findings or decision resulted from board action which is arbitrary, an abuse of discretion, illegal, or in excess of lawfully delegated authority); Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995) (Supreme Court will not reverse circuit court's affirmance of zoning board unless board's findings of fact have no evidentiary support or board commits an error of law).[5] The Court of Appeals' decision is

REVERSED.

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

BURNETT, J., concurring in part and dissenting in part in a separate opinion.

[5]The circuit court did not address Grant's vested right and waiver claims and these issues are not before us.

JUSTICE BURNETT: (concurring in part and dissenting in part). I concur in part and dissent in part. I concur with the majority regarding Grant's estoppel claim. I respectfully dissent, however, from the majority's conclusion which allows a zoning board to produce a transcript of a hearing solely at its own discretion.

> In relevant part, South Carolina Code Ann. § 6-7-760 (1977) provides:
>
> Upon the filing of such an appeal [from the board of adjustment], the clerk of the circuit court shall give immediate notice thereof to the secretary of the board and within thirty days from the time of such notice the board shall cause to be filed with the clerk a duly certified copy of the proceedings had before . . . . the board of adjustment, including a transcript of the evidence heard before it, if any, and the decision of the board.[6]

(Underline added).

"If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). However, where the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. The Lite House, Inc., v. J.C. Roy, Co., 309 S.C. 50, 419 S.E.2d 817 (Ct. App. 1992).

A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. Roche v. Young Bros., Inc., of Florence, 332 S.C. 75, 504 S.E.2d 311 (1998).

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[6]Section 6-7-760 has been repealed and recodified with similar language at § 6-29-830 (Supp. 2000).

"Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." Bennett v. Sullivan's Island Bd. of Adjustment, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993). In giving effect to legislative intent, the court is constrained to avoid an absurd result. South Carolina Tax Comm'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 447 S.E.2d 843 (1994).

The majority and I agree that Section 6-7-760 is ambiguous. As noted by the majority, "if any" arguably modifies the noun "transcript;" alternatively, "if any" modifies the phrase, "evidence heard before it."

In my opinion, the most reasonable interpretation of § 6-7-760 is that the legislature intended to require a zoning board to prepare and file a transcript with the circuit court whenever evidence was presented before it and its decision is appealed. Requiring a zoning board to file a transcript **if** it prepares one leaves the production of a verbatim transcript at the discretion of the zoning board, a result I find the legislature could not have intended. My interpretation is entirely consistent with § 6-7-740 which requires zoning boards to keep public records of its hearings and other official actions. In compliance with this section, zoning boards can record evidentiary proceedings then transcribe the recording if a decision is appealed.[7]

Because of my interpretation of § 6-7-760, I necessarily must address City's question whether the Court of Appeals erred by concluding the circuit court should have remanded this matter to the Board for rehearing after Grant encountered hostility while attempting to reconstruct the record.

At the initial hearing before the circuit court, the parties agreed the tape recording from the Board hearing was of poor quality and could not be transcribed. Accordingly, Grant moved to either reconstruct the record or hold a new hearing. The circuit court allowed Grant to reconstruct the record

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[7]Under my interpretation, zoning boards need not employ full-time court reporters.

by stipulation, affidavit, or transcript.

At the second hearing, Grant's attorney stated:

> . . . it was a bit difficult to supplement the record, Your Honor. I guess one explanation might be that these were not friendly witnesses, in that I did not get return phone calls from people I really wanted to get affidavits from, since I could not require them [to] call me back or cooperate.

City's attorney responded:

> Your Honor, [Grant's attorney] – I don't think she meant to imply this, but I just want to present to the Court that we have been very cooperative in trying to reach a stipulation. She talked about not [sic] able to reach people. I do not believe those people were city employees, and I do not believe she meant to imply that [City's attorney] or I somehow, you know, caused the problem.

Grant's attorney replied:

> It is correct that I did not imply that they were not cooperative at all. They have been, but, nonetheless, Your Honor, the record is still incomplete.

Grant reconstructed the record with an affidavit from his property manager.

The record does not support the Court of Appeals' conclusion Grant was "prohibited in obtaining affidavits" and "encountered a hostile environment" in attempting to reconstruct the record. The record indicates the circuit court gave Grant the opportunity to reconstruct the record from the Board hearing through stipulation, affidavits, or transcript. Although she initially suggested otherwise, Grant's counsel agreed City's employees were cooperative.

The circuit court properly allowed Grant to reconstruct the record. See Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 418 S.E.2d 319 (Ct. App. 1992) (holding trial court did not err in granting property owner's request to reconstruct the record of zoning proceeding where portions of original tape of hearing were incapable of being transcribed and loss of vital portions of record appeared to have been through no fault of zoning board); see also China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968) (where portions of stenographic notes of trial proceeding were lost before being transcribed, not error for trial judge to consider affidavit of trial counsel and court reporter in determining what transpired). Because Grant failed to take advantage of the opportunity to reconstruct the record by obtaining a stipulation with City's attorney, deposing witnesses, and/or filing his own and his attorney's[8] affidavits, he is not entitled to a new hearing.[9]

I would affirm in part and reverse in part the Court of Appeals' opinion.

