The Supreme Court of South Carolina

In the Matter of Mariano
Frank Cruz, Respondent.

O R D E R

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

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

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

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

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Charles Baxter Burnette, III, Esquire, has been duly appointed by this Court and has the authority to

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

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

FOR THE COURT

Toal, C.J., not participating

Columbia, South Carolina

February 23, 2001

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

February 26, 2001

ADVANCE SHEET NO. 8

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Teresa Wintersteen, Petitioner,

v.

Food Lion, Inc., Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Orangeburg County
Charles W. Whetstone, Jr., Circuit Court Judge

Opinion No. 25254
Heard November 2, 2000 - Filed February 26, 2001

AFFIRMED

Jean P. Derrick, of Lexington, and F. Patrick Hubbard, of University of South Carolina School of Law, of Columbia, for petitioner.

Samuel F. Painter and Elizabeth H. Campbell, of Nexsen, Pruet, Jacobs & Pollard, of Columbia, for respondent.

JUSTICE WALLER: We granted a writ of certiorari to review Wintersteen v. Food Lion, Inc., 336 S.C. 132, 518 S.E.2d 828 (Ct. App. 1999). We affirm.

FACTS

Wintersteen slipped and fell on a puddle of clear liquid in a Food Lion grocery store. She was walking near a self-service soda fountain equipped with an ice dispenser when the fall occurred. As a result of the fall, she suffered a back injury and underwent surgery for herniated disks; she subsequently filed suit against Food Lion.

At the close of Wintersteen's case, Food Lion moved for a directed verdict, contending Wintersteen presented no evidence that any Food Lion employee had actual or constructive notice of the presence of the substance on the floor prior to the accident. The trial court denied the motion, concluding Food Lion, by providing its customers with a self-service soda fountain equipped with an ice dispenser, created a foreseeable risk that ice would fall onto the floor and create a dangerous condition. The jury awarded Wintersteen $500,000 in actual damages (reduced by her 45% comparative negligence) and $500,000 punitive damages. The Court of Appeals reversed, holding Wintersteen failed to prove Food Lion had actual or constructive knowledge of the substance on the floor. Accordingly, citing Simmons v. Winn-Dixie Greenville, Inc., 318 S.C. 310, 457 S.E.2d 608 (1995), and Bessinger v. Bi-Lo, Inc., 329 S.C. 617, 496 S.E.2d 33 (Ct.App.1998), the Court of Appeals held Food Lion was entitled to a directed verdict.

ISSUE

Did the Court of Appeals err in holding Food Lion was entitled to a directed verdict?

DISCUSSION

When reviewing the denial of a motion for directed verdict or judgment notwithstanding the verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Steinke v. South Carolina Dep't of Labor, 336 S.C. 373, 520 S.E.2d 142 (1999). If the evidence as a whole is susceptible of only one reasonable inference, no jury

issue is created and a directed verdict motion is properly granted. Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000).

To recover damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, the plaintiff must show either (1) that the injury was caused by a specific act of the defendant which created the dangerous condition; or (2) that the defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it. Anderson v. Racetrac Petroleum Inc., 296 S.C. 204, 371 S.E.2d 530 (1988); Pennington v. Zayre Corp, 252 S.C. 176, 165 S.E.2d 695 (1969); Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 262 (1957). In the case of a foreign substance, the plaintiff must demonstrate either that the substance was placed there by the defendant or its agents, or that the defendant had actual or constructive notice the substance was on the floor at the time of the slip and fall. Calvert v. House Beautiful Paint & Decorating Ctr., Inc., 313 S.C. 494, 443 S.E.2d 398 (1994); Wimberly v. Winn-Dixie Greenville, Inc., 252 S.C. 117, 165 S.E.2d 627 (1969); Pennington v. Zayre Corp., 252 S.C. 176, 165 S.E.2d 695 (1969); Orr v. Saylor, 253 S.C. 155, 169 S.E.2d 396 (1969); Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 262 (1957); Gilliland v. Pierce, 235 S.C. 268, 111 S.E.2d 521 (1959); Gillespie v. Wal-Mart Stores, Inc., 302 S.C. 90, 394 S.E.2d 24 (Ct.App.1990).

Wintersteen does not dispute the trial court's ruling that Food Lion neither placed the substance on the floor nor had actual or constructive notice thereof. Rather, she contends that, if it is foreseeable an item will fall to the floor, then the storekeeper has a duty to minimize such risks and take measures to prevent the items from falling. Although this approach has some appeal, we decline to depart from our traditional "foreign substance" analysis. We adhere to prior precedent that a storekeeper is liable only upon a showing that it actually placed the foreign substance on the floor, or that it had actual or constructive notice thereof. Simmons v. Winn-Dixie; Hunter v. Dixie Home Stores.

Storekeeper liability is founded upon the duty of care a possessor of land owes to an invitee. Generally, a person owes an invitee the duty of exercising **reasonable** or **ordinary** care for his safety and is liable for any injury resulting from the breach of this duty. Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984). Although a merchant is not an insurer of the safety of his customers. Felder v. K-Mart, 297 S.C. 446, 377 S.E.2d 332 (1989), he owes a duty to keep aisles and passageways in a reasonably safe condition. Moore v. Levitre, 294

S.C. 453, 365 S.E.2d 730 (1988).

To date, we have not required storekeepers to take actions to prevent or minimize the foreseeable risk of a foreign substance on the floor of its premises.[1]

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[1] Wintersteen contends this Court and the Court of Appeals did so in Henderson v. St. Francis Community Hospital, 303 S.C. 177, 399 S.E.2d 767 (1990), and Pinckney v. Winn-Dixie Stores, Inc., 311 S.C. 1, 426 S.E.2d 327 (Ct. App. 1992). We disagree. Henderson involved a slip and fall on a sweet gum ball in the parking lot of St. Francis Hospital. The hospital built the parking lot in 1969, planted sweet gum trees in 1971, and notwithstanding the advice of its architect that the trees be removed to implement a 1982 addition to the lot, added a stairway beside one of the trees. We held a jury question was presented as to whether the hospital was negligent in failing to either remove the trees or employ sufficient safeguards "when it had actual and constructive knowledge of the dangerous condition created by the sweet gum trees." 303 S.C. at 181, 399 S.E.2d at 769. Implicit in this holding is the fact that the defendant had constructive notice of the gum balls on the ground on the day of the accident. Accordingly, as actual and constructive notice was found in Henderson, it is inapposite to the case at hand.

Pinckney is a Court of Appeals case in which the plaintiff slipped and fell on poinsettia leaves. The Court of Appeals held there was evidence of record from which the jury might have inferred the store manager observed the poinsettia leaves falling to the floor and that the leaves were left on the floor until the next periodic sweeping. Implicit in this finding is a holding that the store had actual or constructive notice of fallen leaves at the time of the plaintiff's fall. Accordingly, Pinckney is of no aid to Wintersteen.

Prior to Pinckney and Henderson, it was generally held that constructive notice is established through evidence the foreign substance was on the floor for a sufficient length of time that the storekeeper should have discovered and removed it. Wimberly v. Winn-Dixie Greenville, Inc., 252 S.C. 117, 165 S.E.2d 627 (1969). However, this is not the only manner in which to establish constructive notice. Notably, in both Henderson and Pinckney, the conditions were of such a recurrent nature that the defendants were chargeable with constructive notice on the day of the accident. Although mere recurrence alone is insufficient to establish constructive notice, there may be certain factual

In fact, two recent cases reject Wintersteen's contention.

