The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
(803) 734-1080
FAX (803) 734-1499

N O T I C E

IN THE MATTER OF K. DOUGLAS THORNTON, PETITIONER

On September 25, 2000, Petitioner was definitely suspended from the practice of law for a period of six months and one day, retroactive to February 15, 2000. In the Matter of Thornton, 342, S.C. 440, 538 S.E.2d 4 (2000). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than April 17, 2001.

Columbia, South Carolina

February 16, 2001

The Supreme Court of South Carolina

IN THE MATTER OF DAVID H. CONNOLLY, JR., RESPONDENT

ORDER

The records in the office of the Clerk of the Supreme Court show that on October 5, 1987, David H. Connolly, Jr. was admitted and enrolled as a member of the Bar of this State.

In a letter addressed to the Clerk of the Supreme Court of South Carolina, dated January 9, 2001, David H. Connolly, Jr. submitted his resignation from the South Carolina Bar. His letter is made a part of this order.

IT IS THEREFORE ORDERED THAT David H. Connolly, Jr. shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, he shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

David H. Connolly, Jr. shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of David H. Connolly, Jr. shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

February 9, 2001

DAVID HUGH CONNOLLY, JR.
4421 Phil Street
Bellaire, Texas 77401
(713) 667-9763

January 9, 2001

Hon. Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Re: David H. Connolly, Jr./ Membership resignation
State Bar Number: 009711 (Inactive)

Dear Mr. Shearouse:

By this letter I wish to resign as a member of the South Carolina Bar. I would appreciate your submitting it to the Court for their consideration in this regard. I am currently an inactive member and have not practiced in South Carolina for over five years. Additionally, as I am presently pursuing a Ph.D. in History at Rice University I do not intend to resume the practice of law in South Carolina. I understand that by resigning my membership I will be required to retake the bar and undergo all the procedures demanded of a first time applicant should I ever decide to resume practicing in the state.

If additional information, or action on my part, is required, please do not hesitate to call.

Sincerely,

s/ David H. Connolly, Jr.

Cc: South Carolina State Bar

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

February 20, 2001

ADVANCE SHEET NO. 7

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

CONTENTS

SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

EXTENSION OF TIME TO FILE PETITION FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

3270 - Boddie-Noell v. 42 Magnolia Partners	Pending
3273 - Duke Power v. Laurens Elec.	Pending
3274 - Pressley v. Lancaster County	Pending
3276 - State v. Florence Evans	Pending
3280 - Pee v. AVM, Inc.	Pending
3282 - SCDSS v. Basnight	Pending
3284 - Bayle v. SCDOT	Pending
3285 - Triple E., Inc. v. Hendrix	Pending
3286 - First Palmetto v. Patel	Pending
3287 - State v. John Thomas Robinson	Pending
3288 - Bob Jones University v. Strandell	Pending
3289 - Olson v. Faculty House	(2) Pending
3290 - State v. Salley & Kirby T. Parker	Pending
3292 - Davis v. O-C Law Enforcement Comm.	Pending
3293 - Wiedemann v. Town of Hilton Head Island	Pending
3294 - State v. Nathaniel Williams	Pending
2000-UP-707 - SCDSS v. Rita Smith	Pending
2000-UP-776 - Rutland v. Yates	Pending
2000-UP-781 - Michael Cooper v. State	Pending
2000-UP-783 - State v. Clayton Benjamin	Pending
2000-UP-784 - State v. Katari Miller	Pending
2001-UP-002 - Gibson v. Cain	Pending
2001-UP-010 - Crites v. Crites	Pending

2001-UP-013 - White v. Shaw	Pending
2001-UP-015 - Milton v. A-1 Financial Service	Pending
2001-UP-016 - Stanley v. Kirkpatrick	(2) Pending
2001-UP-019 - Baker v. Baker	Pending
2001-UP-021 - Piggly Wiggly v. Weathers	Pending
2001-UP-022 - Thomas v. Peacock	Pending
2001-UP-023 - Harmon v. Abraham	Pending
2001-UP-026 - Phillip v. Phillips	Pending
2001-UP-037 - Wilkie v. Werner Enterprises	Pending
2001-UP-038 - Gary v. American Fiber	Pending
2001-UP-047 - Kirt Eliot Thompson v. State	Pending
2001-UP-049 - Johnson v. Palmetto Eye	Pending
2001-UP-050 - Robinson v. Venture Capital	Pending
2001-UP-053 - Howard v. Seay	Pending
2001-UP-054 - State v. Ae Khingratsaiphon	Pending
2001-UP-058 - State v. Brian Keith Nesbitt	Pending
2001-UP-066 - SCDSS v. Duncan	Pending
2001-UP-069 - SCDSS v. Taylor	Pending
2001-UP-078 - State v. James Mercer	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

2000-OR-062 - Ackerman v. 3-V Chemical	Granted
3059 - McCraw v. Mary Black Hospital	Pending

3069 - State v. Edward M. Clarkson	Pending
3093 - State v. Alfred Timmons	Pending
3102 - Gibson v. Spartanburg Sch. Dist.	Pending
3116 - Loadholt v. SC Budget & Control Board	Pending
3126 - Hundley v. Rite Aid	Pending
3128 - St. Andrews PSD v. City of Charleston	Pending
3160 - West v. Gladney	Pending
3161 - Gordon v. Colonial Ins.	Pending
3162 - Paparella v. Paparella	(2) Denied
3173 - Antley v. Shepherd	Pending
3176 - State v. Franklin Benjamin	Pending
3178 - Stewart v. State Farm Mutual	Denied
3183 - Norton v. Norfolk	Pending
3190 - Drew v. Waffle House, Inc.	Pending
3192 - State v. Denise Gail Buckner	Pending
3195 - Elledge v. Richland/Lexington	Pending
3197 - State v. Rebecca Ann Martin	Pending
3200 - F & D Electrical v. Powder Coaters	Pending
3204 - Lewis v. Premium Investment	Pending
3205 - State v. Jamie & Jimmy Mizzell	Pending
3214 - State v. James Anthony Primus	Granted
3215 - Brown v. BiLo, Inc.	Pending
3216 - State v. Jose Gustavo Castineira	Pending