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[8]A different attorney represented Grant on appeal.

[9]Section 6-9-840 (Supp. 2000) specifically provides that if the circuit court judge "determines that the certified record is insufficient for review, the matter may be remanded to the zoning board of appeals for rehearing." This section became effective in May 1999. See Act No. 355, 1994 S.C. Acts 4036. The predecessor to this section, § 6-7-780, did not have a provision for remand.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Derrick Bernard Woods, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From York County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 25318
Heard April 3, 2001 - Filed July 16, 2001

AFFIRMED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, and Assistant Attorney General Toyya Brawley Gray, all of Columbia; and Solicitor Thomas E. Pope, of York, for petitioner.

Deputy Chief Attorney Joseph L. Savitz, III, of South Carolina Office of Appellate Defense, of Columbia, for respondent.

JUSTICE PLEICONES: We granted certiorari to review a decision of the Court of Appeals granting respondent a new trial. The Court of Appeals held respondent was entitled to a new trial because a seated juror failed to disclose that she had worked as a volunteer victims' advocate in the prosecuting office. State v. Woods, 338 S.C. 561, 527 S.E.2d 128 (Ct. App. 2000). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In August of 1998 respondent was convicted of possession with intent to distribute (PWID) crack cocaine and PWID within proximity of a park.

After the jury returned its verdict, but before the court imposed sentence, defense counsel moved for a new trial on the basis of after-discovered evidence. The after-discovered evidence consisted of information, made known to respondent after the trial, that a juror ("Juror B") had for three years worked as a volunteer victims' advocate in the solicitor's office which prosecuted the case. The court held an evidentiary hearing to consider the motion. At the hearing, Juror B testified that she had worked as a volunteer victims' advocate in the solicitor's office "off and on for about a good three years" ending in 1998. Juror B added that her job did not entail significant interaction with the attorneys employed in the solicitor's office.

The trial court denied the motion for a new trial, finding respondent had failed to show Juror B intentionally concealed information. The court further found Juror B had not been biased in favor of the State. Respondent appealed. The Court of Appeals, citing State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982), reversed the trial court's denial of respondent's motion for a new trial because "the juror did not justify her failure to disclose" the information sought during *voir dire*. We granted the State's petition for

certiorari to review the Court of Appeals' decision.

During *voir dire*, the court asked potential jurors the following questions:

Question 1:

> Now you can tell me are you friends or casual acquaintances with any of them [i.e., the attorneys involved in the trial] or business associates or social acquaintances with any of them, that would also include having been represented by any of them in the past[?] [I]f so please stand.

Question 2:

> Ladies and gentlemen, are any of you contributors to or supporters of any organization which has as its primary function the promotion of law enforcement or protection of victims' rights such as MADD, SADD, CAVE, or the like[?] [I]f so please stand.

Several jurors responded affirmatively to the questions above. However, Juror B did not respond to either question. Juror B was subsequently seated as a juror in the case. When Juror B's name was drawn, respondent had one peremptory challenge remaining.

Juror B testified that she did not recall the judge asking Question 2, and that she would have responded had she heard the question. She qualified her response by stating, "it just didn't synchronize if I heard it, but I'm not doubting that it hadn't been said but it just didn't synchronize because I came into court with a clear mind." She testified that she responded affirmatively to a similar question when asked on *voir dire* at a subsequent trial during the same term of court.

Juror B gave conflicting testimony regarding Question 1. Initially, she admitted hearing the question, but said she did not think it applied to her. She then said she could not recall the question being asked. When

analysis is whether the juror intentionally concealed the information during *voir dire*. Kelly, 331 S.C. at 146, 502 S.E.2d at 106-07. However, in Kelly we did not precisely define what constitutes an intentional concealment.

We hold that intentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.

Necessarily, whether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis.

Other jurisdictions have recognized similar distinctions between intentional and unintentional juror concealment. For example, the Missouri Supreme Court distinguished intentional from unintentional concealment as follows:

> Intentional nondisclosure occurs: 1) where there exists no reasonable inability to comprehend the information solicited by the question asked of the prospective juror, and 2) where it develops that the prospective juror actually remembers the experience or that it was of such significance that his purported forgetfulness is unreasonable.
> Unintentional nondisclosure exists where, for example, the experience forgotten was insignificant or remote in time, or where the venireman reasonably misunderstands the question posed.

Williams by and through Wilford v. Barnes Hosp., 736 S.W.2d 33, 36 (Mo. 1987).