In Simmons v. Winn-Dixie Greenville, Inc., 318 S.C. 310, 457 S.E.2d 608 (1995), the plaintiff did not challenge this Court's long-standing rule regarding a storekeeper's actual or constructive notice of foreign substances. Simmons contended, however, that due to the number of slip and fall incidents occurring in Winn-Dixie's stores, that it had created a dangerous condition and foreseeable risk of harm. We declined to expand the standard of actual or constructive notice in the foreign substance slip and fall cases. In declining to adopt a "foreseeability" rule in foreign substance cases, Simmons implicitly rejected a "duty to prevent" rule.

Similarly, in Bessinger v. Bi-Lo, Inc., 329 S.C. 617, 496 S.E.2d 33 (Ct. App. 1998), the plaintiff slipped on a grape in a Bi-Lo check-out line. She contended the store's method of displaying the grapes in vented bags created a dangerous condition. As in Simmons, the Court of Appeals in Bessinger rejected the contention, holding the plaintiff was required to prove either actual or constructive notice of the foreign substance.

We find a very legitimate basis for adherence to our traditional slip and fall analysis. In such cases, although there may be a foreseeable risk that substances will wind up on the floor, there is no specific act of the defendant which causes the substance to arrive there, i.e., it generally arrives there through the handling of a third party. To require shopkeepers to anticipate and prevent the acts of third parties is, in effect, to render them insurers of their customers' safety. This is simply not the law of this state. See Hunter v. Dixie Home Stores, 232 S.C. 139, 145, 101 S.E.2d 262, 265 (1957) (noting Kentucky case which held shopkeeper was not, as a general rule, bound to anticipate an independent act of negligence by a third party in placing such objects on the floor**)**; Milligan v. Winn-Dixie Raleigh, 273 S.C. 118, 120, 254 S.E.2d 798, 799 (1979) (noting "[i]t has long been the law in South Carolina that a merchant is not an insurer of the safety of his customer but owes them only the duty of

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patterns, as in Henderson and Pinckney, wherein the recurrence is of such a nature as to amount to a continual condition, and that factor, when coupled with other evidence, such as store employees' knowledge thereof, may be sufficient to create a jury issue as to the defendant's constructive notice at the time of the accident.

exercising ordinary care to keep the premises in reasonably safe condition").

Although some courts have adopted either a "mode of display" or a duty to prevent analysis, such an approach has been criticized. As noted by one court,

> In a slip and fall case [the] focus is on whether the defendant acted reasonably in discovering and removing foreign objects from the floor. To shift the inquiry to the storekeeper's chosen method of displaying and packaging goods would place an unreasonable burden on storekeepers. It simply would not be reasonable to require storekeepers to make it impossible for food items to fall on the floor. Nor, do we think, would such a result be possible. . . . Some latitude must be allowed to the proprietor of a store to display goods in a manner consistent with the nature of the goods and of the business.

Richardson v. Kroger, 521 So.2d 934, 937 (Ala. 1988). In Baker v. Toys-R-Us Inc., 133 F.3d 913 (1998 WL 7939)(4th Cir. 1998)(applying South Carolina law), the Fourth Circuit Court of Appeals, analyzing the distinction between a "created danger" case and a "foreign substance" case, noted,

> Retail stores exist for the singular purpose of selling goods to customers, and therefore the goods must be subject to removal by store patrons. Sometimes, however, this results in a dangerous condition created when a store's customers drop products on the floor. Because this danger is a necessary consequence of the retail business, the South Carolina courts appear to rule that such hazards are reasonable as a matter of law so long as they are remedied when discovered. Thus, where the defect results from the unauthorized act of another, the storekeeper is held only to reasonable care in the discovery and remedy or removal of it.

See also Rowe v. Winn-Dixie Stores, 714 So.2d 1180 (Fla. 1998) (declining, in supermarket slip and fall cases, to adopt "negligent method of operation" theory which would require a continuous duty to look out for the safety of patrons); Lingerfelt v. Winn-Dixie Texas, 645 P.2d 485, 492 (Tex. 1982)(Justice Barnes, dissenting) (expressing view that majority's ruling "amounts to imposition of liability on a 'no fault basis' and store owners who display their fruits and vegetables in their usual and customary manner will become insurers. The

result, of course, will be that stores will be forced to wrap in cellophane or other containers, their fresh produce which . . . is not warranted or desired by the average store customer").

CONCLUSION

We decline to depart from traditional foreign substance analysis: a storekeeper is only liable if it places the substance on the floor, or if it has actual or constructive notice thereof. See Simmons v. Winn-Dixie, supra (declining to expand "foreign substance" liability based upon inherently dangerous condition and foreseeable risk of harm). Accordingly, as Wintersteen failed to prove either of these, Food Lion was properly granted a directed verdict, and the Court of Appeals' opinion is therefore

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Ivey
Pernell Starks, Respondent.

Opinion No. 25255
Submitted January 30, 2001 - Filed February 26, 2001

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Assistant Deputy Attorney General J. Emory Smith, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Ivey Pernell Starks, of Columbia, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a definite suspension from the practice of law for a period of two years retroactive to the date he was placed upon disability inactive status and until he is removed from disability

inactive status and reinstated to the practice of law by order of this Court.[1] We accept the agreement. The facts as admitted in the agreement are as follows.

Facts

Respondent was either retained or appointed to represent several clients in criminal and civil matters. He demonstrated a pattern and practice of failing to represent the clients diligently and competently and failing to adequately communicate with them.

In several instances, respondent made little or no contact with the clients after being retained. He failed to respond to a client's written inquiries or accept the client's telephone calls and failed to notify another client of a hearing which resulted in that client being jailed after having his bond revoked for failing to appear. Respondent's failure to communicate with clients led to one client's incarceration for a period of time which exceeded the maximum prison sentence he could receive. In one instance, respondent entered a guilty plea on behalf of a client and in another instance he entered an agreement to have a case transferred from federal court to state court without authorization from the clients.

In several matters, respondent took little or no action on behalf of his clients after being retained. In one criminal matter, respondent did not investigate the facts, did not interview any witnesses, and did not obtain any discovery. In the same case, he filed a notice of appeal on behalf of the client but did not respond to the request of the Office of Appellate Defense (OAD) about his status as appellate counsel so OAD closed their file. In another matter, respondent filed a motion on behalf of a civil client but completed little work thereafter. In two other matters, respondent was retained to initiate lawsuits which were never filed. Respondent failed to return filing

[1]Respondent was placed on disability inactive status by order of this Court dated August 9, 1996. In the Matter of Starks, 322 S.C. 564, 474 S.E.2d 421 (1996).

fees to one of those clients.

Although respondent has been ill since November 1995, he has failed to ensure that action was taken regarding clients' cases and has failed to return a client's file.

Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing clients); Rule 1.4(a) (a lawyer shall keep clients reasonably informed about the status of their cases and promptly comply with clients' reasonable requests for information); Rule 8.4(a) (violating the Rules of Professional Conduct); Rule 8.4(d) (engaging in conduct involving misrepresentation) and Rule 8.4(e) (engaging in conduct that is prejudicial to the administration of justice).