3217 - State v. Juan Carlos Vasquez	Pending
3218 - State v. Johnny Harold Harris	Pending
3220 - State v. Timothy James Hammitt	Pending
3221 - Doe v. Queen	Pending
3225 - SCDSS v. Wilson	Pending
3231 - Hawkins v. Bruno Yacht Sales	Pending
3234 - Bower v. National General Ins. Co.	Pending
3236 - State v. Gregory Robert Blurton	(2) Pending
3240 - Unisun Ins. v. Hawkins	Pending
3241 - Auto Now v. Catawba Ins.	Pending
3242 - Kuznik v. Bees Ferry	Pending
3248 - Rogers v. Norfolk Southern Corp.	Pending
3249 - Nelson v. Yellow Cab Co.	Pending
3250 - Collins v. Doe	Pending
3252 - Barnacle Broadcast v. Baker Broadcast	Pending
3254 - Carolina First v. Whittle	Pending
3257 - State v. Scott Harrison	Pending
3264 - R&G Construction v. Lowcountry Regional	Pending
99-UP-652 - Herridge v. Herridge	Pending
2000-UP-054 - Carson v. SCDNR	Granted
2000-UP-059 - State v. Ernest E. Yarborough	Denied
2000-UP-075 - Dennehy v. Richboug’s	Granted
2000-UP-220 - Lewis v. Inland Food Corp.	Granted
2000-UP-260 - Brown v. Coe	Pending

2000-UP-288 - Kennedy v. Bedenbaugh	Pending
2000-UP-291 - State v. Robert Holland Koon	Pending
2000-UP-341 - State v. Landy V. Gladney	Pending
2000-UP-382 - Earl Stanley Hunter v. State	Pending
2000-UP-426 - Floyd v. Horry County School	Pending
2000-UP-441 - Harrison v. Bevilacqua	Pending
2000-UP-484 - State v. Therl Avery Taylor	Pending
2000-UP-491 - State v. Michael Antonio Addison	Pending
2000-UP-503 - Joseph Gibbs v. State	Pending
2000-UP-509 - Allsbrook v. Estate of Roberts	Pending
2000-UP-512 - State v. Darrell Bernard Epps	Pending
2000-UP-523 - Nationwide Ins. v. Unisun Ins.	Pending
2000-UP-528 - Ingram v. J & W Corporation	Pending
2000-UP-540 - Charley v. Williams	Pending
2000-UP-544 - Cox v. Murrell & Cox	Pending
2000-UP-546 - Obstbaum v. Obstbaum	Denied
2000-UP-547 - SC Farm Bureau v. Chandler	Pending
2000-UP-550 - McKittrick v. Sheriff Chrysler	Pending
2000-UP-552 - County of Williamsburg v. Askins	Pending
2000-UP-560 - Smith v. King	Pending
2000-UP-564 - State v. John P. Brown	Pending
2000-UP-588 - Durlach v. Durlach	Pending
2000-UP-593 - SCDOT v. Moffitt	Pending
2000-UP-596 - Liberty Savings v. Lin	Pending

2000-UP-601 - Johnson v. Williams		Pending
2000-UP-603 - Graham v. Graham		Pending
2000-UP-606 - Bailey v. Bailey		Pending
2000-UP-607 - State v. Lawrence Barron		Pending
2000-UP-608 - State v. Daniel Alexander Walker	(2)	Pending
2000-UP-613 - Norris v. Soraghan		Pending
2000-UP-620 - Jerry Raysor v. State		Pending
2000-UP-627 - Smith v. SC Farm Bureau		Pending
2000-UP-631 - Margaret Gale Rogers v. State		Pending
2000-UP-648 - State v. Walter Alan Davidson		Pending
2000-UP-649 - State v. John L. Connelly		Pending
2000-UP-653 - Patel v. Patel		Pending
2000-UP-655 - State v. Quentin L. Smith		Pending
2000-UP-657 - Lancaster v. Benn		Pending
2000-UP-658 - State v. Harold Sloan Lee, Jr.		Pending
2000-UP-662 - Cantelou v. Berry		Pending
2000-UP-664 - Osteraas v. City of Beaufort		Pending
2000-UP-678 - State v. Chauncey Smith		Pending
2000-UP-697 - Clark v. Piemonte Foods		Pending
2000-UP-705 - State v. Ronald L. Edge		Pending
2000-UP-708 - Federal National v. Abrams		Pending
2000-UP-738 - State v. Mikell Pinckney		Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Leon C. Banks, Respondent.

Opinion No. 25252
Submitted January 16, 2000 - Filed February 12, 2001

DISBARRED

Henry B. Richardson, Jr., and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Desa A. Ballard, of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to disbarment.[1] We accept the

[1]Respondent was placed on incapacity inactive status by order of this Court dated August 13, 1999. In re Banks, 336 S.C. 334, 520 S.E.2d 316

agreement and disbar respondent. The facts as admitted in the agreement are as follows.

Facts

During the course of representing several defendants throughout 1997 and once in 1998, respondent received funds totaling over $161,000 from the Office of Indigent Defense (OID). During that same time, respondent received over $4,000 from the Lancaster County Public Defender Corporation and $10,000 from the Kershaw County Public Defender Corporation. Respondent deposited these funds into his firm's capital litigation account. Respondent did not comply with Rule 417, SCACR, in that he failed to retain sufficiently detailed documentation to adequately identify these deposits.

Respondent disbursed the money from the capital litigation account but did not note on the checks any information as to purpose, client, or file number as required by Rule 417, SCACR. These checks were made payable to respondent personally, to his firm's general operating account, and to cash. Respondent converted the majority of the OID funds for purposes other than that for which they were intended. Both the capital litigation account and the general operating account frequently had negative balances.

After respondent learned about the shortage of funds in the capital litigation account, he deposited $31,260 into the account in February of 1998. That deposit consisted of one check drawn on respondent's personal account that he held jointly with his wife. At the time respondent negotiated the check from his personal account, that joint account contained only $1,470.10. This intentional misrepresentation constituted check kiting.

Also in February of 1998, a deposit of $24,500 was made into the capital litigation account. These funds were from a personal loan from a

---

(1999).

third party. The loan was predicated on a promissary note with a ninety day repayment period. Respondent used these funds to make various payments to service providers and expert witnesses relevant to a capital client. Respondent failed to repay the lender within the ninety day period and the guarantor repaid the loan. As of August 13, 1999, respondent had not yet repaid the guarantor.

A financial management firm loaned money to respondent for personal living expenses. These loans were secured by account vouchers for work completed by respondent for the OID. The financial management firm made a complaint against respondent. Respondent had another attorney representing him in connection with this complaint. In November of 1998, respondent sent his attorney a note enclosing copies of OID vouchers submitted on five cases. Respondent never submitted those five vouchers to the OID nor did that agency make payments to respondent pursuant to those five vouchers.

Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (a lawyer shall hold property of clients that is in a lawyer's possession in connection with a representation separate from the lawyer's own property, funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, and complete records of such account funds shall be kept by the lawyer); Rule 8.4 (it is professional misconduct for a lawyer to: violate the Rules of Professional Conduct; commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; engage in conduct involving moral turpitude; engage in conduct involving dishonesty, fraud, deceit or misrepresentation; engage in conduct that is prejudicial to the administration of justice).

Respondent has also violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(5) (engaging in

conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); Rule 7(a)(6) (violating the oath of office taken upon admission to practice law in this state).

We accept the Agreement for Discipline by Consent and disbar respondent. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Tommy E. Brown, Sr., Petitioner,

v.

Allstate Insurance Company, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Spartanburg County
Roger L. Couch, Special Circuit Court Judge

Opinion No. 25253
Heard November 15, 2000 - Filed February 20, 2001

REVERSED

James C. Cothran, Jr. and Robert M. Holland, both of Spartanburg, for petitioner.

Richard L. Patton, of Patton & Associates, of

Greenville, for respondent.

CHIEF JUSTICE TOAL: We granted Tommy E. Brown's ("Brown") petition for a writ of certiorari to review the Court of Appeals' decision in *Brown v. Allstate Ins. Co.*, 337 S.C. 499, 523 S.E.2d 807 (Ct. App. 1999). We reverse.

FACTS/PROCEDURAL BACKGROUND

On February 13, 1995, Brown's car stopped on U.S. Highway 29 between Cowpens and Gaffney in Cherokee County, South Carolina. He parked the car on the side of the road and left it overnight. The following morning, at approximately 2:00 a.m., Brown's 1984 Chevrolet Corvette was found burning. The car was a total loss as a result of the fire and was taken to the salvage yard. All parties agree the car was intentionally burned.

Prior to the fire, Brown's car was in pristine condition. Mr. Hamrick, the owner of Hamrick's Used Cars and Trucks, was familiar with the car and testified his son detailed the car one month prior to the fire. According to Mr. Hamrick, the car was in mint condition and it had many expensive additions, such as an excellent stereo system and "ground effects." Mr. Mathis, a mechanic who worked on the car for eleven years, testified Brown kept the car in near perfect condition. Mr. Mathis saw the car on the day of the incident and testified the engine was in good condition.

Brown filed a claim with Allstate Insurance Company ("Allstate"), his insurer, for the value of the car. Allstate denied the claim contending the car burned as a result of arson by, or at the direction of, Brown. According to Allstate, Brown was guilty of misrepresentation and bad faith by asserting a false claim. Allstate averred Brown had both the motive and opportunity to set the fire, and Brown misrepresented or concealed his involvement.

On October 12, 1995, Brown brought a civil action against Allstate for breach of contract and bad faith refusal to pay benefits. During the bench trial, Melinda Brown, Browns' ex-wife, testified Brown knew the engine was having problems prior to the fire, but he did not have enough money to fix it. The trial court did not find Melinda Brown's testimony credible because she smiled at inappropriate times during her testimony, did not recall the parties exchanged

criminal warrants prior to her contacting the insurance company, and she appeared to "gain some strange pleasure from her testimony against [Brown]." The trial court disregarded her testimony as unreliable and biased.

On February 10, 1998, the trial court found in favor of Brown for breach of contract and required Allstate to pay $25,000 for his automobile. The trial court dismissed the cause of action for bad faith refusal to pay benefits because several factors justified Allstate's initial refusal to pay benefits, including: (1) there were traces of gasoline in the carpet padding; (2) the stereo and alloy wheels had not been stolen; (3) there were inconsistencies in Brown's testimony; and (4) a statement by Brown's ex-wife that attempted to establish a motive for the fire.

The trial court found, and Brown and Allstate agreed, the fire was of an incendiary nature and intentionally set. The trial court further held Brown had opportunity to set the fire, but Allstate failed to establish a sufficient motive for burning the automobile. The trial court found it persuasive that the morning after Brown parked his car on the side of the road, he went to his usual repair shop to make arrangements to have the car towed, and apparently did not realize it had burned. Further, the trial court found the trial testimony indicated Brown "babied" his car and would have done nothing to harm it.

During the trial, over Allstate's objection, the trial judge allowed Brown to testify he had not been criminally charged with arson, aiding or abetting arson, or conspiracy to commit arson. Allstate appealed alleging the trial court erred in admitting evidence concerning the State's decision not to prosecute Brown for arson. The Court of Appeals reversed holding: (1) as a matter of first impression, evidence of the State's failure to prosecute the insured for arson was inadmissible; (2) this error required reversal; and (3) the presumption of regularity of proceedings in a bench trial did not apply.

The following issue is before this Court on certiorari:

> Did the trial judge err in receiving evidence the State did not charge or prosecute Brown for arson?

LAW/ANALYSIS

Brown and Allstate concede the trial judge received incompetent evidence

when he allowed Brown to testify he had not been prosecuted for arson or related crimes. We agree with the Court of Appeals' opinion and recent case law that evidence of non-prosecution for criminal arson is irrelevant and immaterial in a civil case for fire insurance proceeds. *See Rabon v. Great Southwest Fire Ins. Co.*, 818 F.2d 306 (4th Cir. 1987) (holding a federal trial court committed reversible error when it permitted a plaintiff in a suit for fire insurance proceeds to present evidence of his non-prosecution or acquittal on related criminal arson charges); *see also Kelly's Auto Parts, No. 1, Inc. v. Boughton*, 809 F.2d 1247 (6th Cir. 1987); *Am. Home Assurance Co., v. Sunshine Supermarket, Inc.*, 753 F.2d 321 (3d Cir. 1985); *Kamenov v. N. Assurance Co. of Am.*, 687 N.Y.S.2d 838 (N.Y. App. Div. 1999); *Cook v. Auto Club Ins. Ass'n*, 552 N.W.2d 661 (Mich. Ct. App. 1996); *Krueger v. State Farm Fire & Cas. Co.*, 510 N.W.2d 204 (Minn. Ct. App. 1993); 19 Couch On Insurance 2d *Evidence* § 79:571 (Rev. ed. 1983 & Supp. 1999) (indictment of insured for arson, or failure to indict him or her for such crime, is irrelevant and inadmissible in action on a fire insurance policy where the defense is the insured caused the fire).