The State argues that because respondent has not shown that he was prejudiced by Juror B's responses, the Court of Appeals' decision was erroneous. We disagree. The test pronounced in Thompson v. O'Rourke, supra, makes clear that where a juror's response to *voir dire* amounts to an intentional concealment, the movant need only show that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. Where the juror's failure to disclose information is "without justification," i.e., intentional, the juror's bias will be inferred. Conversely, where the failure to disclose is innocent, no inference of bias can be drawn. See Savage, 306 S.C. at 8, 409 S.E.2d at 810. See also Doyle v. Kennedy Heating & Service, Inc., 33 S.W.3d 199, 201 (Mo. Ct. App. 2000) ("If a juror intentionally withholds material information requested on *voir dire*, bias and prejudice are inferred from such concealment. . . . Only where a juror's intentional nondisclosure does not involve a material issue, or where the nondisclosure is *unintentional*, should the trial court inquire into prejudice." (Emphasis in original)).

Applying this analysis to the instant case, we find the concealment was intentional. Questions 1 and 2 were reasonably comprehensible and should have elicited a positive response from Juror B. Juror B worked as a volunteer victims' advocate for a period of three years in the solicitor's office which prosecuted the case. There is no question she remembered the experience.

Question 1 unambiguously sought a response from any juror having a business association with any of the attorneys trying the case. Despite her prior three year relationship with the prosecuting attorney's office, Juror B did not respond. Her contention that she did not hear the question when asked, or that if she heard the question, she did not realize it applied to her, cannot excuse her failure to respond.

Similarly, her failure to respond in the affirmative to Question 2 amounted to an intentional concealment. Juror B had for three years performed volunteer work for an organization whose primary function was the protection of victims' rights. She offered inconsistent explanations for

CONCLUSION

Because Juror B failed to respond to questions on *voir dire* which clearly applied to her, and because her concealment deprived respondent of information material to his intelligent use of peremptory challenges, we AFFIRM the decision of the Court of Appeals.

TOAL, C.J., WALLER, J., and Acting Justice George T. Gregory, Jr., concur. BURNETT, J., dissenting in a separate opinion.

JUSTICE BURNETT: I respectfully dissent. While Juror B did not respond to two *voir dire* questions, the record does not support the majority's conclusion that she intentionally concealed information from the parties. Accordingly, I would reverse the decision of the Court of Appeals granting respondent a new trial. State v. Woods, 338 S.C. 561, 527 S.E.2d 128 (Ct. App. 2000).

During *voir dire*, the trial judge asked the following question (Question 1):

> Now can you tell me are you friends or casual acquaintances with any of them [i.e., the attorneys involved in the trial] or business associates of social acquaintances with any of them . . .?
>
> No juror responded.
>
> The trial judge later inquired (Question 2):
>
> Ladies and gentlemen, are any of you contributors to or supporters of any organization which has as its primary function the promotion of law enforcement or protection of victim's rights such as MADD, SADD, CAVE, or the like. . .?

At the new trial hearing, the trial judge informed Juror B the parties were interested in her participation as a victim advocate with the Solicitor's Office. Juror B stated she had volunteered as a victim advocate with the Solicitor's Office. When defense counsel referred generally to the *voir dire*, Juror B stated: "I may have misunderstood or didn't hear [the trial judge] but he didn't mention anything about an advocate that I heard. You know, being an advocate you're not eligible and so forth, not for this particular trial."

Defense counsel then questioned Juror B specifically about her responses to the *voir dire* questions. At first, Juror B agreed she heard the trial judge ask Question 1, but did not believe it applied to her as a victim's

advocate. Thereafter, she stated she did not recall Question 1 being asked. Finally, after defense counsel showed her the transcript from the *voir dire*, Juror B stated:

> Yes. Well see, that wouldn't, that didn't phase [sic] me. I was under the impression that you were talking about, you know, the victim or you all because I don't have anything to do with. Like I never spoken to you.

Regarding whether she recalled the trial judge asking Question 2, Juror B responded:

> No, if I had I would have stepped up. I heard some things on the second time that they called me to be a juror and then I stood up. . . I don't know. It just didn't synchronize if I heard it, but I'm not doubting that it hadn't been said but it just didn't synchronize because I came into court with a clear mind. And I have no problems. I cannot associate one thing with another. And I had no association with that at all.

Finding Juror B did not intentionally refuse to respond to the *voir dire* questions, the trial judge denied respondent's motion for a new trial.

A trial judge's denial of a new trial motion will not be disturbed on review absent an abuse of discretion. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). Where a juror fails to respond to *voir dire* questions:

> [A new trial] is required only when the court finds the [intentionally] concealed information would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. The inquiry must focus on the character of the concealed information, not on the mere fact that a concealment occurred.

Id. at 146, S.E.2d at 106 (brackets in original) quoting Thompson v.

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

FACTS

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

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

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

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

cottage watching the children through a window when the fire truck began to move.