Respondent has also violated the following: Rule 7(a)(1), RLDE (violating or attempting to violate the Rules of Professional Conduct); Rule 7(a)(5), RLDE and Paragraph 5(E) of former Rule 413 (engaging in conduct tending to pollute the administration of justice or bringing the legal profession into disrepute, and engaging in conduct demonstrating an unfitness to practice law); and Paragraph 5(A), of former Rule 413 (violating the oath of office taken upon admission to the practice of law).

Conclusion

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for a period of two years retroactive to the date he was placed upon disability inactive status and until he is removed from disability inactive status and reinstated to the practice of law by order of this Court. 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, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

The Supreme Court of South Carolina

IN THE MATTER OF RUSSELL S. STEMKE, RESPONDENT

ORDER

Respondent was suspended on November 20, 2000, for a period of three months. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR. The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

February 22, 2001

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

R. Phil Roof,

Appellant,

v.

Arthur M. Swanson, Mason R. Chrisman, Charles R. Jackson, La Vonne N. Phillips, Jerry Shearer, W. Carlyle Blakeney, R. Lee Burrows, Jr., and Joseph P. Griffith, Jr.,

Respondents.

Appeal From Richland County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 3305
Heard December 11, 2000 - Filed February 26, 2001

AFFIRMED

Gerald M. Finkel, Howard S. Sheftman, both of Finkel & Altman, of Columbia; and Robert E. Culver, of Charleston, for appellant.

Carl B. Epps, III, and Laura Callaway Hart, both of Nelson, Mullins, Riley & Scarborough, of Columbia, for respondents.

GOOLSBY, J.: In this shareholder action for breach of fiduciary duty, R. Phil Roof appeals the grant of summary judgment to Arthur Swanson, Mason Chrisman, Charles Jackson, La Vonne Phillips, Jerry Shearer, Carlyle Blakeney, R. Lee Burrows, Jr., and Joseph P. Griffith, Jr., all of whom are former members of ComSouth's Board of Directors. The trial court found Roof's action was barred by the statute of limitations. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In July 1988, ComSouth Bankshares, Inc. (ComSouth) began operations as a bank holding company with the opening of its wholly-owned subsidiary, the Bank of Columbia. In April 1990, ComSouth opened its second bank and wholly-owned subsidiary, the Bank of Charleston. Between December 1991 and July 1992, representatives from both the National Bank of South Carolina (NBSC) and Carolina First Corporation held negotiations with the respondents, who were then members of the ComSouth board of Directors, in an attempt to acquire ComSouth.

At the time of the negotiations, Roof was a ComSouth shareholder. On July 30, 1997, he commenced this action against the respondents, alleging the Board's failure to immediately disclose the existence and the substance of the negotiations to shareholders constituted a breach of fiduciary duty and a violation of S.C. Code Ann. section 35-1-1210 (1987). Roof further alleged the acquisition offers would have greatly increased the value of ComSouth's shares and the Board rejected the offers in an attempt to purchase the stock at depressed prices from existing shareholders.

Prior to the commencement of Roof's individual action, Roof was a member of a prospective class action filed by fellow ComSouth shareholder, Carl Almond. Almond filed the class action against the ComSouth Board on January 17, 1994, alleging the same breaches of duty involved in this case. By order dated October 9, 1996, Judge Casey Manning denied Almond's motion for class certification.

The respondents answered Roof's complaint and moved for summary judgment on several grounds, including that the claim was untimely under the applicable statute of limitations.[1] At a hearing on the motion, Roof withdrew his securities fraud claim under section 35-1-1210 and proceeded solely on the alleged breach of fiduciary duty. The parties stipulated that Roof's cause of action accrued on July 28, 1992, the date the Board ceased any sale or merger discussions with NBSC and Carolina First. Judge Jackson V. Gregory found Roof's action was barred by the statute of limitations and granted summary judgment to the respondents. This appeal followed.

ISSUE

The sole issue presented in this appeal is whether S.C. Code Ann. section 33-8-300(e) bars a cause of action brought within three years of accrual when the plaintiff had knowledge of the breach more than two years prior to the commencement of the action.

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of

[1] S.C. Code Ann. § 33-8-300(e) (1990).

law.[2] In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party.[3]

LAW/ANALYSIS

Section 33-8-300(e) provides:

> An action against a director for failure to perform the duties imposed by this section must be commenced within three years after the cause of action has accrued, or within two years after the time when the cause of action is discovered, or should reasonably have been discovered, whichever sooner occurs. This limitations period does not apply to breaches of duty which have been concealed fraudulently.[4]

As we noted above, the parties stipulated that the cause of action accrued on July 28, 1992. Roof, however, did not file this action until July 27, 1997, and service was not effected until on or after August 15, 1997. Roof argues the statute of limitations was tolled during the thirty-three months that the Almond class action was pending and, as a result, only twenty-seven months was charged against the statute.

Whether a statute of limitations is tolled during the pendency of a class action is an issue of first impression in South Carolina. We, however, deem it

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[2] Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); Rule 56(c), SCRCP.

[3] Young, 333 S.C. at 717-18, 511 S.E.2d at 415.

[4] S.C. Code Ann. § 33-8-300(e) (1990).

unnecessary to address the issue in the present case because even assuming Roof's method of calculation is correct, he failed to commence his action within two years of his discovery of the breach.

On appeal, Roof contends the statute provides for a minimum rather than maximum three-year limitations period. He argues that the phrase "whichever sooner occurs" refers to the distinction between actual and constructive notice of the breach, rather than the expiration of the two and three-year periods. He, therefore, posits that the "discovery provision" can operate only to increase the three-year period. We disagree.

"In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation."[5] Furthermore, "[t]he statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design and policy of lawmakers."[6]

The discovery provision of section 33-8-300(e) – "when the cause of action is discovered or reasonably should have been discovered" – provides that the two-year limitations period is triggered by either the actual or the constructive discovery of a breach. Implicit in the provision is the notion that either event, without regard to which occurs first, is sufficient to start the two-year limitation running.

Moreover, we believe that, if the General Assembly had wished to provide for a minimum limitations period of three years, it would have used language

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[5] City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997).

[6] Rosenbaum v. S-M-S 32, 311 S.C. 140, 143, 427 S.E.2d 897, 898 (1993).

similar to that found in section 15-3-545(B).[7] That statute, which provides for a limitations period for cases in which a foreign object is left inside a patient after surgery, states in pertinent part:

> The action must be commenced within two years from date of discovery or when it reasonably ought to have been discovered; provided, that, in no event shall there be a limitation on the commencement of the action less than three years after the placement or leaving of the appliance or apparatus.[8]

Unlike the language used above, section 33-8-300(e) provides for alternative limitations periods running from either the date of accrual or the date of discovery.

Absent fraudulent concealment, the three-year period establishes the maximum amount of time available to a plaintiff to bring a claim under the statute. It applies in all cases where the plaintiff discovers his cause of action more than one year but less than three years after accrual.

Roof also argues that, at the very least, the statute is ambiguous and, as such, it must be construed against the party seeking to use it to bar the claim. He contends that where there is any doubt as to which limitations period should apply, the conflict must be resolved in favor of the longer period.[9] We find this argument unavailing.

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[7] S.C. Code Ann. § 15-3-545(B) (2000 Supp.).

[8] Id. (emphasis added).