According to the court in *Rabon*, evidence of criminal charges related to arson is excluded in suits for fire insurance proceeds because such evidence goes to the principal issue before the court and is highly prejudicial. *Rabon*, 818 F.2d at 309. Furthermore, a prosecutor's decision not to prosecute and a jury's decision to acquit in a criminal trial are based on different criteria than those that apply in a civil proceeding. *Id.* "In particular, a prosecutor's decision to *nolle prosse* may take into account many factors irrelevant in a civil suit, such as the higher standard of proof required for a criminal conviction. In any event, a prosecutor's opinion whether the insured started the fire is inadmissible since based on knowledge outside his personal experience." *Id.*

Although we find the evidence of Brown's non-prosecution for arson was irrelevant and inadmissible, we reverse the Court of Appeals' decision because the admission of the evidence was harmless. We find there was not a sufficient showing the trial judge either affirmatively relied on the incompetent evidence, or could not have reached the same result without relying on the incompetent evidence.

We agree with the Court of Appeals' dissent, which concurred in the majority's finding that the evidence of Brown's non-prosecution was inadmissible, but dissented on the issue of prejudice. The dissent concluded, as do we, that the admission of the evidence was harmless because Allstate failed

to prove motive, an essential element of its defense. To prove arson, an insurer must demonstrate by the preponderance of the evidence the fire was of an incendiary origin, and the insured caused the fire. *Carter v. Am. Mut. Fire Ins. Co.*, 297 S.C. 218, 375 S.E.2d 356 (Ct. App. 1988). An insurer can prevail in an arson defense based solely on circumstantial evidence if it shows the fire was of an incendiary origin and the plaintiff had both the opportunity and the motive to set the fire. *Id.* (quoting *Fortson v. Cotton States Mut. Ins. Co.*, 308 S.E.2d 382, 385 (Ga. Ct. App. 1983)).

In this case, the trial judge held the fire was of an incendiary nature and Brown had the opportunity to set it. However, the trial judge ruled Allstate failed to prove Brown had sufficient motive for burning the vehicle. According to the trial judge, no evidence was introduced concerning Brown's stressed financial condition, other than his ex-wife's testimony, which the court discounted as unreliable. Furthermore, the trial court was persuaded by the fact an engine repair would cost less than the value of the car. Such repair would place the car in pristine condition and Brown would be able to sell the car for a substantial amount of money. Moreover, all the trial testimony indicated Brown "babied" his car and would have done nothing to damage it. The trial judge was also persuaded by the fact Brown visited his mechanic and asked to have the vehicle towed the morning after the fire, apparently unaware the vehicle was destroyed.

Based on these specific factual findings, the trial judge held Allstate did not establish motive. Because Allstate failed to prove an essential element of its defense, Allstate cannot demonstrate it was prejudiced by the trial judge's admission of the incompetent evidence. Therefore, the admission of the improper evidence was, at most, harmless error.

The Court of Appeals, in its majority opinion, held the admission of evidence was reversible error because the incompetent evidence was admitted precisely for consideration of the ultimate issue before the court – whether Brown committed arson of his vehicle. According to the majority: "We reject the application of the [presumption of regularity] rule where the court in a bench trial allows a potpourri of improper evidence *on the ultimate issue in the case* followed by an order with no ruling or comment by the court indicating a rejection of the incompetent evidence." *Brown*, 337 S.C. at –, 523 S.E.2d at 815 (emphasis in original). The majority held that because the trial judge never acknowledged the evidence was inadmissible, did not respond affirmatively to

counsel's argument in that regard, and did not reconsider the ruling or state the evidence would not be considered on the ultimate issue of arson, the overwhelming inference from the record was the trial judge considered the evidence. Accordingly, the majority concluded the incompetent evidence induced the court to make an essential finding which would not otherwise have been made.

The majority essentially adopts a new rule for trial judges sitting without a jury. According to the majority, if incompetent evidence is admitted on the ultimate issue of the trial, the trial judge must affirmatively reject this evidence, even if it is clear he is making a judgment based on competent evidence in the record. We reject this rule because it would require trial judges to rule on all admitted evidence in a bench trial. A trial judge's role in a bench trial is to admit all evidence and then evaluate it in a non-jury setting. The majority's rule is, therefore, unnecessarily burdensome and would inhibit the trial judge's ability to evaluate the evidence and ascertain the truth.

CONCLUSION

Based on the lack of competent evidence of motive and the lack of reference to the incompetent evidence in the trial judge's order, there is not a reasonable probability such evidence had an effect on the result. We, therefore, **REVERSE** the Court of Appeals' decision and **REINSTATE** the decision of the trial court.

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

The Supreme Court of South Carolina

In the Matter of John L. Creson, Petitioner.

ORDER

On September 9, 1999, this Court imposed concurrent six month and one year suspensions on petitioner, retroactive to March 8, 1999. In the Matter of Creson, 336 S.C. 565, 521 S.E.2d 274 (1999). Petitioner has now filed a petition for reinstatement. The Committee on Character and Fitness recommends that the petition be granted. We agree and hereby reinstate petitioner to the practice of law in this state.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
February 12, 2001

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas J. and Carolyn Silvester,

Appellants,

v.

Spring Valley Country Club,

Respondent.

Appeal From Richland County
L. Henry McKellar, Circuit Court Judge

Opinion No. 3297
Heard October 12, 2000 - Filed February 12, 2001

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Thomas J. and Carolyn B. Silvester, both of Columbia, pro se.

John E. Cuttino, of Turner, Padget, Graham & Laney, of Columbia, for respondent.

STILWELL, J.: Thomas and Carolyn Silvester filed this action against Spring Valley Country Club for damages and injunctive relief for trespass and nuisance. The trial court granted the Club's motion to dismiss the action, finding all claims barred by the statute of limitations. The Silvesters appeal. We affirm in part, reverse in part, and remand.

FACTS

In 1983, the Silvesters purchased a residence in Spring Valley subdivision. The rear of their lot adjoins a portion of the Club's golf course. Water from the Club's land channels onto the Silvesters' lot, allegedly causing erosion, the deposit of trash, and a potentially hazardous condition due to standing water. The Silvesters maintain this water channels through a man-made ditch, while the Club argues the water channels through a naturally occurring stream. The problem manifested itself shortly after the Silvesters occupied the house in 1984.

The Silvesters brought this action in April 1996. They alleged for a first cause of action a trespass occurring in 1992 when the Club constructed a french drainage system to collect and concentrate surface water, thereby exacerbating the Silvesters' drainage problem. They complain the Club failed to implement a proper storm drainage system to prevent water from taking over their property. The Silvesters argue that even if the Club has an easement to discharge storm water over their land, it has exceeded its rights. For their second cause of action, the Silvesters allege the Club's actions constitute a continuing nuisance affecting the enjoyment of their land.