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

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

SCOPE OF REVIEW

On appeal from an order granting summary judgment, we must consider the evidence in the light most favorable to the nonmoving party. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997). Summary judgment should be granted only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Café Assocs. v. Gerngross, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991). "Assumption of risk is peculiarly a question for the jury, and only in very rare cases should a trial judge direct a nonsuit or direct a verdict in favor of a defendant on this ground, but there are rare cases in which this should be done." Singleton v. McLeod, 193 S.C. 378, 386, 8 S.E.2d 908, 911-12 (1940); see also Small v. Pioneer Mach., Inc., 316 S.C. 479, 489, 450 S.E.2d 609, 615 (Ct. App. 1994) ("The defenses of contributory negligence and assumption of risk ordinarily present questions of fact for the jury and only rarely become questions of law for the court to determine.").

GOOLSBY, J.: In this action to enforce a guaranty on a promissory note, Edward Crafton appeals the special referee's ruling on the admissibility of parol evidence to alter or amend the guaranty. Crafton also argues the referee erred in finding there was no mutual assent or meeting of the minds on the guaranty and the guaranty was not supported by consideration. We reverse and remand.

FACTUAL BACKGROUND

In January 1988, John Wellman and Wilbur Brown traveled to Dahlonega, Georgia, to present an investment proposal for a plastic reclamation and recycling business to Edward Crafton.[1] Crafton was a wealthy man, and Wellman and Brown hoped he would bankroll the project.

Crafton liked their proposal and over the next year and a half, made several large loans to Wellman. In 1989, Crafton permitted Wellman to consolidate these loans into a single note and defer payment until August 1994 or until Wellman Industries made an initial public offering of its stock. Accordingly, Wellman signed a promissory note for $2,395,484.00 on August 18, 1989. At the same time, Brown executed a guaranty for $500,000.00. When the note came due in 1994, Wellman defaulted.

In 1996, Crafton filed this action to collect on Brown's guaranty. Brown defended, arguing the note was part of a larger collateral oral agreement in which Crafton allegedly pledged to loan Wellman an additional twenty to twenty-five million dollars. Brown contended that the guaranty was conditioned upon the loaning of the money by Crafton to Wellman, and that Crafton's failure to loan the money invalidated the guaranty. Brown further asserted Crafton's failure to loan additional money resulted in a failure of consideration for the guaranty.

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[1] Wilbur Brown was involved intimately with organizational efforts and he served as both a consultant to Wellman and the corporation and from time to time loaned his own money to Wellman and Wellman Industries in these efforts.

At trial, Brown sought to prove through the admission of parol evidence that a collateral contract existed. Crafton objected, arguing the guaranty was unambiguous on its face and parol evidence was not admissible to vary its terms. The referee ruled, however, that the parol evidence of a larger agreement was admissible. Based upon the parol evidence admitted at trial, the referee found that the guaranty was unenforceable because there was no meeting of the minds of the parties at the time the guaranty was executed and the guaranty was not supported by consideration. Crafton appeals.

LAW/ANALYSIS

Standard of Review

A guaranty is a "promise to answer for the payment of some debt or the performance of some duty in case of the failure of another person who is himself in the first instance, liable to such payment or performance."[2] An action to collect on a guaranty is an action at law.[3] In an action at law, an appellate court will correct errors of law but must defer to the trial court's factual findings and affirm unless there is no evidence reasonably supporting those findings.[4]

Parol Evidence

Crafton first asserts the referee erred in admitting parol evidence to vary the terms of the guaranty because the guaranty was unambiguous. We agree.

"The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of

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[2] J. L. Mott Iron Works v. Clark, 87 S.C. 199, 203, 69 S.E. 227, 228 (1910).

[3] Twelfth RMA Partners, L.P. v. National Safe Corp., 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999).

[4] Crary v. Djebelli, 329 S.C. 385, 496 S.E.2d 21 (1998).

a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument."[5] "[W]here the terms of [a] written guaranty agreement are clear and complete, extrinsic evidence of agreements or understandings contemporaneous with or prior to its execution cannot be used to contradict, explain, or vary its terms, in the absence of fraud, accident, or mistake in its procurement."[6]

The promissory note stated:

> For value received, the undersigned Maker promises to pay to the order of EDWARD W. CRAFTON ("Holder"), on August 31, 1994, at such place as Holder may reasonably designate in writing, the principal sum of TWO MILLION THREE HUNDRED NINETY-FIVE THOUSAND FOUR HUNDRED EIGHTY-FOUR ($2,395,484.00) DOLLARS ("Principal Sum"), with interest thereon until paid at the simple interest rate of ten percent (10%) per annum computed on the basis of a 360 day year.
>
> Upon the closing of a public offering of all or any part of any class of securities issued by J.G. Wellman Industries, Inc. pursuant to an effective registration statement under the Securities Act of 1933, as amended, the entire Principal Sum and accrued interest thereon shall become due and payable without further notice.

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[5] Gilliland v. Elmwood Properties, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990).

[6] Pee Dee State Bank v. National Fiber Corp., 287 S.C. 640, 643, 340 S.E.2d 569, 570-71 (Ct. App. 1986).