[9] See Scovill v. Johnson, 190 S.C. 457, 461, 3 S.E.2d 543, 545 (1939) (quoting Payne v. Ostrus, 50 F.2d 1039, 1042 (8th Cir. 1931), "[I]f substantial doubt exists, the longer, rather than the shorter, period of limitation is to be preferred . . . .").

"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."[10]

We hold that section 33-8-300(e) requires a plaintiff to commence suit within either: (1) three years after the cause of action accrues; or (2) two years after the date the plaintiff discovers or reasonably should discover the breach. Whichever period occurs or expires first controls.

Because Roof stipulates that twenty-seven months expired between the date of discovery and the date he commenced this action, his claim is untimely and barred by the statute of limitations.

AFFIRMED.

CURETON and CONNOR, JJ., concur.

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[10] Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William L. Aaron, Claimant,

Appellant,

v.

Viro Group, Employer, and ITT Hartford, Carrier,

Respondent.

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

Opinion No. 3306
Heard January 9, 2001 - Filed February 26, 2001

REVERSED AND REMANDED

Franklin D. Beattie, of Aiken, for appellant.

Scott B. Garrett, of McAngus, Goudelock & Courie, of Columbia, for respondents.

ANDERSON, J.: William L. Aaron ("Aaron") appeals an order of

the Circuit Court, which affirmed the determination of the full Workers' Compensation Commission ("Commission") that Aaron's rights to compensation and to take or prosecute any proceedings against his employer Viro Group and its workers' compensation carrier, ITT Hartford (collectively "Employer"), under the Workers' Compensation Act were suspended because of his failure to submit to a medical examination, as required by S.C. Code Ann. § 42-15-80. We reverse and remand.

FACTS / PROCEDURAL HISTORY

Aaron injured his back at work on May 8, 1995. The injury was admitted by Employer, who provided medical treatment to Aaron by Dr. Edward Golay. Dr. Golay, a family practice physician, was designated by Employer as Aaron's treating physician. Dr. Golay treated Aaron on numerous occasions from the time shortly after Aaron's accident until December 1996. During this treatment, Dr. Golay referred Aaron for magnetic resonance imaging ("MRI") testing. Dr. Ross D. Lynch, a specialist in orthopedics, ordered an MRI for Aaron. The test was performed May 15, 1996. Following the MRI, Dr. Lynch assigned Aaron a 5% impairment rating and dismissed Aaron from his care on June 4, 1996. Dr. Golay continued to treat Aaron.

Dr. Golay referred Aaron to Dr. Randall G. Drye, a neurosurgeon, in November 1996. As a result of this referral, Dr. Drye examined Aaron and recommended surgery. Surgery was performed on Aaron's back on December 27, 1996. Employer refused to pay for this procedure. Following treatment, Dr. Drye informed Aaron he could return to work, but Employer laid him off.

In January 1997, Aaron filed a Form 50 request for a hearing. Aaron withdrew this request before the hearing took place. Aaron filed another Form 50 on June 12, 1997. By letter dated September 15, 1997, Employer requested Aaron attend a medical examination on September 30, 1997, pursuant to § 42-15-80. By letter dated September 29, 1997, Aaron's attorney stated Aaron could not attend on September 30, 1997, but would be available on or after October 5, 1997. Employer rescheduled the exam for October 13, 1997; however, Aaron did not appear for this scheduled evaluation.

Based on Aaron's refusal to submit to a medical evaluation, Employer filed a motion to compel Aaron to submit to the examination and to postpone the scheduled hearing pursuant to § 42-15-80. Aaron filed an objection to this motion.

By order dated October 17, 1997, the single commissioner summarily denied Employer's motion without hearing or argument. Employer filed a Form 30 requesting review by the full Commission. However, pending this appeal, the single commissioner issued an order dated December 5, 1997, awarding Aaron workers' compensation benefits based on a hearing held on October 23, 1997. Employer filed an additional Form 30 request for review as a result of the December order.

Additionally, by order dated January 12, 1998, the single commissioner again denied Employer's motion to compel a medical evaluation or suspend the proceedings. Employer filed a third Form 30 requesting full Commission review of the single commissioner's denial of its motion, although a hearing on the merits had already taken place.

The three Form 30s were consolidated for appeal. By order dated June 16, 1998, the full Commission reversed the single commissioner's orders dated October 17, 1997 and January 12, 1998, finding Aaron's rights to compensation and to take or prosecute any proceedings against Employer were suspended by his failure to submit to an independent medical examination ("IME"), as required by § 42-15-80. As a result of finding Aaron's right to prosecute was suspended, the full Commission vacated the order of the single commissioner dated December 5, 1997, which awarded Aaron benefits, because the October 23, 1997, hearing was improperly convened. Aaron appealed this order to the Circuit Court, which affirmed the decision of the full Commission. This appeal follows.

LAW/ANALYSIS

Aaron argues the Circuit Court erred in affirming the full Commission's order, which held Aaron's rights to compensation and to take or prosecute any

proceedings against Employer were suspended because of his failure to submit to a medical examination, as required by § 42-15-80. We agree.

Section 42-15-80 provides:

> After an injury and so long as he claims compensation, the employee, if so requested by his employer or ordered by the Commission, **shall submit** himself to examination, at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer or the Commission. The employee shall have the right to have present at such examination any duly qualified physician or surgeon provided and paid by him. No fact communicated to or otherwise learned by any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in hearings provided for by this Title or any action at law brought to recover damages against any employer who may have accepted the compensation provisions of this Title. **If the employee refuses to submit himself to or in any way obstructs such examination requested by and provided for by the employer, his right to compensation and his right to take or prosecute any proceedings under this Title shall be suspended until such refusal or objection ceases and no compensation shall at any time be payable for the period of suspension unless in the opinion of the Commission the circumstances justify the refusal or obstruction.** The employer or the Commission may in any case of death require an autopsy at the expense of the person requesting it.

(emphasis added).

Our Supreme Court first addressed a claimant's refusal to submit to an IME in Hill v. Skinner, 195 S.C. 330, 11 S.E.2d 386 (1940). The Hill Court recognized the trial court's determination that where a claimant refuses to submit to a physical examination upon the request of the duly authorized agent

of the employer and the court can find no justification for his refusal to submit to the examination, the mandatory provisions of Section 27 of Act No. 610, 1936 Acts 1231 ("Section 27")[1] become operative and the claimant is not entitled to compensation for the period that elapsed between the time of his refusal and the time when such refusal ceased. Id. at 338, 11 S.E.2d at 390.

In Wardlaw v. J.G. Ridgeway Construction Co., 212 S.C. 116, 46 S.E.2d 662 (1948), the claimant was suffering from a back injury. The physician desired to perform a spinal puncture on the claimant to complete his diagnosis. The claimant averred he was afraid of the puncture and afraid "to be worked on in the spinal part anywhere at all." Id. at 119, 46 S.E.2d at 663. Further, he knew of people who had been disabled as the result of such treatment and a friend, he said, had died from a "spinal shot." Id. The Court held that where no medical evidence was submitted on the issue whether the spinal puncture was dangerous, the employee was not justified in refusing to submit to the spinal puncture because of an unfounded fear of danger. Id. at 121, 46 S.E.2d at 664.