On June 12, 1998, the Club filed a motion to dismiss the action "pursuant to Rules 41 and/or 56 of the South Carolina Rules of Civil Procedure." In its supporting memorandum, the Club argued the statute of limitations had expired.

The action was called to trial on June 17, 1998, with the Silvesters proceeding pro se. Prior to selecting a jury, the court heard the Club's motion to dismiss. During argument on the motion, Mr. Silvester admitted they realized the severity of the water problem by 1991. Mr. Silvester informed the court they

received a copy of an engineering study commissioned by the Club in October or November 1991, but the Silvesters insisted the Club did not follow its own study's recommendations.

Mrs. Silvester argued the action should not be dismissed based on the statute of limitations because it was an ongoing nuisance. She stated if the court dismissed the action, the Silvesters would have to file a new action for the continuing nuisance. The trial judge stated, "You might have to do that." During the colloquy, the trial judge made some remarks which the Silvesters interpreted as being antagonistic toward them as pro se litigants.[1]

The trial court granted the motion to dismiss based on the statute of limitations. The Silvesters appeal.

STANDARD OF REVIEW

The Club filed the motion to dismiss pursuant to Rules 41(b) and 56, SCRCP. Rule 41(b) permits the defendant, "[a]fter the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence," to move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Rule 41(b), SCRCP (emphasis added); see Johnson v. J.P. Stevens & Co., 308 S.C. 116, 118, 417 S.E.2d 527, 529 (1992) (holding Rule 41(b), SCRCP, allows the judge as the trier of facts to weigh the

---

[1] During the colloquy the trial judge said:

> Mrs. Silvester, let me say something. . . . If you don't want to hire a lawyer, that's fine. But let me tell you what Abraham Lincoln said one time. A man who represents himself has a fool for a lawyer. That was in my Daddy's law office when I was a kid. It's great advice. But if you don't want to hire a lawyer, that's fine. That's your business. If you pay your seventy bucks you can come over here and play this game just like everybody else.

evidence, determine the facts, and render a judgment against the plaintiff at the close of his case if justified).

Rule 56, SCRCP, allows a party to move, with or without supporting affidavits, for summary judgment in his favor. Under the circumstances present here, we conclude the trial court effectively ruled on the motion as if it were a motion for summary judgment under Rule 56. Accordingly, we utilize the standard of review governing motions for summary judgment. See McDonnell v. Consol. Sch. Dist. of Aiken, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994) (holding a motion for summary judgment can be used to raise the defense of statute of limitations).

In determining whether summary judgment is proper, this court must view all evidence in the light most favorable to the non-moving party. Barr v. City of Rock Hill, 330 S.C. 640, 642, 500 S.E.2d 157, 158 (Ct. App. 1998). Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. City of Columbia v. ACLU of South Carolina, 323 S.C. 384, 386, 475 S.E.2d 747, 748 (1996). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Id. Thus, we review the record in the light most favorable to the Silvesters.

LAW/ANALYSIS

I.
Trespass

The Silvesters pled trespass as the first cause of action in their complaint. However, at the hearing before the trial court, the continuing nuisance claim was the only issue clearly addressed. Additionally, the Silvesters' appellate brief does not raise as an issue on appeal error on the part of the trial court in granting summary judgment as to the trespass cause of action. Finally, at oral argument the Silvesters only argued the trial court erred in granting summary judgment to the Club on their continuing nuisance claim. We therefore find the grant of

As to a permanent nuisance, such as a building or a railroad encroaching on a party's land, the injury is fixed and goes to the whole value of the land. Id.

When the statute of limitations begins to run hinges on whether a nuisance is classified as permanent or continuing. Id. § 26; see Glenn, 294 S.C. at 535-36, 366 S.E.2d at 50-51. When the nuisance is permanent in nature and only one cause of action may be brought for damages, the applicable statute of limitations bars the action if not brought within the statutory period after the first actionable injury. 58 Am. Jur. 2d Nuisances § 307 (1989). When the nuisance is continuing and the injury is abatable, the statute of limitations does not run merely from the original intrusion on the property and cannot be a complete bar. Id. Rather, a new statute of limitations begins to run after each separate invasion of the property. Id.; see Cutchin v. South Carolina Dep't of Highways & Pub. Transp., 301 S.C. 35, 37, 389 S.E.2d 646, 648 (1990) (citing Webb v. Greenwood County, 229 S.C. 267, 277, 92 S.E.2d 688, 692 (1956) (stating if the injury is permanent, the plaintiff has a single cause of action which cannot be split; however if the cause of the injury is abatable, each injury gives rise to a new cause of action)). A nuisance is continuing if abatement is reasonably and practicably possible. 58 Am. Jur. 2d Nuisances § 29 (1989).

In discussing the limitations period applicable in a continuing nuisance action, our supreme court has stated:

> Since every continuance of a nuisance is a new nuisance, authorizing a fresh action, an action may be brought, for the recovery of all damages, resulting from the continuance of a nuisance, within the statutory period of the statute of limitations, for which no previous recovery has been had, even though the original cause of action is barred, unless the nuisance has been so long continued, as to raise the presumption of a grant, or in case of injury to real property, unless the plaintiff's right of entry is barred. But when the injury is of such a nature, that all the damages resulting therefrom, whether past or prospective, are recoverable

> in one action, the statute of limitations begins to run, from the time of the completed erection of the nuisance. This rule, however, is subject to the modification, that when the cause of action is the consequential injury, from an act of erection which is not, in itself, an actionable nuisance, the statute does not begin to run, until the injury is actually inflicted.

Sutton v. Catawba Power Co., 104 S.C. 405, 408, 89 S.E. 353, 353 (1916).

In McCurley v. South Carolina Highway Dep't, the court stated that if the injury to neighboring lands is caused by negligence, or if the cause is abatable, then there arises a continuing cause of action. 256 S.C. 332, 335, 182 S.E.2d 299, 300 (1971). While the statute of limitations begins to run at the occurrence of the first actual damage, the landowner may at any time recover for injury which occurred within the statutory period. Id. Furthermore, although the statute of limitations may bar a nuisance action for damages, it "is not a defense in an action based upon nuisance for injunctive relief since such statutes do not bar the equitable relief of injunction." 58 Am. Jur. 2d Nuisances § 381 (1989); see Mack v. Edens, 306 S.C. 433, 437, 412 S.E.2d 431, 434 (Ct. App. 1991) (stating injunctive relief is appropriate for continuous injury to land).