The guaranty stated:

> In the consideration of the credit extended on a Promissory Note dated August 18, 1989 from John G. Wellman to Edward Crafton ("Holder") in the amount of Two Million Three Hundred Ninety-Five Thousand Four Hundred Eighty-Four and 00/100 ($2,395,484.00), I guarantee the payment of Five Hundred Thousand and 00/100 ($500,000.00) Dollars of the above referenced note.

The guaranty explicitly recites that it is in consideration of the credit extended in the amount of $2,395,484.00. In view of the clear and unambiguous nature of the language of the guaranty and the recitation of its consideration as the $2,395,484.00 promissory note, we conclude the referee improperly admitted parol evidence.

Brown cites Iseman v. Hobbs[7] in support of his argument that parol evidence was properly admitted in this case. In Iseman, this court held parol evidence was admissible when the language of consideration was not contractual. The Iseman court explained:

> [I]f the consideration recited is an act or forbearance, as distinguished from a promise or covenant, it may be shown that it did not take place and that therefore the writing is gratuitous and unenforceable. On the other hand, if a promise or covenant is recited as having been made as consideration, this recital cannot be contradicted, explained, or varied by extrinsic evidence. In the present case, the phrase "for value received" is not a recital of a promise or covenant, but a recital that an act (i.e., the receipt of value) has occurred.

[7] 290 S.C. 482, 483, 351 S.E.2d 351, 352 (Ct. App. 1986).

> Contradiction of the fact of receipt would in no way alter the contractual terms of the note.[8]

Brown sought to introduce evidence that the promissory note and guaranty were part of a larger contract to loan between twenty and twenty-five million dollars, not that the consideration recited was never paid over.[9] This is precisely the evidence the parol evidence rule seeks to bar.[10] Accordingly, the referee erred when he admitted parol evidence to alter the terms of the guaranty.

Mutual Assent/Meeting of the Minds

Crafton next argues that the referee erred in finding there was no mutual assent at the time the guaranty was executed. Crafton argues mutual assent was proved because he accepted the guaranty contemporaneously with the execution of the note. We agree.

"A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement is contemporaneous with the guaranty, . . . the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract."[11] Because the guaranty and

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[8] Id. at 484, 351 S.E.2d at 352-53 (emphasis added).

[9] The parties agreed that Crafton loaned Wellman $2,395,484.00.

[10] See Ray v. South Carolina Nat'l Bank, Inc., 281 S.C. 170, 174, 314 S.E.2d 359, 361 (Ct. App. 1984) ("An oral agreement between the parties, made contemporaneously with the execution of the note or prior thereto, relating to [a] condition not expressed in the note is incompetent to change the contract as represented on the face of the note.").

[11] Hudepohl Brewing Co. v. Bannister, 45 F. Supp. 201, 203 (D.S.C. 1943) (emphasis added).

promissory note were executed simultaneously, there was no need for further evidence of a meeting of the minds.

We find it irrelevant that Crafton did not think anything of the guaranty at the time it was executed. Crafton primarily relied on the promissory note and looked to Wellman for payment under the note. Brown's guaranty only assumed importance after Wellman's default.[12]

Consideration

Crafton next argues that the referee erred in finding a lack of consideration to support the guaranty. We agree.

In finding the guaranty was without consideration, the referee's order noted Brown "did not get anything as a result of delivering the document." This was error, however, because Crafton was not required to show that Brown received a benefit under the guaranty.

Generally, when a guaranty is executed at the same time as the note, the consideration for the note functions as consideration for the guaranty.[13] Moreover, "it is not necessary that the guarantor derive any benefit from either the principal contract or the guaranty" as long as there is a benefit to the obligor or a detriment to the creditor.[14]

In the present case, Wellman received a benefit from the note because he was able to defer repayment of the $2,395,484.00 loan until 1994 or until the closing of Wellman Industries' initial public offering. An agreement to extend

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[12] See 38A C.J.S. Guaranty § 12b (1996) (stating notice of acceptance of a guaranty is not required when the principal contract is contemporaneous with the guaranty).

[13] Id. § 27.

[14] Id. § 29.

the debtor's payment date is sufficient consideration for a guaranty by a third person.[15]

Brown himself testified Wellman received a benefit from the "long maturity on the note" because it gave him "a year or two to operate at a profit and then carry [the company] to an initial public offering . . . ." Brown also stated "[t]he purpose of the guarantee was to clean up the balance sheet of J.G. Wellman Industries" and his signature on the guaranty "enhanced" the cleaning-up process. Thus, we find sufficient consideration to support the guaranty.

CONCLUSION

We find that the referee erred in admitting parol evidence of a collateral agreement between the parties to alter the guaranty. We further find that the guaranty is unambiguous, that there was a meeting of the minds between the parties, and that the guaranty was supported by valid consideration. Accordingly, we reverse the judgment for Brown and remand for the entry of judgment for Crafton.

REVERSED AND REMANDED.

HEARN, C.J. and CONNOR, J., concur.