The first case in which the Supreme Court determined a claimant's refusal to submit to an examination was justified was Ward v. Dixie Shirt Co., 223 S.C. 448, 76 S.E.2d 605 (1953). In Ward, the claimant refused to undergo a spinal myelogram test by a Spartanburg neurosurgeon selected by her employer's insurer. The claimant's primary care physician, the doctor initially assigned to claimant by her employer, believed the claimant's condition required the "most expert neurological opinion" and referred her to an orthopedic surgeon and a neurosurgeon at Emory University in Atlanta. Id. at 453, 76 S.E.2d at 607. The claimant wanted to pursue the course of treatment prescribed by her primary care physician. The employer sought to suspend the claimant's compensation payments until the claimant reported to the Spartanburg neurosurgeon. A single commissioner, finding the evidence relating to the claimant's condition

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[1] Section 42-15-80 contains substantially the same language as Section 27 and all other subsequent code sections that required the submission of the claimant to independent medical examination. See 1962 Code § 72-307; 1952 Code § 72-307; 1942 Code § 7035-30.

warranted her refusal to be treated by the employer's designated specialist, denied the employer's request. Id. at 454, 76 S.E.2d at 608. The commissioner further ordered the employer and its insurer to defray the claimant's costs of examination by the Emory surgeons. Id. The full Commission and Circuit Court affirmed. Id. Hence, the claimant's rights under the Workmen's Compensation Act were not suspended for her refusal.

In reaching its decision, the Ward Court articulated the proper standard of review for the determination of justification on the part of the claimant. The Court stated:

> Where the facts are disputed and are subject to more than one reasonable inference as to whether the employee is justified in refusing to submit to an examination requested by his employer, the conclusion of the Industrial Commission thereabout is final. But where the circumstances warrant only one reasonable inference, the question becomes one of law rather than of fact and the decision of the Industrial Commission is subject to review.

Id. at 455, 76 S.E.2d at 608 (citation omitted).

Similarly, the Court in Singleton v. Young Lumber Co., 236 S.C. 454, 114 S.E.2d 837 (1960), found the claimant's refusal to submit to a medical examination requested by his employer was justified. The claimant had previously seen three other physicians. These physicians examined him, rated him as to his physical impairment, and testified in the case. The claimant fully cooperated with these doctors during his numerous visits to them, which often entailed the claimant making day-long trips to receive treatment. In light of his cooperation, the Court found no reason to penalize the claimant due to his refusal to undergo additional examination and testing. Id. at 463, 114 S.E.2d at 841.

In Ford v. Allied Chemical Corp., 252 S.C. 561, 167 S.E.2d 564 (1969), the claimant had seriously injured his neck in a workplace accident. He was put under the care of the company doctor, a general practitioner. The company

doctor, determining the claimant's condition required the attention of a specialist, referred the claimant to an orthopedic surgeon. The claimant saw the specialist. The claimant communicated his symptoms to the orthopedic surgeon; however, the doctor was not "impressed" with the claimant's complaints and discharged him, suggesting he "buy some aspirin and return to work." Id. at 565, 167 S.E.2d at 566. Unsatisfied and continuing to suffer from pain, claimant sought the services of another orthopedic surgeon, whereby the claimant was admitted to the hospital. The carrier for the employer demanded the claimant immediately put himself back under the company doctor's care. The claimant did not comply with this request. The claimant later made a claim to the Industrial Commission for compensation and medical benefits. The employer denied liability, asserting the claimant refused the treatment it had offered to him. Upon its review, the Supreme Court upheld the determination, finding the claimant's lack of improvement stemming from the employer's treatment justified the claimant's refusal of continued care at his employer's direction. Id. at 567, 167 S.E.2d at 567.

This Court addressed the issue of an employee refusing employer-sponsored medical care in Scruggs v. Tuscarora Yarns, Inc., 294 S.C. 47, 362 S.E.2d 319 (Ct. App. 1987). In Scruggs, the employer scheduled a myelogram for the claimant who had injured her back at work. The claimant was a 61-year-old with a heart condition. She was advised by her physician a myelogram was not to be taken lightly due to her age and health. Additionally, the doctor told the claimant that subsequent orthopedic surgery would likely not improve her condition. She therefore did not pursue further care from the employer's physicians. The single commissioner found the claimant suffered a total and permanent disability of 50% and should receive weekly compensation for a period not to exceed 500 weeks. Id. at 49, 362 S.E.2d at 321. The full Industrial Commission and Circuit Court affirmed. Id. at 48, 362 S.E.2d at 320. On appeal to the Court of Appeals, the employer contended the award was erroneous because the claimant did not submit to medical treatment. This Court disagreed, finding sufficient evidence existed supporting the commission's findings that the claimant's refusal to accept treatment was justified due to its potential limited efficacy. Id. at 50, 362 S.E.2d at 321.

It is strikingly strange that Employer honored a referral of Aaron by Dr. Golay to Dr. Lynch, but would not approve Aaron's referral to Dr. Drye. The record reveals Dr. Golay was the treating physician of Aaron. Dr. Golay was Employer's physician.

The Commission, in its order, stated:

> The law as prescribed in the Workers' Compensation Act and the greater weight and preponderance of the evidence supports the finding that the Claimant unjustifiably refused to submit to a medical examination requested and provided for by the Defendants.

The ruling by the Commission is conclusory at best. There are no factual bases for the statement. The order of the Commission is violative of the statute. The statute mandates the exercise of discretion in analyzing the factual scenario in totality. Simply put, this was not done.

CONCLUSION

We remand this matter to the Circuit Court to further remand to the full Workers' Compensation Commission for the purpose of making a factual determination, pursuant to § 42-15-80, whether Aaron's refusal was justified under all of the surrounding circumstances.

For the foregoing reasons the order of the Circuit Court is

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Pamela C. Curcio, as Personal Representative of the Estate of Dennis M. Turner,

Appellant,

v.

Caterpillar, Inc. a.k.a Caterpillar Tractor Company,

Respondent.

Appeal From Greenville County
John W. Kittredge, Circuit Court Judge

Opinion No. 3307
Formerly Unpublished Opinion 2001-UP-085
Heard January 9, 2001 - Filed February 7, 2001
Refiled February 26, 2001

AFFIRMED

John Kassel and B. Randall Dong, of Suggs & Kelly, of Columbia, for appellant.

W. Frances Marion, Jr., of Haynsworth, Sinkler & Boyd, of Greenville, for respondent.

GOOLSBY, J.: A jury awarded Pamela C. Curcio, as Personal Representative of the Estate of Dennis M. Turner, $500,000 in a wrongful death action against Caterpillar, Inc. The trial court later set the verdict aside and dismissed the complaint. Curcio appeals. We affirm.

BACKGROUND

Turner worked as a heavy-equipment mechanic for Blanchard Machinery Company in Simpsonville, South Carolina. On March 23, 1994, he was crushed to death while performing maintenance on a Caterpillar 953 Track Loader.

The Caterpillar 953 Track Loader operates on a series of hydraulic pumps. The cab of the loader is located over the engine and pumps. To remove the engine for repairs, the cab must be tilted forward. The Caterpillar Disassembly & Assembly Manual gives instructions for tilting the cab to either 24 degrees or 90 degrees. At either position, the cab is bolted to the frame of the machine to hold it in place, and brace bars are provided for this purpose. If the cab is not bolted to the frame, it is chained to the front implement of the machine.