The Silvesters argue water channels from a man-made ditch dug by the Club onto their property. The Club maintains water channeling through a naturally occurring stream passes over a portion of the Silvesters' lot and only "occasionally" overflows their yard. However, Mr. Silvester testified at the hearing "there was an enormous amount of water coming through the property," and Mrs. Silvester stated "our property daily is being damaged." After reviewing the record, we find there exist genuine issues of material fact making summary judgment inappropriate in this case.

The Silvesters alleged a continuing nuisance and requested damages and injunctive relief. The trial court summarily applied the three year statute of limitations to the continuing nuisance cause of action without considering the possibility of abatement, the Club's alleged negligence, or the Silvesters'

promotion, he operated only three vats and one dryer. Lockridge lifted between 1600 and 3000 pounds of chemicals during the shift.

As he worked, Lockridge became extremely tired, began sweating, and developed pain in his neck and jaw. He also experienced shortness of breath and soreness between his shoulders. Although Lockridge originally intended to stay at the plant until 5:00 p.m., the onset of these symptoms caused him to return home as soon as the replacement lead man arrived at 3:00 p.m.

Throughout the evening, Lockridge continued to experience symptoms and eventually was transported to the emergency room at Anderson Area Medical Center where he was diagnosed as having sustained a heart attack. Lockridge was then transferred to Greenville Memorial Hospital where he underwent quadruple bypass heart surgery. Lockridge was fifty-eight years old at the time of the heart attack.

Following his operation, Lockridge returned to work at Santens in various capacities but was terminated in December 1996 for reasons not involved here and has not been employed since.

In denying Lockridge's claim, the single commissioner concluded he did not suffer an injury by accident arising out of and in the course of employment. Moreover, the commissioner found Lockridge's heart attack was not caused or induced by unexpected strain or overexertion in the performance of his job duties or by unusual or extraordinary conditions in his employment on October 14, 1995. The full commission determined that all of the single commissioner's findings of fact and rulings of law were correct as stated, affirmed the hearing commissioner, and adopted his decision as its own. The circuit court affirmed the full commission.

SCOPE OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Any review of the

catheterization report on Lockridge when he was treated at Anderson Area Medical Center, Lockridge had multi-vessel heart disease with total occlusion of his left anterior descending artery and a ninety-nine percent blockage in his right coronary artery with angiographic evidence of ruptured plaque in that artery. Doctor Gaucher explained that plaque is cholesterol and when it ruptures or cracks, the plaque causes clots to form in the artery which, in turn, gives rise to heart attacks. Doctor Gaucher testified the plaque rupture likely occurred at the time of the onset of Lockridge's symptoms.

During direct examination regarding causation, Dr. Gaucher testified that the direct cause of Lockridge's heart attack was plaque rupture in the right coronary artery. In response to the inquiry if he had an opinion whether the plaque rupture was induced or caused by unexpected strain or overexertion in Lockridge's job, Dr. Gaucher answered:

> Well, I don't – All I can say is that plaque rupture is very unpredictable. Coronary artery disease is a chronic condition and very unpredictable. Plaque rupture can occur at any time. In fact it quite often happens at rest, most commonly in the early morning hours, and I don't think that we really understand or know the precipitance of plaque rupture. But it's a chronic . . . disease, and, and it's unpredictable and plaque rupture can occur. So I, I don't know if there's a direct – I don't, don't know if a direct implication can be made with any certainty.

Upon further questioning as to whether a causal connection existed between Lockridge's employment and the heart attack, Dr. Gaucher responded:

> So I did not question [Lockridge] about the – his activities at the time of his symptoms and so forth. So it's in some ways maybe a little bit unfair to ask me that particular question. But what I know, again, from heart disease is that plaque rupture is unpredictable and can occur at any time, and we don't know the precipitance or understand the precipitance. Heart attacks most often occur without physical exertion.

Walker: Yes.

Thereafter, in response to a hypothetical question posed by Lockridge's attorney, which was objected to by Santens' attorney, Dr. Walker stated he "would think" to a reasonable degree of medical certainty that Lockridge's heart attack was causally related to Lockridge lifting the bags of chemicals.

Lockridge argues Dr. Walker's testimony is uncontradicted and, therefore, the commission erred in concluding the heart attack was not caused by Lockridge's physical exertions on the job. We disagree.

While Dr. Walker may have attributed the cause of Lockridge's heart attack to overexertion at work, Dr. Gaucher either would not or could not. Thus, to the extent Dr. Gaucher's testimony contradicts Dr. Walker's testimony, the commission was free to weigh the conflicting evidence accordingly. Sharpe v. Case Produce, Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999) ("Where there is a conflict in the evidence, the Commission's findings of fact are conclusive."); see also Stokes v. First Nat'l Bank, 306 S.C. 46, 50, 410 S.E.2d 248, 251 (1991) (acknowledging that despite conflicting evidence, either of different witnesses or of the same witness, a finding of fact by the commission is conclusive). The final determination of witness credibility and the weight to be accorded evidence is reserved to the full commission, and it is not the task of the court to weigh the evidence as found by the commission. Sharpe, 336 S.C. at 160, 519 S.E.2d at 105; Muir v. C.R. Bard, Inc., 336 S.C. 266, 282, 519 S.E.2d 583, 591 (Ct. App. 1999). Furthermore, "[e]xpert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony. Once admitted, expert testimony is to be considered just like any other testimony." Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999) (citations omitted). Given the conflicting testimony as to the precipitation of Lockridge's heart attack and our scope of review, we find substantial evidence in the record to support the commission's findings regarding causation.

Lockridge also argues the commission erred in holding that under S.C. Code Ann. § 42-1-160 (Supp. 2000), and case law, the test for compensability due to heart attacks caused by unexpected strain or overexertion or by unusual and extraordinary conditions of employment is based on the responsibility of an employee, rather than the physical effort the employee generally performs. Lockridge contends even if the test is based on an employee's responsibilities, the commission erred in failing to recognize Lockridge met the test. We disagree.

The general rule is that a heart attack is compensable as a worker's compensation accident if it is induced by unexpected strain or overexertion in the performance of the duties of claimant's employment or by unusual and extraordinary conditions of employment. Hoxit v. Michelin Tire Corp., 304 S.C. 461, 464, 405 S.E.2d 407, 409 (1991). Various extreme conditions have been considered sufficient to support a finding that an accident resulted from unexpected strain or overexertion or from unusual and extraordinary conditions of employment. See, e.g., Stokes, 306 S.C. 46, 410 S.E.2d 248 (extreme increase in work hours coupled with increased responsibilities resulting in nervous breakdown); Powell v. Vulcan Materials Co., 299 S.C. 325, 384 S.E.2d 725 (1989) (unexpected, serious altercation with employee's supervisor resulting in mental disorder); Holley v. Owens Corning Fiberglas Corp., 301 S.C. 519, 392 S.E.2d 804 (Ct. App. 1990) (climb of an eighty-seven foot ladder in extreme heat resulting in heart attack).