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[15] Hope Petty Motors v. Hyatt, 310 S.C. 171, 425 S.E.2d 786; see also 38A C.J.S. Guaranty § 30 (stating a creditor's agreement to extend the time for payment of a debt is sufficient consideration for a guaranty).

HEARN, C.J.: The State appeals the circuit court's reversal of James E. Henderson, III's municipal court conviction for first offense driving under the influence (DUI) and illegal possession of legal liquor. We affirm.

FACTS AND PROCEDURAL HISTORY

In January 1996, a police officer arrested Henderson, a college student, and charged him with first offense DUI and illegal possession of legal liquor.

At Henderson's trial, the State sought to elicit testimony from the Datamaster test operator that he read Henderson the "right to refuse" warning and advised him of his right to an additional test.[1] Henderson moved to suppress any evidence indicating he had the right to have an independent test to determine his blood-alcohol level.

Citing City of Columbia v. Wilson, 324 S.C. 459, 478 S.E.2d 88 (Ct. App. 1996), Henderson offered to stipulate that "the test was performed pursuant to SLED procedures and that he was advised of his statutory rights." As part of the objection, Henderson requested the trial judge have the "additional tests" language redacted from the SLED report. The State refused the requested stipulation but offered to redact the portions in question from the SLED report before it was admitted into evidence. The trial judge ruled the objectionable portion of the SLED report could be read into the record, but that it would be redacted before admission.

The jury found Henderson guilty on both counts. He was sentenced to 30 days in jail suspended to campus confinement for 15 weekends. Henderson appealed to the circuit court and was granted a new trial based on Wilson.

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[1] In accordance with S.C. Code Ann. § 56-5-2950 (Supp. 2000), the South Carolina Law Enforcement Division Breathalyzer Operator's Test Report (the SLED report) contains an implied consent warning which a BA Operator is required to give to all persons for whom he or she is administering a BA Test.

> I must now tell you that the arresting officer has directed me to give you a breath test. I am trained and certified by the South Carolina Law Enforcement Division, SLED, to give this test. You have the right to refuse to take this test. If you refuse to take this test your privilege to drive in South Carolina must be suspended or denied for 90 days. You have the right to additional independent tests. Whether you take this breath test or not you will be given reasonable assistance in contacting a qualified person of your own choosing to conduct any additional tests. You will have to pay for additional tests.

Given the offer to stipulate by Henderson's counsel, there was no plausible reason why this language should have been read to the jury. Unlike the situation in Wilson, the State was not required to lay a foundation for the Datamaster test results. While we recognize that a stipulation usually involves the consent of all parties, the State's consent was not necessary here, where, by statute, "a person's . . . failure to request additional blood or urine tests is not admissible against the person in the criminal trial." § 56-5-2950(a). It was thus error for the municipal court judge to allow it to come before the jury.

Contrary to the State's argument, we are not persuaded that a different result is required by either State v. Anderson, 318 S.C. 395, 458 S.E.2d 56 (Ct. App. 1995) or State v. Hamilton, 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1997). In Anderson, the defendant was found guilty of driving under suspension (DUS), DUI, and violating the Habitual Traffic Offender Act. At trial, the defendant offered to stipulate to the jurisdiction of the court, but the solicitor refused. On appeal, Anderson argued the trial court erred in denying his motion to sever the habitual traffic offender charge from the DUS and DUI charges. While the dissent would have required the trial court to grant the motion, the majority held it could not reach the issue since it had not been preserved. Accordingly, Anderson cannot be read to hold that the State should not accept an offer to stipulate under the circumstances presented in this case.

Hamilton is equally unavailing to the State's position. There, this court held that the State was not required to stipulate, as requested by the defense, to Hamilton's prior burglary convictions because the previous burglaries were an element of the crime for which Hamilton was charged. We did not hold that a stipulation could never be required, however.

The facts presented in this case are distinguishable from those in either Anderson or Hamilton. Here, a specific legislative enactment proscribes the admission of a person's failure to request additional blood or urine tests. Wilson held there was no error in refusing to redact language concerning independent testing on the Datamaster form where the defendant did not offer to stipulate that proper procedures were followed and that he was advised of his statutory rights. The logical extension of Wilson's holding is that where the defendant does offer to so stipulate, it is error to permit the State to introduce evidence which is barred by § 56-5-2950(a).

For the foregoing reasons, the circuit court judge's decision to reverse Henderson's conviction is hereby

AFFIRMED.

CURETON and CONNOR, JJ., concur.

STILWELL, J.: This case involves an automobile-pedestrian collision resulting in a jury verdict in favor of Bailey. Segars appeals, and we affirm.

FACTS

On October 8, 1996, at approximately 6:45 a.m., Charles Bailey was driving westbound toward Hartsville on Highway 151. The highway has four lanes, with two lanes running in each direction, and is separated by a paved median. Bailey was in the left lane, the one closest to the median, returning home from a hospital where he had visited his father. His wife Doris followed him in another car. Tropical storm Josephine had just passed through the area, and it was dark, rainy, windy, and visibility was poor.