According to the manual, the engine can be started when the cab is tilted to 24 degrees, but the transmission stays in a neutral position. In contrast, the manual has the following warning for tilting the cab to 90 degrees:

> **Do not start the engine when the cab/ROPS/platform[1] is at 90°. The governor control, implement hydraulics, speed-direction and speed-brake linkages are disconnected when the cab/ROPS/platform is tilted to 90°. If the valve spools were moved either accidentally or intentionally when the linkages were disconnected, uncontrolled lift arm and/or track movement will occur when the engine is started. As a result, it**

[1] ROPS is an abbreviation for rollover protective structure.

is possible for the brace group which retains the cabs/ROPS/platform to fail. This can result in severe injury to a serviceman or to bystanders and/or damage to the machine.

If the engine must be started, first, lower the cab to 24° reconnect to the hydraulic jack, and install the support bracket. . . .

(Boldface in original.) In addition, a warning in boldface print appears near the beginning of the manual advising service personnel to "**[d]isconnect batteries before performance of any service work.**"

As noted in the manual, various warnings appear on the loader itself. Located adjacent to where the brace is bolted to the frame when the loader is tilted to 24 degrees is the following alert:

WARNING

PERSONAL INJURY CAN OCCUR IF IMPROPER PLATFORM TILTING PROCEDURES ARE USED. SEE MAINTENANCE GUIDE FOR PROCEDURE TO TILT PLATFORM TO THE 24° POSITION.

- Before raising platform, remove control linkage pins to prevent damage to the linkage.
- Install platform support link properly before any work is done on or under the raised platform to ensure it will not fall.
- Reinstall and properly tighten the ROPS mounting bolts to prevent reduction of rollover protection.

SEE SERVICE MANUAL PROCEDURE TO TILT PLATFORM TO THE 90° POSITION. DO NOT RUN THE ENGINE WITH THE PLATFORM TILTED TO THE 90° POSITION. **LIFT ARMS MAY RAISE AND COULD BREAK PLATFORM 90° SUPPORT BRACKET AND PLATFORM WILL FALL.**

(Boldface in original, underlining added.)

To remove the engine for repairs, Turner had the cab tilted to an angle greater than 90 degrees so that it rested on the tilt cylinders in a "laid-over" position. Although Caterpillar did not include this procedure in the manual, several mechanics testified that they chose to use it because it appeared less precarious than the 90-degree position and required less time. Dr. Jeffrey Warren, Curcio's mechanical engineering expert witness, testified that, in the 90-degree position, the 1,933-pound cab is held in place by only the installation of a small bracket with a single bolt. In contrast, Warren testified that 1,148 pounds of force would be necessary to pick up the cab from its laid-over position and cause it to tip over onto the person working beneath it.

Contrary to the practice of other mechanics who used the laid-over position, Turner did not chain the cab. Furthermore, he apparently made no attempt to bolt the cab to the frame. It appears that, after removing and overhauling the engine of the loader, Turner was crushed to death beneath the cab while he was preparing to insert the engine back into the loader. No one saw the accident happen.

Turner's coworkers discovered his body lying between the transmission and the cab. Mechanics observed that the battery disconnect key was in the ignition switch in the "on" position and the batteries were connected. The loader bucket, which had earlier been down, was raised because an implement control lever was inadvertently moved to the "raise" position, activating the hydraulic system. Investigators surmised that the lift arms and bucket moved, causing the cab to fall on Turner. Mechanic Ben Samuel testified that, if Turner had used the 24-degree brace, the brace would have caught the cab and the accident would not have happened.

Curcio, in her capacity as personal representative of Turner's estate, filed this action asserting claims for negligence, strict liability, and breach of implied warranty. She later voluntarily dismissed the warranty claim and proceeded to trial on the two remaining claims.

Curcio argued Caterpillar was negligent in designing and manufacturing the loader and in failing to warn of foreseeable dangers associated with its use and maintenance. Curcio further contended the loader was unreasonably dangerous because of the absence of an electrical interlock device that allegedly could have prevented the accident.

Caterpillar took the position that Turner disregarded warnings to disconnect the batteries and secure the cab properly. In response to these contentions, Curcio called Warren, who testified the warning on the loader not to "run" the engine was inadequate because it fell short of cautioning service personnel not to "crank" the engine. Warren stated that, to him, "there's a big difference from a mechanic's point of view as to whether he's cranking the engine or running the engine." Warren also testified that an electrical interlock device would have prevented the accident and that the cost for including such a device would most likely have been minimal.

At the close of Curcio's case, Caterpillar moved unsuccessfully for a directed verdict arguing: (1) the warnings on the loader were adequate and Turner's failure to follow those warnings was the proximate cause of his death, and (2) an interlock device was not only unnecessary but ineffective in that it would only disable the ignition switch, which would necessarily have been disconnected once the cab was tilted past 90 degrees. At the close of the testimony, Caterpillar renewed its motion on the same grounds stated in its initial motion, but elaborated on them by further submitting that: (1) the interlock device would not have prevented Turner's death because of evidence that Turner had bypassed the electrical system,[2] and (2) the failure to use the term "crank" in the warning was not evidence that the warning was deficient. Again, the trial court denied the motion and submitted the issues of negligence and strict liability to the jury. The jury found for Caterpillar on the negligence action, but awarded Curcio $500,000 on her strict liability claim.

[2] Caterpillar contended that Turner had bypassed the electrical system by hot-wiring the starter.

Caterpillar moved for judgment notwithstanding the verdict and a new trial. The trial court granted a new trial on the marital relationship between Curcio and Turner.[3] In addition, the trial court held that the warnings were adequate as a matter of law, but found there was sufficient evidence to sustain the verdict based on the defective design claim.

Pursuant to a subsequent motion by Caterpillar under Rule 59(e), SCRCP, however, the trial court reviewed the matter and set the verdict aside, holding, "South Carolina law does not require that a manufacturer refine a product, if it is safe when used in accordance with adequate warnings."

ANALYSIS

I.

Curcio first argues the trial court's decision to set the verdict aside should be reversed because she presented evidence at trial that the warning was inadequate. Specifically, she contends the trial court impermissibly weighed the evidence in discounting Warren's testimony that the warning was ambiguous. We reject this argument.

In Chapter 73 of Title 15 of the South Carolina Code, the South Carolina General Assembly adopted verbatim section 402A of the Restatement, Second, of Torts (1965) to provide as follows:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property

[3] The trial court had initially ruled Caterpillar was precluded from contesting the legal relationship between Curcio and Turner because of a finding by the probate court that Curcio and Turner were common-law husband and wife. Pursuant to Caterpillar's motion, the trial court reversed this ruling, noting the probate court proceeding was an uncontested matter to which Caterpillar had not been made a party.

> is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if
>
> (a) The seller is engaged in the business of selling such a product, and
>
> (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in subsection (1) shall apply although
>
> (a) The seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.[4]

The comments to section 402A have been incorporated by reference as the legislative intent of Chapter 73.[5] Citing comment j, this court has stated that "a seller may prevent a product from being 'unreasonably dangerous' if the seller places an adequate warning on the product regarding its use."[6]

The trial court initially denied Caterpillar's motion for judgment notwithstanding the verdict, holding there was sufficient evidence to support Curcio's recovery under the defective design claim. In the same order, however, the trial court held the warnings at issue were adequate as a matter of law. In its subsequent order setting the verdict aside, the trial court rejected the design failure claim, holding this claim was likewise barred because of the earlier decision on the warning theory.