However, where a claimant cannot prove the heart attack was induced by unexpected strain or overexertion in the performance of employment duties or by unusual and extraordinary conditions of employment, there is no injury by accident compensable under section 42-1-160. See Hoxit, 304 S.C. at 464-65, 405 S.E.2d at 409 (applying the substantial evidence standard of review in affirming the commission's factual finding that a claimant's heart attack was not compensable since it did not result from unexpected strain or overexertion or unusual and extraordinary conditions of his employment); Jennings v. Chambers Dev. Co., 335 S.C. at 258-59, 516 S.E.2d at 458-59 (Ct. App. 1999) (upholding the commission's factual finding that a claimant's ruptured aneurysm was not a work-related injury where there was no evidence anything unusual or

unexpected, requiring abnormal exertion, occurred on the day of employee's death).

Lockridge cites several cases in his brief in support of his argument that the case law draws a distinction between the physical effort the employee generally performs and the employee's usual job responsibility when examining what is an unexpected strain or unusual and extraordinary conditions of employment resulting in a heart attack.[1] However, the cases on which Lockridge relies do not seem to draw such a fine distinction. Instead, these cases suggest that our standard of review governs the outcome on appeal of these factually driven cases.[2]

---

[1] In support of his argument, Lockridge relies on Canady v. Charleston County Sch. Dist., 265 S.C. 21, 216 S.E.2d 755 (1975) (affirming full commission's factual finding that an employee, who had been required to work two nights a week in addition to his normal janitorial duties, had suffered a heart attack that was induced by unexpected strain and overexertion in the performance of his employment duties); McWhorter v. South Carolina Dep't of Ins., 252 S.C. 90, 165 S.E.2d 365 (1969) (affirming full commission's factual finding that an employee, who experienced an extreme increase in work hours, great mental stress, lack of sleep, time pressure and physical exertion on the job, had suffered a heart attack that was induced by overexertion in the performance of his duties due to unusual or extraordinary conditions in his employment); Ricker v. Village Mgmt. Corp., 231 S.C. 47, 97 S.E.2d 83 (1957) (affirming the full commission's factual finding that an employee, a bus driver who experienced considerable physical strain in making a sharp turn during heavy traffic on a hot day, had experienced unusual exertion or strain during the course of his employment, which aggravated the employee's heart condition and resulted in a heart attack).

[2] Canady, 265 S.C. at 25, 216 S.E.2d at 757 (refusing to reverse the decision of the commission since there was competent evidence to support its factual findings); McWhorter, 252 S.C. at 98, 165 S.E.2d at 368 (same); Ricker, 231 S.C. at 55, 97 S.E.2d at 87 (finding evidence to support the factual findings of the commission).

There is conflicting evidence in the record as to Lockridge's responsibility in filling in for an absent lead man. Moreover, the testimony of Dr. Gaucher and Dr. Walker conflicts as to whether Lockridge's heart attack resulted from unexpected strain or overexertion or from unusual and extraordinary conditions of employment. In resolving these factual issues, the commissioner concluded Lockridge's "heart attack was not caused or induced by unexpected strain or overexertion in the performance of [his] duties of his employment [n]or by unusual and extraordinary conditions in the employment . . . ." The commission adopted the commissioner's findings. Where there is a conflict in the evidence, the commission's findings of fact are conclusive. Sharpe, 336 S.C. at 160, 519 S.E.2d at 105; Hoxit, 304 S.C. at 465, 405 S.E.2d at 409. There is substantial evidence in the record to support the commission's findings. Accordingly, the order of the circuit court order is

AFFIRMED.

HOWARD and SHULER, J.J., concur.

FACTS AND PROCEDURAL BACKGROUND

On June 15, 1991, Yensen's Camaro became disabled on Interstate 26 in Charleston County. The Camaro was on the shoulder of the highway. Yensen walked to a pay phone and called the highway patrol. Yensen was picked up by Officer Barnhill.

Yensen and Barnhill returned to Yensen's car. Barnhill parked his patrol car behind the Camaro and summoned a tow truck. A flatbed wrecker belonging to Specialty Towing arrived, and the driver of the wrecker parked in front of the Camaro to hook it up for towing. Yensen and Barnhill exited the patrol car and stood beside the driver's side of the Camaro while the tow truck driver hooked chains to it.

Theodore Huttner was driving a Chevrolet Beretta on Interstate 26 traveling toward Charleston. Huttner struck Yensen, Barnhill, and the tow truck driver, injuring them. Huttner did not stop, but was apprehended nearby after he ran off the road. The Beretta was owned by Huttner's employer, Jackie Cooper Ford Inc. (Jackie Cooper). Yensen and Barnhill subsequently filed negligence actions against Huttner. Yensen received a $900,000 verdict and Barnhill received an $85,000 verdict.

At the time of the accident, Specialty Towing was insured by Jefferson Pilot. Huttner owned a motorcycle and a van which were insured by State Farm. Jackie Cooper was insured by First Southern Insurance Company.[1] The trial judge granted summary judgment to Jefferson Pilot and directed verdicts in favor of State Farm and Guaranty Association.

---

[1] First Southern was later placed into receivership and liquidated. In its place, the South Carolina Property and Casualty Guaranty Association took over handling of these claims.

Viewing the evidence in the light most favorable to them, Officer Barnhill and Yensen were sitting in Barnhill's patrol car preparing an accident report for Yensen's Camaro when the tow truck arrived. The tow truck driver began hooking chains to Yensen's Camaro. Barnhill advised Yensen to retrieve his personal items from the car before it was lifted onto the tow truck. Both Barnhill and Yensen exited the patrol car and went to the driver's side of the Camaro. They were standing on the driver's side near the rear view mirror when Huttner struck them. In his deposition, Yensen testified he had called a friend to come pick him up. However, he also testified that he was planning to leave the scene with the tow truck driver. It is this testimony which Yensen asserts constitutes a genuine issue of material fact sufficient to survive summary judgment. Barnhill's position is that because he was acting in his official capacity of supervising the attachment of the Camaro to the tow truck, he was "occupying" the tow truck. We disagree with both assertions.