That morning there were two accidents. Tamara Sabari was traveling eastbound toward Darlington when she lost control of her car, crossed the median, and collided with a tractor-trailer in the left lane of westbound traffic. Her car came to rest diagonally in the left lane. Bailey saw Sabari standing in the median waving her hands and pulled his white Chevrolet Suburban into the median two to three car lengths ahead of Sabari's car. Bailey left his headlights on but did not turn on his emergency lights. He proceeded to walk back toward Sabari carrying a flashlight.

Like Sabari, Segars was traveling east toward Darlington in the left lane on his way to work. Segars saw headlights and what he thought was an accident some distance ahead[1] but remained in the left lane because he was concerned about the amount of water in the right lane creating the potential for hydroplaning. As Bailey walked toward Sabari, a car traveling westbound in the left lane swerved into the median to avoid hitting Sabari's car. Bailey turned to

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[1] Segars testified inconclusively about the distance but, regardless of the actual distance, it is clear he saw an accident on the road ahead of him. One other witness also testified he saw what appeared to be an accident on the road ahead of him.

avoid being hit by that car and ran into the left lane of eastbound traffic, where Segars struck him with his car.

The force of the accident sent Bailey 100 to 150 feet down the road. He suffered a broken leg, broken neck, broken ribs, and collapsed lungs. Bailey did not know what hit him and has no recollection of the accident.

The force of the collision dented Segars's front bumper, damaged the hood, crushed the windshield, and buckled the car's roof. Segars testified that whatever hit his car appeared so quickly he had no time to respond. Thinking he had hit some flying debris, Segars did not stop immediately but continued driving. He eventually stopped at a gas station two miles down the road because rain was coming into his car through the shattered windshield and he was bleeding. He returned to the accident scene ten to twenty minutes later and saw Bailey lying on the road.

Bailey's expert witness testified that in a vehicle-pedestrian collision the greater the speed of the vehicle the higher the pedestrian's point of impact thereon. Based on the damage to Segars's car, the expert witness concluded Segars was driving between forty and sixty miles per hour at the time of impact. The posted speed limit on Highway 151 was fifty-five miles per hour, and Segars testified he was driving forty to forty-five miles per hour. Although Segars testified he slowed down when he saw the lights of Bailey's vehicle, there were no signs of braking before, during, or after impact.

Bailey initially brought this negligence action against Segars, Sabari, Doe No. 1, the driver of the tractor trailer, and Doe No. 2, the driver of the car that swerved into the median. Claims against all defendants other than Segars were resolved prior to trial.

Segars moved for a directed verdict at the close of Bailey's case and at the close of his own case, arguing Bailey failed to establish actual negligence sufficient to make a finding of proximate cause. The trial court denied these motions. The jury rendered a verdict finding Segars 55% negligent, Bailey 45% negligent, and awarded Bailey $525,000 in damages. The award was initially

302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990) (citations omitted); see also Hubbard v. Taylor, 339 S.C. 582, 589, 529 S.E.2d 549, 552 (Ct. App. 2000) (noting legal cause is proved "if the defendant should have foreseen that his negligence would probably cause injury to someone").

Ordinarily, the question of proximate cause is one of fact for the jury. Vinson, 324 S.C. at 402, 477 S.E.2d at 721. The trial court's sole function regarding the issue is to determine whether particular conclusions are the only reasonable inferences that can be drawn from the evidence. Id. Only in rare or exceptional cases may the issue of proximate cause be decided as a matter of law. Ballou v. Sigma Nu Gen. Fraternity, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct. App. 1986). If there is a fair difference of opinion regarding whose act proximately caused the injury, then the question of proximate cause must be submitted to the jury. Id. at 147-48, 352 S.E.2d at 493. Under South Carolina's doctrine of comparative negligence, a plaintiff may only recover damages if his own negligence is not greater than that of the defendant. Bloom, 339 S.C. at 422, 529 S.E.2d at 712-13. Ordinarily, comparing the plaintiff's negligence with the defendant's is a question of fact for the jury to decide. Id. at 422, 529 S.E.2d at 713.

Viewing the evidence in the light most favorable to Bailey, we conclude the court properly denied Segars's motions for directed verdict and JNOV. First, Segars owed a duty of care to protect others from the risk of harm based on the weather conditions. It was dark, rainy, and windy, due to tropical storm Josephine, and water tended to accumulate in the right lane of Highway 151. Visibility was obviously poor, and even Segars testified the weather conditions were "terrible." Further, Segars saw headlights and what appeared to be an accident on the road ahead of him. Although Segars stated he was keeping a proper lookout, he testified he did not see Bailey's car even though it was a large sport-utility vehicle. The potential for pedestrians and emergency personnel to be near the scene of an accident, and the danger of hitting them, should have been apparent to Segars. Thus, he owed a legal duty of care to Bailey to drive cautiously under these conditions.