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[4] S.C. Code Ann. § 15-73-10 (1976).

[5] Id. § 15-73-30. Turner was a "user" of the product in the sense that he was "utilizing it for the purpose of doing work upon it." Restatement (Second) of Torts § 402A cmt. 1 (1965).

[6] Allen v. Long Mfg. NC, Inc., 332 S.C. 422, 427, 505 S.E.2d 354, 357 (Ct. App. 1998), cert denied (May 28, 1999).

In holding the warning to be adequate as a matter of law, the trial court not only addressed Warren's assertion that the failure to use the word "crank" in the warning made it deficient, but also noted:

> Before working on a Loader, a mechanic is specifically warned to: "Disconnect batteries before performance of any service work." Turner chose to ignore this warning. At the time of the accident, Turner was working on the Track Loader with the batteries connected. Had the batteries been disconnected the accident would not have happened.

(Emphasis added.) We find nothing in the record or the briefs suggesting that Curcio has challenged either the substance or the propriety of this ruling. The manner in which this ruling was set forth by the trial court indicates the ruling was intended as an alternative basis to support the holding that the warning was adequate as a matter of law notwithstanding the impact of Warren's testimony on this issue. Because the trial court's ultimate conclusion on the sufficiency of the warning can be upheld on an independent ground, it is unnecessary for us to consider whether or not the trial court impermissibly discounted Warren's statements.[7]

II.

Curcio further maintains that, irrespective of the efficacy of the warnings, she made a showing that a proposed alternative design that could have prevented

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[7] See I'On v. Town of Mt. Pleasant, 338 S.C. 406, 420-21, 526 S.E.2d 716, 723 (2000) ("[A]n appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal."); Weeks v. McMillan, 291 S.C. 287, 292, 353 S.E.2d 289, 292 (Ct. App. 1987) ("Where a decision is based on alternative grounds, either of which independent of the other is sufficient to support it, the decision will not be reversed even if one of the grounds is erroneous."); Dwyer v. Tom Jenkins Realty, Inc., 289 S.C. 118, 344 S.E.2d 886 (Ct. App. 1986) (holding a judgment will not be disturbed when unchallenged findings are sufficient to support it).

Turner's death was available and economically feasible. Based on this premise, she argues she presented sufficient evidence at trial to raise an issue of fact as to whether the loader was defectively designed and therefore unreasonably dangerous. She further argues that, because the cost of including an interlock device would have been minimal compared with the cost of the loader itself, the loader could have been made safer without the necessity of a warning and was therefore defectively designed. We disagree.

In determining the verdict should be set aside based on its prior findings that the warnings were adequate as a matter of law, the trial court stated:

> Plaintiff urges adoption of the Restatement (Third) of Torts, which allows recovery based on defective design even with an adequate warning. Defendant has demanded adherence to existing South Carolina law. This court declines Plaintiff's invitation. The language in Allen v. Long Mfg. is clear. If the Court of Appeals desires a retreat from Allen v. Long Mfg. by, for example, characterizing parts of its opinion as dicta, that is a matter for the Court of Appeals, not a mere trial judge.

In determining that an adequate warning made the loader safe for use in spite of any alleged defects, the trial court relied on comment j to section 402A of the Restatement (Second) of Torts, as interpreted in Allen.[8] We have found no cases from this jurisdiction that contradict either comment j or the interpretation of this comment in Allen[9]; therefore, we conclude the trial court correctly

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[8] In Allen, this court noted that comment j "has been correctly interpreted to mean when an adequate warning is given, the manufacturer may assume that it will be heeded by the product user." Allen, 332 S.C. at 432-33, 505 S.E.2d at 360 (emphasis in original).

[9] See, e.g., Claytor v. General Motors Corp., 277 S.C. 259, 264, 286 S.E.2d 129, 132 (1982) (stating that, if products are "properly prepared, manufactured, packaged and accompanied with adequate warnings and

applied existing South Carolina law to hold that a product is not unreasonably dangerous if accompanied by adequate warnings that, if followed, make the product safe for use.[10]

III.

Curcio further argues "the trial court had already established as the law of the case that [she] could recover if either a defective warning or a defective design were found to be the proximate cause of . . . Turner's death." (Emphasis in original.) In support of her position, Curcio notes that Caterpillar did not base its directed verdict motion on the proposition that the finding of an adequate warning "cured" any design defects and rendered its product "safe" and that Caterpillar never objected to jury instructions that liability could be based on either defective warning or unreasonably dangerous design. We find no merit to these arguments.

In our view, Caterpillar's contention in its directed verdict motion that the warning was adequate as matter of law was sufficient to raise the argument that Curcio would likewise be precluded from recovering for a design defect. First, in its initial directed verdict motion, the grounds of which were incorporated into its final directed verdict motion, Caterpillar cited the case of Anderson v. Green Bull for the proposition that a product bearing a warning that is safe for use if the user follows the warning is "neither defective nor unreasonably

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instructions, they cannot be said to be defective") (emphasis added); Marchant v. Mitchell Distrib. Co., 270 S.C. 29, 240 S.E.2d 511 (1977) (holding the absence of an optional safety device on a crane did not create an issue of fact as to whether the product was unreasonably dangerous).

[10] Because our holding is based on our decision to follow prior cases holding that a defendant is not liable for a design defect in a product if the product is accompanied by adequate warnings, we decline to address the merits of Curcio's argument that an interlock device would have prevented Turner's death.

dangerous."[11] Furthermore, "a product that is already deemed safe for consumer use as produced need not display a warning to prevent it from being 'unreasonably dangerous,' absent a finding that there is a duty to warn."[12] It follows that, in a products liability case in which the theory of recovery is strict liability, the only inference of any import to be made from a finding that a given warning is adequate is that the product "is not in defective condition nor is it unreasonably dangerous."[13]

We further hold that, under the circumstances of this case, it was not incumbent on Caterpillar to object to the instruction by the trial court that the jury could "consider separately and independently two alternative theories of liability: defect by adequate warning, and defect by lack of a reasonable safety device which could have prevented the accident."

Although the trial court characterized the theories of inadequate warning and design defect as "independent bases on which to impose liability," it included the following instructions in its charge on strict liability:

> In order to prevent a product from being unreasonably dangerous, a manufacturer may be required to give an adequate warning concerning the product regarding its use.
> . . .
>
> If a warning is required, a product bearing an adequate warning is neither defective nor unreasonably dangerous. . . . Where an adequate warning is given, the manufacturer may reasonably assume it will be read and heeded; and a product bearing an

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[11] 322 S.C. 268, 270, 471 S.E.2d 708, 710 (Ct. App. 1996), cert denied (December 19, 1996).

[12] Allen, 332 S.C. at 431, 505 S.E.2d at 359.

[13] Restatement (Second) of Torts § 402A cmt. j (1965).

> adequate warning, which is safe for use if followed, is not in a defective condition, nor is it unreasonably dangerous.

Read as a whole, then, the charge correctly explained that, if the jury found that the product came with adequate warnings, it followed that the product was neither in a defective condition nor unreasonably dangerous.[14] It was therefore reasonable for Caterpillar to expect that, even if the jury found that the loader had a design defect, there would still be no liability if the warning was adequate.

IV.