The trial judge correctly determined that Yensen and Barnhill were not insureds under the Jefferson Pilot policy. They were not occupying the tow truck as the policy defines that term.[2] Under the plain meaning of the words, neither Yensen nor Barnhill was "in, upon, getting in, on, out or off" the tow truck. While there was some testimony that Yensen intended to leave the scene in the tow truck, at the time of the accident, he was not in or on the tow truck, nor was he in the process of getting into it.

Further, under Whitmire, 254 S.C. at 187-92, 174 S.E.2d at 393-95, we do not find Yensen to have been alighting from the tow truck. Whitmire held that where a passenger was struck while within two or three feet of the car he had immediately "alighted from," that passenger may collect uninsured motorist coverage from the insurer of the car he had been riding in. Id. at 191-

[2] See McAbee v. Nationwide Mut. Ins. Co., 249 S.C. 96, 152 S.E.2d 731 (1967)(discussion of term "upon" as synonymous with "contact with"); Whitmire v. Nationwide Mut. Ins. Co., 254 S.C. 184, 174 S.E.2d 391 (1970)(term "alighting from" extends to a situation where the body has reached a point where there is no contact with the vehicle).

Huttner made conflicting statements about whether he had permission to drive the Beretta. Watson initially charged Huttner with use of a vehicle without the owner's consent after Watson spoke to Jim Dill at Jackie Cooper and was told Huttner did not have permission to use the car. However, that charge was dropped after Watson spoke to Jackie Cooper. Watson testified Cooper stated Huttner had both access and consent to drive cars he was working on.

Viewing the evidence in the light most favorable to Yensen and Barnhill, more than one reasonable inference can be drawn from the evidence on the issue of permission. Accordingly, we conclude the trial court erred in granting a directed verdict to Guaranty Association and reverse and remand for a hearing on this issue.

CONCLUSION

We affirm the grant of summary judgment to Jefferson Pilot and the grant of a directed verdict to State Farm. We reverse the grant of a directed verdict to Guaranty Association and remand to the trial court for further proceedings.[4]

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

CURETON and CONNOR, JJ., concur.

---

[4] Yensen and Barnhill argue the trial court erred in not allowing them to include certain portions of the deposition of a witness, Terry Meade, in the record on appeal. Substitution of deposition testimony was necessary after the trial testimony of Meade was lost. We find no reversible error. The appellants failed to proffer the omitted deposition material for this court's examination and have therefore demonstrated no prejudice to this court. TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998)(the failure to make a proffer of excluded evidence will generally preclude review on appeal).

For the foregoing reasons, the order on appeal is

AFFIRMED.

GOOLSBY and CONNOR, JJ., concur.

AFFIRMED

Robert L. Widener, Robert W. Dibble and Robert A. Muckenfuss, all of McNair Law Firm, of Columbia, for appellant.

William P. Davis and Kirby D. Shealy, III, both of Baker, Barwick, Ravenel & Bender, of Columbia, for respondent.

GOOLSBY, J.: Norfolk Southern Railway Company appeals the grant of summary judgment in favor of Frankie Lee Tyler on its cross-claim for equitable indemnity. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On May 18, 1995, Lamont Leon Livingston was riding as a passenger in a vehicle driven by Frankie Lee Tyler on South Carolina highway S-38-1029 in Orangeburg, South Carolina. As the vehicle attempted to cross a train track owned by the Norfolk Southern Railway Company ("Norfolk Southern"), a Norfolk Southern train struck the vehicle, resulting in fatal injuries to Livingston.

On May 14, 1997, in their capacities as personal representatives of the Estate of Livingston, plaintiffs Linda Toomer, Laura M. Simpson, and Tammy Taylor commenced a survival action and a suit for wrongful death against Norfolk Southern, the South Carolina Department of Transportation, Orangeburg County, and Tyler, alleging negligence and joint and several liability. In its answer Norfolk Southern asserted cross-claims for contractual and equitable indemnity against Tyler.

Tyler moved for summary judgment on the cross-claims in both actions. In response to the motion, Norfolk Southern acknowledged that no contract

upon the magistrate who tried the case." S.C. Code Ann. § 18-3-30 (1985). Within ten days of being served with the appellant's notice, the magistrate is required to file the notice with the clerk of court. S.C. Code Ann. § 18-3-40 (Supp. 2000). However, there is no mention of service of the notice of appeal on the State (the SCDPS in this case).

The dilemma posed in this case has arisen because criminal appeals from magistrates are heard in courts that operate under the Rules of Civil Procedure. Because appeals from criminal convictions are heard in the Court of Common Pleas, the SCDPS argues that Rule 74, SCRCP, mandates the appellant serve notice of appeal on the SCDPS. Rule 74 provides:

> Except for the time for filing the notice of appeal, the procedure on appeal to the circuit court from the judgment of an inferior court . . . shall be in accordance with the statutes providing such appeals. Notice of appeal to the circuit court must be served on all parties within thirty (30) days after receipt of written notice of the judgment, order or decision appealed from. In all such appeals the notice of intention to appeal shall be filed with the clerk of the court to which the appeal is taken and with the inferior court . . . within the time provided by the statute, or by this rule when no time is fixed by statute, for service of the notice of intention to appeal.

Rule 74, SCRCP. As delineated above, the procedure on appeal to the circuit court from the magistrate is provided in sections 18-3-10 through -70. However, that procedure only specifically requires the appellant to serve the magistrate with the notice of appeal. It does not address whether the appellant must serve the State.

There are no cases explaining the interaction between Rule 74 and appeals from criminal convictions in magistrates courts. Likewise, there are only a few cases explaining the purpose of Rule 74. Those cases basically quote from the Reporter's Note following Rule 75 that explains both Rules 74 and 75.

Brown was cited. Furthermore, the roadway had undergone some changes since the time of the incident.

Once again, "[t]he admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal." Gamble, 323 S.C. at 373, 474 S.E.2d at 441. Nevertheless, even if the magistrate should have allowed the video into evidence, it was cumulative to the prior testimony regarding the roadway and the diagram of the road used at trial. The exclusion of the video was harmless because the video was cumulative to other evidence and no prejudice resulted from its exclusion. State v. Weaverling, 337 S.C. 460, 473, 523 S.E.2d 787, 793-94 (Ct. App. 1999). Therefore, we find no error in the magistrate's exclusion of the videotape prepared by Brown.

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

AFFIRMED AS MODIFIED.

CURETON and GOOLSBY, JJ., concur.