing Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976)).

LAW/ANALYSIS

SCE&G argues the circuit court erred in granting Awendaw's summary judgment motion. It contends Awendaw does not have authority to charge SCE&G a franchise fee for the right to keeps its poles and lines on Doar Road and Bulls Island Road. We agree.

In its answer to the amended complaint, Awendaw stated "that Plaintiffs are charged a franchise fee under the Defendant's business license ordinance." Further, the master held, "[t]he amounts paid under protest by SCE&G are franchise fees versus taxes." Because this issue has not been appealed, the law of the case is that the charge is a franchise fee. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (unappealed ruling is law of case and should not be reconsidered by appellate court); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 160-61, 177 S.E.2d

544, 544 (1970) (an unchallenged ruling, right or wrong, is the law of the case). Further, Awendaw's counsel conceded at oral arguments that the sum should be considered a non-consensually imposed franchise fee.

"A franchise has been defined as a special privilege granted by the government to particular individuals or companies to be exploited for private profits." Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 165, 547 S.E.2d 862, 867 (2001) (citing City of Cayce v. AT & T Communs., 326 S.C. 237, 486 S.E.2d 92 (1997)). "Government franchisees are traditionally service-type businesses that are willing to pay the municipality for the privilege of doing business with its citizens." Quality Towing, 345 S.C. at 166, 547 S.E.2d at 867. "A 'franchise' is a privilege of doing that which does not belong to citizens generally by common right." Id.

In City of Abbeville v. Aiken Elec. Co-op., Inc., 287 S.C. 361, 338 S.E.2d 831 (1985), our supreme court balanced the rights of a previously assigned electrical supplier and the annexing municipality. The court held:

> A franchisee possessing a valid PSC territorial assignment to serve an area subsequently annexed or newly incorporated:
>
> (1) Is permitted to continue service in that area to those premises being served as of the date of annexation or incorporation;
> (2) Is prohibited, without prior consent of the municipality, from extending or expanding service in that area by the use of streets, alleys, public property or public ways after the date of annexation or incorporation.

Id. at 370-71, 338 S.E.2d at 836.

Pursuant to the City of Abbeville case, SCE&G is permitted to continue serving the twenty-six customers it serviced on the date of annexation but is prohibited from extending or expanding its service after that date without Awendaw's prior approval.

Section 5-7-30 states, "[e]ach municipality of the State [has the authority to] grant franchises for the use of public streets and make charges for them." S.C. Code Ann. § 5-7-30 (Supp. 2001). Awendaw relies on BellSouth v. City of Orangeburg, 337 S.C. 35, 522 S.E.2d 804 (1999), for the proposition that section 5-7-30 permits it to impose a non-consensual franchise fee on SCE&G. The facts of BellSouth are distinguishable. In BellSouth, the municipality granted the telephone utility a franchise by ordinance in 1894, but did not begin charging a fee for the franchise until 1993. BellSouth, 337 S.C. at 38-39, 522 S.E.2d at 805-06. Our supreme court held the city had the power to impose this fee even though the franchise had formerly been gratuitous. Id. at 44-45, 522 S.E.2d at 808-09. In the present case, however, Awendaw has never granted SCE&G a franchise. SCE&G services customers in Awendaw pursuant to the operation of the City of Abbeville decision, rather than a franchise granted to it by Awendaw. As such, absent a franchise agreement, Awendaw cannot impose a franchise fee on SCE&G. Accordingly, the decision of the circuit court is

REVERSED.

SHULER, J., concurs.

CURETON, J., dissents in a separate opinion.

CURETON, J., Dissenting: Unlike the majority, I would find BellSouth Telecomms., Inc. v. City of Orangeburg, 337 S.C. 35, 522 S.E.2d 804 (1999), applies to this action. I therefore respectfully dissent.

In BellSouth, the telephone company brought a declaratory judgment action seeking to invalidate the City's 1993 franchise ordinance, which imposed a franchise fee on BellSouth's use of the City's public streets. Id. at 38, 522 S.E.2d at 805. Prior to the enactment of the 1993 ordinance, the parties operated under an 1894 franchise ordinance which permitted BellSouth to use the streets exempt from taxes or fees for a period of five years. Id. at 39, 522 S.E.2d at

806.[1] BellSouth contended the 1993 ordinance violated a statute authorizing public utilities to maintain and operate their lines over public roads. Id. at 43, 522 S.E.2d at 808. Our supreme court determined the statutory authorization must be read in light of article VIII, § 15, of the state constitution, which provides: "No law shall be passed by the General Assembly granting the right to construct and operate in a public street . . . without first obtaining the consent of the governing body of the municipality. . . ." Id. at 43-44, 522 S.E.2d at 808. The court also discussed S.C. Code Ann. § 5-7-30 (Supp. 1998), which specifically delegates to municipalities the power to grant franchises for the use of public roads and charge fees for the franchises. BellSouth, 337 S.C. at 44, 522 S.E.2d at 808-09.

The court recognized, however, that the constitutional provision did not permit municipalities to oust a utility by imposing fees for the continuation of a franchise. Id. at 44, 522 S.E.2d at 808. The court concluded, however, that the imposition of the fee, 5% of BellSouth's gross revenue earned within the City and a one-time administrative fee, did not constitute an ouster. Id.

In this case, as a result of annexation, SCE&G is using the Town of Awendaw's roads to service its lines. Unlike in BellSouth, the parties were not already operating under a franchise ordinance. I would find, however, that the critical inquiry in this case is not whether a franchise ordinance existed prior to the imposition of the franchise fee. See Athens-Clarke County v. Walton Elec. Membership Corp., 454 S.E.2d 510, 513 (Ga. 1995) (finding a franchise agreement unnecessary because under the enacted ordinance, the utility company's continued use of the streets rendered them liable for the payment of the fees). Rather, I would find the inquiry is whether, after annexation, the imposition of a franchise fee constitutes an ouster, which is prohibited under City of Abbeville v. Aiken Elec. Coop., Inc., 287 S.C. 361, 338 S.E.2d 831 (1985). I would conclude there is no evidence that the Town of Awendaw's imposition of a franchise fee of 3% of SCE&G's gross income, derived from

[1] In 1914, the original franchise ordinance was expanded to include underground use of the public streets. Id.

sales of electricity to customers located in Awendaw, would constitute an ouster. Accordingly, I would affirm the circuit court.