Because we have affirmed the trial court based on our determination that Curcio failed as a matter of law to show that the Caterpillar 953 Track Loader was a defective or unreasonably dangerous product, we do not address her arguments concerning proximate cause.[15]

AFFIRMED.

STILWELL, J., concurs. HEARN, C.J., dissents in a separate opinion.

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[14] See Keaton v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999) (stating a jury charge is correct if, when read as a whole, it contains the correct definition and adequately covers the law).

[15] See Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 543, 462 S.E.2d 321, 328 (Ct. App. 1996) ("In order to recover under a strict liability theory, the plaintiff must establish that: (1) the defendant's product was in a defective condition unreasonably dangerous for its intended use; (2) the defect existed when the product left the defendant's control; and (3) the defect was the proximate cause of the injury sustained.") (emphasis added), cert denied (November 20, 1996); 2 Dan B. Dobbs, The Law of Torts § 354 (2001) (stating strict liability is imposed for only those products that are defective and unreasonably dangerous).

HEARN, C.J.: I respectfully dissent. The majority holds that the accident would not have occurred had Turner heeded the warning to disconnect the batteries and treats this finding by the trial judge as an alternate sustaining ground on which to affirm the grant of judgment notwithstanding the verdict. The logic seems to be that after Caterpillar provided one clear warning that was disregarded, any subsequent warning is immune from a determination of adequacy. I disagree.

In this case, Caterpillar foresaw that the batteries might be connected during maintenance work. The warning contested by Curcio states in part, "If the engine must be started, ..." Such an instruction contradicts the instruction that the batteries must be disconnected at all times during maintenance work. Given this contradiction, it does not follow that failure to follow one warning should preclude Curcio's argument concerning another warning. Moreover, the mere fact that Caterpillar warned against starting the engine is evidence that it knew its admonition about disconnecting the batteries might not be followed. Thus, I do not share the majority's view that the warning to disconnect the batteries vitiated any further duty by Caterpillar to provide adequate warnings.

I would hold that a jury issue was presented as to the adequacy of the warning. At trial, Curcio presented expert testimony distinguishing the words "crank, "run," and "start." The disputed words are all used in different ways throughout the manual. The expert testified that given the use of the words in the manual and the trade usage, Turner may have thought he could "crank" the engine if he did not "start" it.[16] No objection was lodged to the admission of this testimony or to the expert's qualifications.

Generally, the adequacy of a warning is a jury question. Allen v. Long Mfg. NC, Inc., 332 S.C. 422, 427, 505 S.E.2d 354, 357 (Ct. App. 1998); see

[16]According to Curcio's expert, the distinction between these terms lies in the systems used. "Crank" suggests use of the cranking engine, and "start" means rotate the engine until the cranking motor is no longer required and the engine runs on it own.

63A Am. Jur. 2d Products Liability § 1219 (1997). Here, the trial judge correctly sent this issue to the jury. However, I believe he erred in granting judgment notwithstanding the verdict.

In his order, the trial judge appears to have weighed the evidence in determining that the warnings were adequate as a matter of law, stating:

> No reasonable person (and certainly no mechanic like Turner) would adopt Mr. Warren's strained distinction between 'start' and 'crank.' Although not essential for purposes of this ruling, I note that Mr. Warren has absolutely no experience with heavy equipment. Conversely all witnesses with such experience understood the term 'start' to include any notion the engine was to be turned over by the electrical starter motor.

In considering a motion for judgment notwithstanding the verdict, the trial judge is concerned only with the existence of evidence, not its weight. State v. Wakefield, 323 S.C. 189, 196, 473 S.E.2d 831, 835 (Ct. App. 1996). "When considering the motion, neither this court nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony and evidence." Reiland v. Southland Equip. Serv., Inc., 330 S.C. 617, 634, 500 S.E.2d 145, 154 (Ct. App. 1998). Moreover, we will not disturb the factual findings of a jury unless no evidence reasonably supports those findings. Horry County v. Laychur, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993). Therefore, I believe the trial judge erred in overturning the jury's verdict based on his own assessment of the evidence.

Further, I believe the issue of whether the design was defective was also properly submitted to the jury. The majority, relying on language from Allen and comment j to § 402A of the Restatement (Second) of Torts, states that a product may be cured of any unreasonable danger if the seller places an adequate warning on the product. However, because I disagree with the majority's alternate sustaining ground and would hold that a jury issue as to the

adequacy of the warning was created by the expert's testimony, I disagree with the majority's holding that the product was not unreasonably dangerous as a matter of law.

For the above reasons, I would reverse the trial judge's grant of judgment notwithstanding the verdict and reinstate the jury's verdict.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Nelson Brown,

Appellant,

v.

Greenwood School District 50 Board of Trustees; John L. Kinlaw as Superintendent; and Dorothy Kinlaw,

Respondents.

Appeal From Greenwood County
John W. Kittredge, Circuit Court Judge

Opinion No. 3308
Submitted January 3, 2001 - Filed February 26, 2001

APPEAL DISMISSED

Nelson Brown, of Greenwood, pro se.

Allen D. Smith, of Childs & Halligan, of Columbia, for respondents.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Interest of Thomas Edward D., a minor under the age of seventeen years,

Appellant.

Appeal From Florence County
Wylie H. Caldwell, Jr., Circuit Court Judge

Opinion No. 3309
Submitted January 3, 2001 - Filed February 26, 2001

AFFIRMED

Assistant Appellate Defender Robert M. Pachak, of SC Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, all of Columbia; and Solicitor Edgar L. Clements, III, of Florence, for respondent.

GOOLSBY, J.: Thomas Edward D. appeals the family court's adjudication of delinquency based upon its finding that Thomas brought a firearm to school. Thomas appeals. We affirm.[1]

On November 6, 1999, the assistant principal at Wilson High School received word that Thomas had a gun in his possession. In an effort to discover whether Thomas did have a gun, the assistant principal called Thomas to her office. Also present in the office was Deputy Graham. Graham testified that as he patted Thomas down, he felt a large bulge in Thomas' pocket consistent with a pistol. Graham then retrieved the gun from Thomas' pocket. Graham also retrieved nine bullets. The cylinder of the gun was not attached to the remainder of the gun, and the pin that holds the cylinder in place was missing.

Thomas was charged with violating South Carolina Code section 16-23-430,[2] carrying a weapon on school grounds, and South Carolina Code section 16-23-30(e),[3] possessing a gun while under the age of twenty-one. At the close of the State's case, Thomas moved for a directed verdict. The trial court denied Thomas' motion and found him delinquent. The court sentenced Thomas to the custody of the Department of Juvenile Justice for a period not to extend beyond his twenty-first birthday.

On appeal, Thomas argues that the trial court erred in failing to grant a directed verdict because the gun was not operational and therefore could not inflict bodily injury or death. We disagree.

South Carolina Code section 16-23-430(1) states:

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

[2] S.C. Code Ann. § 16-23-430 (Supp. 2000).

[3] S.C. Code Ann. § 16-23-30(e) (Supp. 2000).

Because a firearm is a per se violation of the statute, the family court properly denied Thomas' motion for a directed verdict. After review of the record as required by Anders v. California[7] and State v. Williams,[8] we find no other arguable issues. We also grant counsel's petition to be relieved.

AFFIRMED.

ANDERSON and STILWELL, JJ., concur.

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[7] 386 U.S. 738 (1967).

[8] 305 S.C. 116, 406 S.E.2d 357 (1991).