Second, viewed in the light most favorable to Bailey, there is evidence that Segars breached his duty of care in one or more ways. First, although Segars testified he was concerned about the amount of water in the right lane, no cars were beside, in front of, or behind him, and he made no effort to slow down or to change lanes. No evidence exists that Segars slowed even after the collision. The expert witness estimated Segars's speed at forty to sixty miles an hour, while Segars himself testified to driving between forty and forty-five. Although the posted speed limit was fifty-five miles per hour, the jury could infer from the evidence that under the circumstances Segars was driving too fast for conditions. Segars appears to argue that the speed of his vehicle was not a proximate cause of the collision because he had a legal right to occupy the portion of the highway on which he was traveling. However, there is sufficient evidence to support a conclusion that Segars's speed contributed to the accident, and we cannot as a matter of law rule out speed as the proximate cause. See Clark v. Cantrell, 332 S.C. 433, 444, 504 S.E.2d 605, 611 (Ct. App. 1998). Additionally, the evidence of Segars's failure to keep a proper lookout under the prevailing circumstances precludes us from denying liability as a matter of law. Segars's failure to reduce his speed and keep a proper lookout, despite his awareness of the weather conditions and the circumstances ahead of him, are evidence of negligence that, in a natural and continuous sequence of events, resulted in the accident.

Finally, on the issue of proximate cause, the evidence is sufficient for the jury to have found that "but for" Segars's failure to reduce his speed, keep a proper lookout, and keep his car under control, he would not have hit Bailey. Segars should have foreseen that someone near the accident could be injured. His admitted concern about the possibility of hydroplaning based upon a previous similar experience is further evidence from which the jury could reasonably have concluded that Segars was driving too fast for conditions. Thus, taken in the light most favorable to Bailey, there is evidence that causation in fact is present in this case.

Evidence of legal cause was also shown, because Bailey's injuries were a natural and probable consequence of Segars's dereliction. Therefore, there being adequate evidence of both causation in fact and legal cause, the jury's

finding that Segars's negligence proximately caused Bailey's injuries is justified.

The question of proximate cause and comparison of the plaintiff's negligence with that of the defendant are generally questions of fact for the jury. The jury found Bailey 45% at fault and Segars 55% at fault. The evidence in this case is not susceptible of only one reasonable inference, and thus, the motions for directed verdict and JNOV were properly denied.

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

AFFIRMED.

HEARN, C.J., and ANDERSON, J., concur.

PER CURIAM: The State appeals the trial court's ruling allowing Curtis Gibbs to stay his probationary sentences pending appeal without filing an appeal bond pursuant to Rule 230, SCACR. We affirm.[1]

FACTS

Gibbs was indicted for driving under suspension, fourth offense, which was later changed to DUS second. He was also indicted for a fraudulent check more than $500. He pled guilty to both charges and was sentenced to six months imprisonment suspended upon two months probation for the DUS charge. He was sentenced to eight years imprisonment suspended upon two years probation on the fraudulent check charge. The State tried to revoke Gibbs's probation shortly thereafter but Gibbs had filed a notice of intent to appeal the guilty pleas. He argued the State could not proceed with the probation revocation because his sentences were stayed pending the conclusion of the appeal. He did not file an appeal bond arguing, pursuant to Rule 230, SCACR, it was not required since his sentences did not involve confinement. The trial court agreed, ruling the sentences were stayed pending the appeal and that Gibbs did not have to file an appeal bond.

LAW/ANALYSIS

In regard to stays in criminal appeals, our appellate court rules state in pertinent part:

> The service of a notice of appeal by a criminal defendant shall operate as a stay of the execution of the sentence until the appeal is finally disposed of; provided, however, a sentence of confinement shall not be stayed until the defendant has posted bail under S.C. Code Ann. §§ 18-1-80 and -90 (1985).[2]

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

[2] "Pending such appeal the defendant shall still remain in confinement until he give bail in such sum and with such sureties as to the court shall seem

procedure. When the rule contains clear and unambiguous terms, those terms should be given their plain and ordinary meaning.

Here, the State argues Gibbs received sentences of confinement that were "merely suspended" because they were reduced to probation. The State contends the sentences fell under the latter part of Rule 230, SCACR, and thus, maintains that Gibbs had to file an appeal bond to stay the sentences. We disagree.

Rule 230, SCACR, is clear and unambiguous in stating the filing of the notice of intent to appeal stays the execution of sentences that do not confine the defendant. The trial court sentenced Gibbs to two years probation on the fraudulent check charge and two months probation on the DUS charge. The sentences did not require Gibbs to be confined and, therefore, the filing of the notice of intent to appeal alone was sufficient to stay the sentences. Thus, we conclude that Gibbs's sentences were stayed pending appeal without the necessity of an appeal bond being filed.

AFFIRMED.

CURETON, STILWELL, and HOWARD, JJ., concur.